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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Docket No. AMS–FV–08–0091; FV09–984–1 IFR]

Walnuts Grown in California; Changes to Regulations Governing Board Nominations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule revises the administrative rules and regulations governing nominations for the California Walnut Board (Board). The Board locally administers the marketing order that regulates the handling of walnuts grown in California (order). This rule removes references to independent handlers, revises specifications under which groups of growers may submit nominations for certain grower positions on the Board, and corrects numerical references to other sections of the order. This change is needed to bring the administrative rules and regulations into conformance with recently enacted amendments to the order concerning Board structure and nomination procedures.

DATES: Effective December 6, 2008. Comments received by February 3, 2009 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Martin J. Engeler, Senior Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or e-mail: *Martin.Engeler@usda.gov* or *Kurt.Kimmel@usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule revises the administrative rules and regulations governing Board nominations by removing references to ''independent'' handlers, adding language specifying that groups of growers who marketed an aggregate of at least 500 tons of walnuts through handlers that handled less than 35% of the prior year's crop may submit nominations for grower positions on the ballots, and correcting references to order sections that were renumbered as a result of recent order amendments.

Section 984.35 of the California walnut marketing order provides for the allocation of grower and handler positions on the Board. Historically, some members represented the interests of a major industry cooperative, and some members represented independent interests. Some members represented the interests of certain production area districts, and some served the industry ''at large.'' Recently, the structure of the industry changed when the major cooperative handler became a publicly-traded corporation. Subsequently, the industry approved amendments to the order that restructured the Board to reflect the changes to the industry's structure. Language specifying membership allocation between cooperative and independent interests was removed from the order because all production area walnut handlers are now considered independent. Alternative membership allocation provisions were added to the order. Board membership positions are now allocated between growers and handlers, the specific Districts within the production area, and grower positions with no District affiliation (''at large'' positions). In the event that one industry handler handles 35 percent or more of the crop, such handler—and growers affiliated with such handler—are entitled to a given number of Board positions. As a result of the amendments, some sections of the order were renumbered.

Section 984.37 of the order provides authority for the Board, with the approval of USDA, to make changes to the Board nomination procedures

specified in the order. The procedures are contained in the order's administrative rules and regulations. Currently, § 984.437 of the regulations specifies that if the ''at large'' grower position on the Board is assigned to represent independent growers, groups of ten or more growers who marketed a combined volume of 500 or more tons of walnuts through independent handlers in the prior year may propose a nominee for the ballot. The current regulations also specify that groups of ten or more growers from each district who marketed an aggregate of 500 or more tons of walnuts through independent handlers in the prior year may propose nominees for the independent grower positions in their districts.

The amended order no longer differentiates between cooperative and independent entities, and Board positions are no longer apportioned to represent either cooperative or independent entities. References in the order to independent handlers have been removed from the provisions specifying Board nominations. This rule makes changes to § 984.437(a) and (b) of the administrative rules and regulations by removing references to independent handlers. Changes are also made to those paragraphs to specify that groups of ten or more growers who marketed an aggregate of at least 500 tons of walnuts through handlers that handled less than 35 percent of the prior year's crop may nominate growers to serve in the ''at large'' grower positions. This rule also revises the regulations to specify that groups of ten or more growers from each district who marketed an aggregate of at least 500 tons of walnuts through handlers that handled less than 35 percent of the prior year's crop may nominate growers to represent each district. Finally, this rule also revises certain references to renumbered order provisions in the regulations that are no longer correct.

This rule was unanimously recommended by the Board at its meeting on September 12, 2008.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. The Small Business Administration (SBA) defines small agricultural service firms as those whose annual receipts are less than $7,000,000, and defines small agricultural producers as those whose annual receipts are less than $750,000 (13 CFR 121.201).

There are currently 55 handlers of California walnuts subject to regulation under the marketing order, and there are approximately 4,000 growers in the production area. USDA's National Agricultural Statistics Service (NASS) reports that California walnuts were harvested from a total of 218,000 bearing acres during 2007–08. The average yield for the 2007–08 crop was 1.49 tons per acre, which is slightly lower than the 1.53 tons per acre average for the previous five years. NASS reported the value of the 2007–08 crop at $2,320 per ton, which is considerably higher than the previous five year average of $1,384 per ton.

At the time of the 2002 Census of Agriculture, which is the most recent information available, approximately 83 percent of California's walnut farms were smaller than 100 acres. Forty-seven percent were between 1 and 15 acres. A 100-acre farm with an average yield of 1.49 tons per acre would have been expected to produce about 149 tons of walnuts during 2007–08. At $2,320 per ton, that farm's production would have had an approximate value of $345,000. Assuming that the majority of California's walnut farms are still smaller than 100 acres, it could be concluded that the majority of the growers had receipts of less than $345,000 in 2007–08. This is well below the SBA threshold of $750,000, thus, the majority of California's walnut growers would be considered small growers according to SBA's definition.

According to information supplied by the industry, approximately two-thirds of California's walnut handlers shipped merchantable walnuts valued under $7,000,000 during the 2007–08 marketing year and would therefore be considered small handlers according to the SBA definition.

This rule revises the administrative rules and regulations governing the nomination of Board members. References to independent handlers are being removed from the regulations to conform to recent amendments to the order. Procedures for the nomination of grower members by groups of growers who marketed an aggregate of at least 500 tons of walnuts through handlers that handled less than 35 percent of the prior year's crop are being added. References to renumbered sections of the order are being corrected. This action imposes no additional cost or burden on growers or handlers of any size.

The Board unanimously recommended these changes, which were necessary to bring the order's administrative rules and regulations into conformance with the recently amended order. As such, no alternatives were considered practicable.

The Board's meeting was widely publicized throughout the California walnut industry and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 12, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This rule imposes no additional reporting or recordkeeping requirements on either small or large California walnut handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E–Government Act, to promote the use of Internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on changes to the administrative rules and regulations currently prescribed under the marketing order for California walnuts. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant matters presented, the information and recommendations submitted by the

Board, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined, upon good cause, that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The marketing order amendments prompting these changes were implemented on April 2, 2008; (2) related issues were discussed in amendatory proceedings (including a public hearing) and amendments to the order were subsequently approved by producers; (3) the revised regulation should be in effect prior to January 2009, when Board nominations will be conducted; (4) the Board unanimously recommended these changes at a public meeting and interested parties had an opportunity to provide input; and (5) the rule provides a 60-day comment period, and any written comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 984

Walnuts, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 984 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 984.437, paragraphs (a) and (b) are revised to read as follows:

§ 984.437 Methods for proposing names of additional candidates to be included on walnut growers' nomination ballots.

(a) With regard to Board grower member positions specified in § 984.35(a)(5) and (6), any ten or more such growers who marketed an aggregate of 500 or more tons of walnuts through handlers who did not handle 35% or more of the crop during the marketing year preceding the year in which Board nominations are held, may petition the Board to include on the nomination ballot the name of an eligible candidate for this position, and the name of an eligible candidate to serve as his or her alternate. The names of the eligible candidates proposed pursuant to this paragraph shall be included on the ballot together with the names of any incumbents who are willing to continue serving on the Board.

(b) Any ten or more growers eligible to serve in the grower member positions specified in § 984.35(a)(3) and (4) and § 984.35(b)(4) and (5) and who marketed an aggregate of 500 or more tons of walnuts through handlers who did not handle 35% or more of the crop during the marketing year preceding the year in which Board nominations are held, may petition the Board to include on the nomination ballot for a district the name of an eligible candidate for the applicable position, and the name of an eligible candidate to serve as his or her alternate. The names of the eligible candidates proposed pursuant to this paragraph shall be included on the ballot together with the names of any incumbents who are willing to continue serving on the Board.

* * * * *

Dated: November 26, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–28673 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM393; Special Conditions No. 25–377–SC]

Special Conditions: Airbus A318, A319, A320, and A321 Series Airplanes; Astronautics Electronic Flight Bags With Lithium Battery Installations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Airbus A318, A319, A320, and A321 series airplanes. These airplanes, as modified by L2 Consulting Services, will have a novel or unusual design feature associated with Astronautics electronic flight bags which use lithium battery technology. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* January 5, 2009.

FOR FURTHER INFORMATION CONTACT: Nazih Khaouly, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2432; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

On March 12, 2007, L2 Consulting Services of Dripping Springs, Texas, applied for a supplemental type certificate to install Astronautics electronic flight bags on Airbus A318, A319, A320, and A321 series airplanes. In addition to lithium batteries, the Astronautics electronic flight bags contain the following equipment:

- Multiple electronic flight bag display units,
- Multiple electronic units (computer),
- Electronic flight bag power On/Off switches, and
- Mounting arms and mounting brackets.

At present, there is limited experience with use of rechargeable lithium batteries in applications involving commercial aviation. However, other users of this technology, ranging from wireless telephone manufacturers to the electric vehicle industry, have noted safety problems with lithium batteries. These problems include overcharging, over-discharging, and flammability of cell components.

1. Overcharging

In general, lithium batteries are significantly more susceptible to internal failures that can result in self-sustaining increases in temperature and pressure (i.e., thermal runaway) than their nickel-cadmium or lead-acid counterparts. This is especially true for overcharging that causes heating and destabilization of the components of the cell, leading to the formation (by plating) of highly unstable metallic lithium. The metallic lithium can ignite, resulting in a self-sustaining fire or explosion. Finally, the severity of thermal runaway due to overcharging increases with increasing battery capacity due to the higher amount of electrolyte in large batteries.

2. Over-Discharging

Discharge of some types of lithium batteries beyond a certain voltage (typically 2.4 volts) can cause corrosion of the electrodes of the cell, resulting in loss of battery capacity that cannot be reversed by recharging. This loss of capacity may not be detected by the simple voltage measurements

commonly available to flightcrews as a means of checking battery status—a problem shared with nickel-cadmium batteries.

3. Flammability of Cell Components

Unlike nickel-cadmium and lead-acid batteries, some types of lithium batteries use liquid electrolytes that are flammable. The electrolyte can serve as a source of fuel for an external fire if there is a breach of the battery container.

These problems experienced by users of lithium batteries raise concern about the use of these batteries in commercial aviation. Accordingly, the proposed use of lithium batteries in Astronautics electronic flight bags on Airbus A318, A319, A320, and A321 series airplanes has prompted the FAA to review the adequacy of existing regulations in Title 14 Code of Federal Regulations (14 CFR) part 25. Our review indicates that the existing regulations do not adequately address several failure, operational, and maintenance characteristics of lithium batteries that could affect the safety and reliability of lithium battery installations.

The intent of these special conditions is to establish appropriate airworthiness standards for lithium batteries in Airbus A318, A319, A320, and A321 series airplanes modified by L2 Consulting Services, and to ensure, as required by § 25.601, that these battery installations are not hazardous or unreliable. Accordingly, these special conditions include the following requirements:

- Those provisions of § 25.1353 which are applicable to lithium batteries.
- The flammable fluid fire protection provisions of § 25.863.

In the past, this regulation was not applied to batteries of transport category airplanes, since the electrolytes used in lead-acid and nickel-cadmium batteries are not flammable.

- New requirements to address the hazards of overcharging and over-discharging that are unique to lithium batteries.
- New Instructions for Continuous Airworthiness that include maintenance requirements to ensure that batteries used as spares are maintained in an appropriate state of charge.

Type Certification Basis

Under the provisions of 14 CFR 21.101, L2 Consulting Services must show that the Airbus A318, A319, A320, and A321 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.''

The certification basis for Airbus A318, A319, A320, and A321 series airplanes includes applicable sections of part 25, effective February 1, 1965, as amended by Amendments 25–1 through 25–56, plus other amendments for each model as indicated in Type Certificate No. A28NM. In addition, the certification basis includes certain special conditions, exemptions, equivalent levels of safety, or later amended sections of the applicable part 25 that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for Airbus A318, A319, A320, and A321 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Airbus A318, A319, A320, and A321 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the models for which they are issued. Should L2 Consulting Services apply for a supplemental type certificate to modify any other model included on Type Certificate No. A28NM to incorporate the same or similar novel or unusual design feature, these special conditions would also apply to the other model.

Novel or Unusual Design Features

The Airbus A318, A319, A320, and A321 series airplanes, as modified by L2 Consulting Services, to include Astronautics electronic flight bags which use lithium battery technology, will incorporate a novel or unusual design feature. Because of rapid improvements in airplane technology, the applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

The Astronautics electronic flight bags will include lithium battery installations. Large, high-capacity, rechargeable lithium batteries are a novel or unusual design feature in transport category airplanes. This type of battery has certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on large transport category airplanes. The FAA issues these special conditions to require that all characteristics of the lithium battery and its installation do not adversely affect the safe operation of the airplane.

Discussion of Comments

A Notice of proposed special conditions No. 25–08–06–SC for the Airbus A318, A319, A320 and A321 series airplanes modified by L2 Consulting Services was published in the **Federal Register** on August 7, 2008 (73 FR 45886). One comment was received from Deutsche Lufthansa, AG.

Comment: Lufthansa states that additional testing on Class 1 and Class 2 electronic flight bags will add cost without providing higher degrees of safety.

FAA Disposition: Lufthansa's comments refer to Class 1 and 2 electronic flight bags. The classes of electronic flight bags are defined in Advisory Circular 91–78: ''Physical EFB displays may be portable (Class 1), attached to a mounting device (Class 2), or built into the aircraft (Class 3).'' The electronic flight bags to which these special conditions apply are Class 3 electronic flight bags which are permanently installed equipment. Therefore, the comments is not applicable. The special conditions are issued as proposed.

Applicability

As discussed above, these special conditions are applicable to the Airbus A318, A319, A320, and A321 series airplanes as modified by L2 Consulting Services. Should L2 Consulting Services apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A28NM to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features of the Airbus A318, A319, A320, and A321 series

airplanes as modified by L2 Consulting Services. It is not a rule of general applicability and affects only the applicant which applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

PART 25—[AMENDED]

■ The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certificate for the Airbus A318, A319, A320 and A321 series airplanes, modified by L2 Consulting Services.

Lithium batteries and battery installations on Airbus A318, A319, A320, and A321 series airplanes must be designed and installed as follows:

1. Safe cell temperatures and pressures must be maintained during any foreseeable charging or discharging condition and during any failure of the charging or battery monitoring system not shown to be extremely remote. The lithium battery installation must preclude explosion in the event of those failures.

2. Design of the lithium batteries must preclude the occurrence of self-sustaining, uncontrolled increases in temperature or pressure.

3. No explosive or toxic gases emitted by any lithium battery in normal operation or as the result of any failure of the battery charging system, monitoring system, or battery installation which is not shown to be extremely remote may accumulate in hazardous quantities within the airplane.

4. Installations of lithium batteries must meet the requirements of § 25.863(a) through (d).

5. No corrosive fluids or gases that may escape from any lithium battery may damage surrounding structure or any adjacent systems, equipment, or electrical wiring of the airplane in such a way as to cause a major or more severe failure condition, in accordance with § 25.1309(b) and applicable regulatory guidance.

6. Each lithium battery installation must have provisions to prevent any hazardous effect on structure or essential systems caused by the maximum amount of heat the battery can generate during a short circuit of the battery or of its individual cells.

7. Lithium battery installations must have a system to control the charging rate of the battery automatically, so as to prevent battery overheating or overcharging, and,

(a) A battery temperature sensing and over-temperature warning system with a means for automatically disconnecting the battery from its charging source in the event of an over-temperature condition, or

(b) A battery failure sensing and warning system with a means for automatically disconnecting the battery from its charging source in the event of battery failure.

8. Any lithium battery installation whose function is required for safe operation of the airplane must incorporate a monitoring and warning feature that will provide an indication to the appropriate flight crewmembers whenever the state-of-charge of the batteries has fallen below levels considered acceptable for dispatch of the airplane.

9. The Instructions for Continued Airworthiness required by § 25.1529 must contain maintenance requirements to assure that the lithium battery is sufficiently charged at appropriate intervals specified by the battery manufacturer to ensure that batteries whose function is required for safe operation of the airplane will not degrade below specified ampere-hour levels sufficient to power the electronic flight bag applications that are required for continued safe flight and landing. The Instructions for Continued Airworthiness must also contain procedures for the maintenance of lithium batteries in spare storage to prevent the replacement of batteries whose function is required for safe operation of the airplane with batteries that have experienced degraded charge retention ability or other damage due to prolonged storage at a low state of charge. Precautions should be included in the Instructions for Continued Airworthiness maintenance instructions to prevent mishandling of the lithium battery which could result in short-circuit or other unintentional damage that could result in personal injury or property damage.

Note 1: The term ''sufficiently charged'' means that the battery will retain enough of a charge, expressed in ampere-hours, to ensure that the battery cells will not be damaged. A battery cell may be damaged by lowering the charge below a point where there is a reduction in the ability to charge and retain a full charge. This reduction would be greater than the reduction that may result from normal operational degradation.

Note 2: These special conditions are not intended to replace § 25.1353(c), Amendment 25–113 in the certification basis of the L2 Consulting Services supplemental type certificate. These special conditions apply only to lithium batteries and their installations. The requirements of § 25.1353(c), Amendment 25–113 remain in effect for batteries and battery installations on the L2 Consulting Services supplemental type certificate that do not use lithium batteries.

Compliance with the requirements of these special conditions must be shown by test or analysis, with the concurrence of the Fort Worth Special Certification Office.

Issued in Renton, Washington, on November 28, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28876 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 0809191235–81395–01]

RIN 0694–AE48

Addition of Certain Persons to the Entity List: Persons Acting Contrary to the National Security or Foreign Policy Interests of the United States

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the Export Administration Regulations (EAR) by adding additional persons to the Entity List (Supplement No. 4 to Part 744) on the basis of Section 744.11 of the EAR. This rule is the second rule to add persons to the Entity List on the basis of Section 744.11 of the EAR. These additional persons being added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. The first rule that added persons to the Entity List on the basis of Section 744.11 of the EAR was published on September 22, 2008 (73 FR 54499).

The Entity List provides notice to the public that certain exports and reexports to parties identified on the Entity List require a license from the Bureau of Industry and Security (BIS) and that

availability of License Exceptions in such transactions is limited.

DATES: *Effective Date:* This rule is effective December 5, 2008. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis.

ADDRESSES: You may submit comments, identified by RIN 0694–AE48, by any of the following methods:

E-mail: publiccomments@bis.doc.gov Include ''RIN 0694–AE48'' in the subject line of the message.

Fax: (202) 482–3355. Please alert the Regulatory Policy Division, by calling (202) 482–2440, if you are faxing comments.

Mail or Hand Delivery/Courier: Timothy Mooney, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, *Attn:* RIN 0694–AE48.

Send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), by e-mail to *Jseehra@omb.eop.gov*, or by fax to (202) 395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230. Comments on this collection of information should be submitted separately from comments on the final rule (i.e. RIN 0694–AE48)—all comments on the latter should be submitted by one of the three methods outlined above.

FOR FURTHER INFORMATION CONTACT: Karen Nies-Vogel, End-User Review Committee, Office of the Assistant Secretary, Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–3811, Fax: (202) 482–3911, E-mail: *kniesv@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

In Supplement No. 4 to part 744 (The Entity List), this rule adds fifteen (15) persons to the Entity List on the basis of Section 744.11 of the EAR. In total, this rule adds 16 new entries to the Entity List, including one additional entry for a newly added person with multiple addresses. The Entity List provides notice to the public that certain exports and reexports to parties identified on the Entity List require a license from the Bureau of Industry and Security (BIS) and that availability of License Exceptions in such transactions is limited.

These additional persons being added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. Specifically, these parties are of concern to the United States Government under Section 744.11 (License Requirements that Apply to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States) of the EAR.

ERC Entity List Decisions

Pursuant to Supplement No. 5 to Part 744 (Procedures for End-User Review Committee Entity List Decisions), the End-User Review Committee (ERC) made the decision to add these 15 persons to the Entity List on the basis of Section 744.11. The ERC, composed of representatives of the Departments of Commerce, State, Defense, Energy and, where appropriate, the Treasury, makes all decisions to make additions to, removals from or changes to the Entity List. The ERC is chaired by the Department of Commerce and will make all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote.

The ERC reviewed Section 744.11(b) (Criteria for Revising the Entity List) in making this determination to add these persons to the Entity List. Under that paragraph, entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such entities may be added to the Entity List pursuant to Section 744.11.

Paragraph (b) includes an illustrative list of activities that could be contrary to the national security or foreign policy interests of the United States. This illustrative list of activities of concern is described under paragraphs (b)(1)–(b)(5). The persons being added to the Entity List with this rule have been determined by the ERC to be involved in activities that could be contrary to the national security or foreign policy interests of the United States.

Implementation of the ERC Decision

This rule implements the decision of the ERC to add these 15 persons to the Entity List on the basis of Section 744.11 of the EAR. For all of the persons being added to the Entity List, the ERC decided to specify a license requirement for all items subject to the EAR and establish a license application review policy of a general policy of denial. A license requirement applies to any transaction in which items are to be exported or reexported to such persons or in which such persons act as purchaser, intermediate consignee, ultimate consignee, or end-user. In addition, the ERC decided that no license exceptions are available for shipments to those persons being added to the Entity List.

Specifically, this rule adds the following 15 persons/16 entries to the Entity List:

Iran

(1) *Amir Hosein Atabaki*, 5 Yaas St, Unit 4, Tehran, Iran;

(2) *H. Farahani*, Ground Floor—No. 31, Alborz Alley, EnghelabSt, Tehran, Iran;

(3) *Mahdi Electronics*, Ground Floor—No. 31 Alborz Alley, EnghelabSt, Tehran, Iran;

(4) *Naser Golshekan*, Ground Floor—No. 31, Alborz Alley, EnghelabSt, Tehran, Iran;

(5) *Pakgostar Company*, Appt 501 & 502, Borje Sefid Bldg, Pasadaran Avenue, Tehran 1946963651, Iran;

(6) *Raht Aseman*, No. 1.2, Mosque Alley, Mohammadi St, North Bahar Ave, Tehran, Iran;

(7) *Reza Zahedipour*, 5 Yaas St, Unit 4, Tehran, Iran;

(8) *Safir Electronics*, Ground Floor—No. 31 Alborz Alley, EnghelabSt. Tehran, Iran; and

(9) *Sahab Phase*, 5 Yaas St, Unit 4 Tehran, Iran.

Singapore

(10) *Brian Douglas Woodford*, 1 Scotts Road, Suite 25–06 Shaw Centre, Singapore 228208 (See alternate listing under the United Kingdom);

(11) *Gryphon Aerospace*, 36 Lorong N Telok Kurau Unit #03–03, Singapore 425160;

(12) *Monarch Aviation*, 1 Scotts Road, Suite 25–06 Shaw Centre, Singapore 228208; and

(13) *Yip Kum Kuan*, 36 Lorong N Telok Kurau, Unit #03–03, Singapore 425160.

United Kingdom

(14) *Brian Douglas Woodford*, (See alternate address under Singapore);

(15) *Farshid Gillardian, a.k.a., Isaac Gill, Isaac Gillardian*, London, United Kingdom; and

(16) *MCES*, London, United Kingdom.

Under these entries on the Entity List, a BIS license is required for the export or reexport of any item subject to the EAR to any of the persons listed above,

including any transaction in which any of the listed persons will act as purchaser, intermediate consignee, ultimate consignee, or end-user of the items. This listing of these persons also prohibits the use of License Exceptions (see part 740 of the EAR) for exports and reexports of items subject to the EAR involving such persons.

Technical Corrections and Clarifications to Previously Listed Entities

This rule makes two technical corrections, to correct two inadvertent misspellings of Kuala Lumpur that were included in two Malaysian entities added to the Entity List in the EAR final rule published on September 22, 2008 (73 FR 54499). In addition, this rule makes a clarification to one U.A.E. entity added to the Entity List, in the final rule published on September 22, 2008. This U.A.E. entity, Advanced Technology General Trading Company, is a co-located entity with addresses listed under the U.A.E. and Kuwait. However, the same Kuwaiti address was listed under both the U.A.E. and Kuwaiti entries for this entity. This rule removes the Kuwaiti address from the U.A.E. entry of this entity and provides a cross reference to the alternate address under Kuwait.

Savings Clause

Shipments of items removed from eligibility for a License Exception or export or reexport without a license (NLR) as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting or reexporting carrier, or en route aboard a carrier to a port of export or reexport, on December 5, 2008, pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR) so long as they are exported or reexported before January 5, 2009. Any such items not actually exported or reexported before midnight, on January 5, 2009, require a license in accordance with this rule.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of July 23, 2008, 73 FR 43603 (July 23, 2008), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by the OMB under control numbers 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748. Miscellaneous and recordkeeping activities account for 12 minutes per submission. Total burden hours associated with the Paperwork Reduction Act and Office and Management and Budget control number 0694–0088 are expected to increase slightly as a result of this rule.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military or foreign affairs function of the United States. (*See* 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are not applicable.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

■ Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 10, 2008, 73 FR 67097 (November 12, 2008).

■ 2. Supplement No. 4 to part 744 is amended:

■ (a) By adding under Iran, in alphabetical order, nine Iranian entities;

■ (b) By revising under Malaysia, two Malaysian entities;

■ (c) By adding under Singapore, in alphabetical order, four Singaporean entities;

■ (d) By revising under United Arab Emirates, one U.A.E. entity, and

■ (e) By adding, in alphabetical order, the country of the United Kingdom and three UK entities, to read as follows:

SUPPLEMENT NO. 4 TO PART 744—ENTITY LIST

Country	Entity	License requirement	License review policy	Federal Register citation
*	*	*	*	*
Iran	*Amir Hosein Atabaki,* 5 Yaas St, Unit 4, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.

SUPPLEMENT NO. 4 TO PART 744—ENTITY LIST—Continued

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	* *	* *	*	*
	H. Farahani, Ground Floor—No. 31, Alborz Alley, EnghelabSt, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
	Mahdi Electronics, Ground Floor—No. 31 Alborz Alley, EnghelabSt, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
	Naser Golshekan, Ground Floor—No. 31, Alborz Alley, EnghelabSt, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
	Pakgostar Company, Appt 501 & 502, Borje Sefid Bldg, Pasadaran Avenue, Tehran 1946963651, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
	Raht Aseman, No. 1.2, Mosque Alley, Mohammadi St, North Bahar Ave, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
	Reza Zahedipour, 5 Yaas St, Unit 4, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
	Safir Electronics, Ground floor No. 31 Alborz Alley, EnghelabSt. Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
	Sahab Phase, 5 Yaas St, Unit 4 Tehran, Iran	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
Malaysia	*Analytical Solutions,* #GB (Ground Floor), Pearl Tower, O.G. Heights, Jalan Awan Cina, 58200 Kuala Lumpur, Malaysia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR 54508 9/22/08. 73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
	Mohd Ansari, #GB (Ground Floor), Pearl Tower, O.G. Heights, Jalan Awan Cina, 58200 Kuala Lumpur, Malaysia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR 54508 9/22/08. 73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
Singapore	*Brian Douglas Woodford,* 1 Scotts Road, Suite 25–06 Shaw Centre, Singapore 228208 (See alternate address under the United Kingdom).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* *	* *	*	*
	Gryphon Aerospace, 36 Lorong N Telok Kurau Unit #03–03, Singapore 425160.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
	Monarch Aviation, 1 Scotts Road, Suite 25–06 Shaw Centre, Singapore 228208.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.

SUPPLEMENT NO. 4 TO PART 744—ENTITY LIST—Continued

Country	Entity	License requirement	License review policy	Federal Register citation
*	* * *	* *	*	*
	Yip Kum Kuan, 36 Lorong N Telok Kurau, Unit #03–03, Singapore 425160.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* * *	* *	*	*
United Arab Emirates ..	*Advanced Technology General Trading Company,* U.A.E. (See alternate address under Kuwait).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR 54509 9/22/08. 73 FR [INSERT FR PAGE NUMBER] 12/5/08.
*	* * *	* *	*	*
United Kingdom	*Brian Douglas Woodford* (See alternate address under Singapore).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
	Farshid Gillardian, a.k.a., Isaac Gill, Isaac Gillardian, London, United Kingdom.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.
	MCES, London, United Kingdom	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	73 FR [INSERT FR PAGE NUMBER] 12/5/08.

Dated: December 2, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8–28872 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

[Docket No. 0811251525–81526–01]

RIN 0648–AS36

Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales

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

ACTION: Final rule; OMB approval of collection-of-information requirements.

SUMMARY: NMFS announces approval by the Office of Management and Budget (OMB) of collection-of-information requirements contained in regulations implementing speed restrictions to reduce the incidence and severity of ship collisions with North Atlantic right whales.

DATES: Effective December 9, 2008.

ADDRESSES: Written comments regarding burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Gregory Silber, Ph.D., or Shannon Bettridge, Ph.D., Fishery Biologists, Office of Protected Resources, NMFS, at (301) 713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** document is also accessible at the Web site of the Office of the Federal Register: *http://www.gpoaccess.gov/fr/index.html.*

Background

On October 10, 2008, NMFS published a final rule implementing speed restrictions to reduce the incidence and severity of ship collisions with North Atlantic right whales (73 FR 60173). That final rule contained a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) that had not yet been approved by OMB. Specifically, 50 CFR 224.105(c) requires a logbook entry to document that a deviation from the 10-knot speed limit was necessary for safe maneuverability under certain conditions.

On October 30, 2008, OMB approved the collection-of-information requirements contained in the October 10, 2008, final rule. NMFS announces that the collection-of-information requirements are approved under Control Number 0648–0580, with an expiration date of April 30, 2009.

List of Subjects in 15 CFR Part 902

Reporting and recordkeeping requirements.

Dated: December 1, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons stated in the preamble, 15 CFR part 902 is amended as follows:

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

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

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under ''50 CFR'' is amended by adding a new entry in numerical order to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

CFR part or section where the information collection requirement is located	Current OMB control number (All numbers begin with 0648–)
* * * * *	
50 CFR	
* * * * *	
224.105(c)	–0580
* * * * *	

[FR Doc. E8–28874 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 293

RIN 1076–AE99

Class III Tribal State Gaming Compact Process

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This rule establishes procedures for Indian tribes and States to submit Tribal-State compacts and compact amendments, governing the conduct of class III gaming activities on the tribe's Indian lands located within that State, for review and approval by the Secretary of the Interior.

DATES: This rule is effective on January 5, 2009.

FOR FURTHER INFORMATION CONTACT: Paula Hart, Acting Director, Office of Indian Gaming, 1849 C Street, NW., Mail Stop 3657–MIB, Washington, DC 20240; Telephone: (202) 219–4066.

SUPPLEMENTARY INFORMATION:

I. Authority
II. Background
III. Discussion of Comments Received on Proposed Rule
A. General Comments
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C. Section 293.3 What is a compact?
D. Section 293.4 What authority does the Secretary have to approve or disapprove compacts and amendments?
E. Section 293.5 When should the Indian tribe or State submit a compact or a compact amendment for review and approval?
F. Section 293.6 Are technical amendments subject to review and approval?
G. Section 293.7 Are extensions of compacts and amendments subject to review and approval?
H. Section 293.8 Who can submit a compact or amendment?
I. Section 293.9 What documents must be submitted with a compact or amendment?
J. Section 293.10 Where should a compact or amendment be submitted for review and approval?
K. Section 293.11 How long will the Secretary take to review a compact or amendment?
L. Section 293.12 When will the 45-day timeline be triggered?
M. Section 293.13 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?
N. Section 293.14 Who can withdraw a compact or amendment after it has been received by the Secretary?
O. Section 293.15 When may the Secretary disapprove a compact or amendment?
P. Section 293.16 When does an approved or considered-to-have-been-approved compact or amendment take effect?
IV. Changes to Proposed Rule
V. Procedural Requirements
A. Regulatory Planning and Review (Executive Order 12866)
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C. Small Business Regulatory Enforcement Fairness Act (SBREFA)
D. Unfunded Mandates Act
E. Takings Implication Assessment (Executive Order 12630)
F. Federalism (Executive Order 13132)
G. Civil Justice Reform (Executive Order 12988)
H. National Environmental Policy Act
I. Paperwork Reduction Act
J. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)
K. Effects on the Nation's Energy Supply (Executive Order 13211)
L. Information Quality Act

I. Authority

The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301 and 25 U.S.C. 2, 9, and 2710. The Secretary has delegated this authority to the Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual.

II. Background

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701–2721, was signed into law on October 17, 1988. IGRA authorizes class III gaming activities on Indian lands when authorized by an approved ordinance, located in a State that permits such gaming and conducted in conformance with a Tribal-State compact. See 25 U.S.C. 2710. The Indian tribe and State must submit each compact and compact amendment to the Secretary for approval or disapproval. See 25 U.S.C. 2710(d)(8)(A), (B) and (C).

On July 2, 2008, the Bureau of Indian Affairs (BIA) published a proposed rule establishing the procedures for submitting Tribal-State compacts and compact amendments to the Secretary for approval. *See* 73 FR 37907. The original comment period ended on September 2, 2008. BIA extended the comment period until September 22, 2008. *See* 73 FR 51255 (September 2, 2008).

III. Discussion of Comments Received on Proposed Rule

During the public comment period, the Department received a total of 15 comments from Indian tribes, individual commenters, States, State associations, and non-profit organizations. The following discussion provides a summary of general and section-specific comments, and the Department's responses to those comments. The section-specific comments below are organized according to the sections listed in the proposed rule.

A. General Comments

One comment commended the Secretary for publishing these regulations.

One comment requested that the rule require the surrounding communities to approve compacts or amendments before they may become effective.

Response: This recommendation was not adopted because the Secretary does not have the authority to require such approval by surrounding communities. Publication in the **Federal Register** serves as notice to the public, including surrounding communities, before compacts or amendments become effective. *See* section 293.15 of the final rule. Each State's compact approval process is a matter of State law and governs whether surrounding communities can provide input.

One comment suggested that throughout the rule we add ''substantive'' in every instance we used the word ''amendment.''

Response: This comment applied to the proposed rule because the proposed rule subjected only substantive comments to Secretarial review and approval. The final rule subjects all amendments, whether substantive or technical, to Secretarial review and approval; therefore, the comment requesting that we specify that amendments refer to substantive amendments only is no longer applicable.

One comment suggested adding language to clarify the Department's position on ''Indian lands.''

Response: This regulation addresses the process for submission by tribes and States and consideration by the Secretary of Class III Tribal-State

Gaming Compacts, and is not intended to address substantive issues. To clarify, we have removed references to the purpose of this rule being to establish the ''criteria'' by which the Secretary reviews compacts in section 293.1.

One comment suggests using the phrase ''State Governor's Office'' rather than the generic term ''State'' for greater specificity.

Response: The final rule continues to refer to ''State'' because IGRA does not specify the ''State Governor's Office.''

B. Section 293.2 How are key terms defined in this part?

One comment suggested defining the terms ''substantive amendment,'' ''technical amendment,'' and ''Tribal-State gaming compact.''

Response: We accepted this recommendation with regard to defining ''Tribal-State gaming compact.'' In the proposed rule, this definition was in its own section. The final rule includes the definition with definitions of other terms in section 293.2. With regard to defining ''substantive amendment'' and ''technical amendment,'' this distinction is no longer necessary because the final rule subjects all amendments to Secretarial review and approval.

C. Section 293.3 What is a compact?

A comment suggested this section be deleted and a definition of a Tribal-State compact added to section 293.2.

Response: We accepted this recommendation and added a definition of ''Tribal-State gaming compact'' to section 293.2.

One comment suggested we remove ''on the tribe's Indian lands located within the State.''

Response: In response to the previous comment, the entire section was deleted. The phrase ''on the tribe's Indian lands located within the State,'' is not included in the new definition of ''Tribal-State gaming compact.''

D. Section 293.4 What authority does the Secretary have to approve or disapprove compacts and amendments?

One comment states that the Indian tribe or State should submit the compact or amendment after it has been ''legally entered into'' by both parties. Another comment suggested that the Department should consider adding a requirement that the compact or amendment also be ''in effect.''

Response: These comments are related and both are addressed later in the rule. First, at 293.8 (293.9 in the proposed rule), the final rule now requires documentation from both the tribe and the State certifying that their respective representatives were authorized to execute the proposed compact or amendment. Section 293.15 (section 293.16 in the proposed rule) is consistent with IGRA because, once approved or considered-to-have-been-approved, a compact or amendment is ''in effect'' for the purposes of IGRA only when a notice of approval of the compact is published in the **Federal Register**, not when submitted by the parties.

Another comment asked for identification of the Secretary's authority for approving amendments.

Response: IGRA requires that the Secretary review all compacts. The Secretary must review amendments to insure that the terms of the compact, as amended and considered as a whole, do not violate any provision of IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

One comment requested that the Department notify the parties as well as the local jurisdictions that are affected of when the compact or amendment becomes effective.

Response: This recommendation was not adopted because publication in the **Federal Register** serves as notice to the public. *See* section 293.15 of the final rule.

Multiple comments recommended referencing section 293.15 (section 293.14 of the final rule) to address the Secretary's disapproval authority.

Response: This recommendation was accepted and section 293.14 of the final rule is now referenced with regard to the Secretary's disapproval authority.

E. Section 293.5 When should the Indian tribe or State submit a compact or a compact amendment for review and approval?

One commenter would like the local jurisdictions to be notified when a compact or amendment is submitted.

Response: This recommendation was not adopted because IGRA does not require this notification.

F. Section 293.6 Are technical amendments subject to review and approval?

One comment suggests that we require ''proof of State [r]atification * * *, an enacted and chaptered bill or evidence of a legislative action.''

Response: We accepted in part by adding language in final section 293.8 that would require the Governor or his representative to submit a certification of authority under State law to enter into the compact or amendment.

One comment requests us to, ''clearly specif[y] * * * the date by which the Compact or amendment ratification takes affect [sic].''

Response: The date on which the compact is effective will be stated in the **Federal Register** notice.

One comment opposes this section and questions the statutory authority for the proposed exemption.

Response: The Department has amended this section to provide that all amendments are subject to Secretarial review and approval.

Multiple comments suggested redrafting sections 293.6 and 293.7 because of the confusion regarding submitting a technical amendment for approval and regarding when an amendment is not substantive.

Response: The Department has amended this section to provide that all amendments, whether technical or substantive, are subject to Secretarial review and approval.

G. Section 293.7 Are extensions of compacts and amendments subject to review and approval?

One comment suggested changing this section to address amendments and adding a new section to address extensions.

Response: We accepted this comment by adding a new section 293.5 in the final rule to solely address extensions.

One comment suggested that extensions do not need approval.

Response: We accepted this comment for all extensions that do not amend the terms of a compact, but clarified that the tribe and State must still submit the extension and supporting documentation to the Secretary. This will allow the Secretary to publish notice of the extension in the **Federal Register**; IGRA specifies that a compact is not in effect unless notice is published in the **Federal Register**.

One comment suggested that all amendments and extensions are substantive.

Response: The final rule addresses amendments and extensions separately. The final rule subjects all amendments to Secretarial review and approval, regardless of whether they are substantive or not. The final rule separately addresses extensions, providing that as long as they do not amend the terms of the compact, they are not subject to Secretarial review and approval, but still must be submitted to the Secretary for publication in the **Federal Register**.

H. Section 293.8 Who can submit a compact or amendment?

One comment suggested that we add to (a) ''provided that all the necessary

documents are included with the submission.''

Response: This recommendation was not adopted because it does not address the question raised in the heading. Final rule section 293.8 addresses what documents must be submitted.

One comment suggested language that would require the Secretary to notify the non-submitting party (the State or the Indian tribe) of the submission.

Response: This recommendation was not adopted because it is not required under IGRA. Additionally, the submission must be executed by both the Tribe and State government to qualify as a Tribal-State gaming compact under section 293.2(b)(2).

One comment suggested that we verify that the person submitting the compact or amendment to the Secretary has the authority to do so.

Response: This recommendation was not adopted because it is not required under IGRA; however, we have added a requirement that the State certify that it has authority to enter into the compact or amendment.

One comment suggested that we require a single submitter (either the State or the tribe).

Response: This recommendation was not adopted because IGRA does not require a single submitter.

I. Section 293.9 What documents must be submitted with a compact or amendment?

One comment asked that the Office of Indian Gaming have a ''unique date and time stamp.''

Response: The Office of Indian Gaming currently uses a ''unique'' date stamp that identifies the office.

The same commenter suggested requiring the person who receives the compact to ''initial'' that they took possession of the document.

Response: The Office has determined that having each person with custody of the document initial the document upon receipt will not address the apparent concern that a document does not reach the Office of Indian Gaming.

One comment recommended language that formalized the requirement that the tribe approve the compact or amendment.

Response: We accepted this recommendation in part by changing ''adopted'' to ''approved.''

One comment raised the concern that submitted information that is confidential and proprietary in nature may be released under the Freedom of Information Act (FOIA).

Response: If the Secretary determines that submitted information is confidential, as defined by FOIA, then the Secretary would withhold the information from public disclosure. The Secretary needs enough information to make a determination as to whether submitted information is confidential and therefore exempt from public disclosure requirements under FOIA.

One comment requested that we require the compact to be ''signed.''

Response: We have not accepted this comment because existing language in the rule requiring that the compact be ''executed'' by both parties addresses this comment.

One comment suggests adding to paragraph (d) of this section language that clarifies that the Secretary may only seek additional documentation that is ''relevant'' to the Secretary's decision whether to approve or disapprove the compact or amendment.

Response: We did not accept this comment because the rule, as written, allows the Secretary to request only additional documentation that is ''necessary to determine whether to approve or disapprove the compact or amendment.'' Adding a requirement that the additional documentation be ''relevant'' would be superfluous, given that any documentation that is ''necessary'' for the decision will also be relevant to the decision.

J. Section 293.10 Where should a compact or amendment be submitted for review and approval?

One comment suggests we not state the address as ''Mail Stop 3657'' because in the future the office could move.

Response: We have accepted this comment in part. We did not remove the ''Mail Stop 3657'' but we added, ''If this address changes, a notice with the new address will be published in the **Federal Register** within 5 business days.''

K. Section 293.11 How long will the Secretary take to review a compact or amendment?

One comment requested that a requirement be added to this section stating that, ''the Secretary must withdraw the Federal notice in order to clarify the record and ensure that the Tribal State compact receives the proper scrutiny before being published.''

Response: The Department determined that this additional language is not necessary because the Department has procedures in place requiring internal Departmental review before a notice can be delivered to and published in the **Federal Register**. If the Secretary determines that the compact or amendment was not legally entered into, the Secretary will disapprove the compact or amendment; in that case, no notice will be published in the **Federal Register**. As stated in section 293.12 of the final rule, ''If the Secretary neither affirmatively approves nor disapproves a compact or amendment within the 45-day review period, the compact or amendment is considered to have been approved, but only to the extent it complies with the provisions of the Indian Gaming Regulatory Act.'' Notice that the compact or amendment is considered to be approved will be published in the **Federal Register** and will state the date on which the compact or amendment is ''in effect.''

One commenter would like the local jurisdictions to be notified of the Secretary's decision to approve or disapprove a compact or amendment.

Response: This recommendation was not adopted because notification of the Secretary's decision to approve or disapprove is not required by IGRA. Additionally, publication in the **Federal Register** serves as notice to the public that the compact or amendment is ''in effect.'' See section 293.15 of the final rule.

One comment suggested that we replace the language in (b) with, ''If the Secretary has not put forward a decision to approve or disapprove a compact or amendment with 45 days, the compact or amendment will be considered approved.''

Response: This comment was rejected because section 293.13 (section 293.12 of the final rule) already includes language regarding what happens when the Secretary does not put forward a decision to approve or disapprove the compact or amendment within 45 days.

One comment stated that the Department grants itself extensions to the 45-day time period for issuing a decision.

Response: The 45-day time period is statutory and no extensions are granted.

L. Section 293.12 When will the 45-day timeline be triggered?

One comment wanted us to add a paragraph stating that if the compact has not been legally ''entered into'' then it is ''not in effect.''

Response: It appears that this comment was meant to address proposed section 293.15 (When may the Secretary disapprove a compact or amendment?). We reject this comment because section 293.7 of the final rule, stating that a compact or amendment may only be submitted to the Secretary after it has been legally entered into, addresses this concern. Likewise, because IGRA requires that the compact or amendment be legally entered into, final section 293.14, stating that the Secretary may disapprove a compact or

amendment that violates any IGRA provision, addresses this concern.

Three comments suggested that we add the following sentence to this section, ''Once the compact or amendment is received and date stamped in the Office of Indian Gaming, both parties (the State and the Indian Tribe) will be notified in writing by the Office of Indian Gaming, of the date triggering the 45-day timeline.''

Response: We reject this comment because it is not required under IGRA and because the parties are generally aware of the submission date, given that they make (or authorize, in coordination with the other party) the submission. Additionally, it is often infeasible for the Office of Indian Gaming to individually respond to each submission in writing soon after receiving that submission, given the numerous other actions the Office is required to take during the 45-day time frame. The trigger for the 45-day time frame is established by statute, and the Secretary does not make any determination as to when the 45-day time frame begins, so sending a letter with the date triggering the 45-day period will not affect when the time period begins to run, or the length of the time period.

M. Section 293.13 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

One comment recommends that when a compact is considered to be approved that the Secretary make a finding about the extent to which the compact complies with IGRA.

Response: This recommendation was not adopted because it is not required under IGRA. Section 25 U.S.C. 22710(d)(8)(C) authorizes the Secretary to allow a compact to become effective without requiring a determination as to whether the compact/amendment complies with IGRA.

One comment stated that the Secretary should notify the tribe and the State upon completion of the 45-day period.

Response: We reject this comment because the tribe and State will be notified by publication in the **Federal Register** of the Secretary's approval within 90 days from the date the compact or amendment is received by the Office of Indian Gaming.

N. Section 293.14 Who can withdraw a compact or amendment after it has been received by the Secretary?

One comment suggested amending this section to provide that any withdrawal must be in writing and executed by the tribe and the State.

Response: This recommendation was not adopted because this section already specifies that the request must be ''written'' and submitted by both the Indian tribe and State (meaning that both must execute the request).

Two comments suggested that the Secretary shall notify the other party in writing of the request to withdraw.

Response: This suggestion is rejected because this section already requires written requests signed by both parties.

O. Section 293.15 When may the Secretary disapprove a compact or amendment?

Two comments recommended that we clarify the meaning of ''[t]he Secretary may disapprove a compact or amendment only if it violates * * * [a]ny provisions of the Indian gaming Regulatory Act; * * * or * * * [t]he trust obligations of the United States to Indians.''

Response: This recommendation was not adopted because this regulation is a procedural rule, and is not intended to address substantive issues.

P. Section 293.16 When does an approved or considered-to-have-been-approved compact or amendment take effect?

Multiple comments would like to restrict the Secretary's time for publishing the **Federal Register** notice to within 5 days of the approval. Another comment would like the time period to be shortened from 90 days to 60 days. Yet another comment would like the Secretary to publish the **Federal Register** notice within 15 days from the date of approval.

Response: These comments were not accepted because the 90-day time frame that has been incorporated is reasonable.

One comment suggested that this provision is ''ultra vires'' because IGRA provides that a compact ''shall be considered to have been approved'' if no action is taken within the 45-day review period. Another comment suggested a considered-to-be-approved compact will be automatically effective 60 days following the submission.

Response: We reject these comments because IGRA specifies that a compact may be considered approved but does not take effect until notice is published in the **Federal Register**. See 25 U.S.C. 2710(d)(3)(B). The act of actual publication is necessary.

One comment suggests that 25 U.S.C. 2710(d)(8)(D) does not specify that publication is necessary in order for compacts that are ''considered to be approved'' to be effective.

Response: Section 2710(d)(8)(D) states, ''The Secretary shall publish in the **Federal Register** notice of any Tribal-State compact that is approved, or considered to have been approved * * *'' Section 2710(d)(3)(B) states that a ''compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the **Federal Register**.''

IV. Changes to Proposed Rule

In section 293.1 (What is the purpose of this part?), the final rule clarifies in paragraph (b) that this rule addresses the procedures the Secretary follows in reviewing compacts and amendments, rather than establishing the criteria (which are already established by IGRA). The final rule incorporates a revised definition of ''Tribal-State Gaming Compact'' into section 293.2 (How are key terms defined in this part?), and deletes section 293.3 (What is a compact?). The final rule also adds a definition of ''extensions.''

In response to a comment, the final rule adds to section 293.3 (What authority does the Secretary have to approve or disapprove compacts and amendments?) a cross-reference to the section addressing when the Secretary may disapprove a compact or amendment.

Section 293.5 (When should the Indian tribe or State submit a compact or compact amendment for review and approval?) was moved to follow the section addressing ''Who can submit a compact or amendment?''

The final rule revises section 293.6 (Are technical amendments subject to review and approval?) to: (1) Address whether compacts are also subject to review and approval; and (2) eliminate the distinction between technical and substantive amendments by subjecting all amendments to Secretarial review. This section is located in the final rule at section 293.4 (Are compacts and amendments subject to review and approval?).

The final rule revises section 293.7 (Are extensions of compacts and amendments subject to review and approval?) to address only extensions. See final rule section 293.5 (Are extensions to compacts subject to review and approval?). The final rule also changes the response to provide that extensions are not subject to review and approval, but must be submitted to the Secretary to allow for publication in the **Federal Register**.

The final rule makes no changes to section 293.8 (Who can submit a

compact or amendment?), which is now located at section 293.6.

The final rule revises section 293.9 (What documents must be submitted with a compact or amendment?) to require the representative of the State to submit certification of his or her authority to enter into the compact or amendment. The final rule also changes the word ''adopted'' to ''approved'' in response to a comment. See final section 293.8.

The final rule revises section 203.10 (Where should a compact or amendment be submitted for review and approval?) to clarify that, if the address provided should change, the Department will publish a notice with the new address in the **Federal Register** within 5 business days. See final section 293.9.

The remaining sections are substantively unchanged in the final rule.

V. Procedural Requirements

A. Regulatory Planning and Review (Executive Order 12866)

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action and is not subject to review by the Office of Management and Budget (OMB).

(a) This rule will not have an economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) This rule will not create serious inconsistencies or otherwise interfere with an action taken or planned by another Federal agency. BIA is the only governmental agency that approves Tribal-State compacts and compact amendments.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule sets out the procedures for the submission of Tribal-State compacts and compact amendments.

(d) This rule will not raise novel legal or policy issues.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Indian tribes are not considered to be small entities for the purposes of this Act.

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal government or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings Implication Assessment (Executive Order 12630)

In accordance with Executive Order 12630, the Department has determined that this rule does not have significant takings implications. The rule does not pertain to the ''taking'' of private property interests, nor does it impact private property. A takings implication assessment is not required.

F. Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the Department has determined that this rule does not have significant Federalism implications because it does not substantially and directly affect the relationship between the Federal and State governments and does not impose costs on States or localities. A Federalism Assessment is not required.

G. Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. The rule contains no drafting errors or ambiguity and is written to minimize litigation, provides clear standards, simplify procedures, reduces burden, and is clearly written. The rule does not preempt any statute.

H. National Environmental Policy Act

The Department has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

I. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. No person is required to respond to an information collection request that has not complied with the PRA.

This regulation requires an information collection under the Paperwork Reduction Act of 1955 at section 293.8. The information is submitted to fulfill requirements for approval of a Tribal-State compact or compact amendment and it is used by the Bureau to determine whether the tribe has met the criteria required by IGRA. All information is collected in the tribe's submission of a Tribal-State compact or compact amendment. It is estimated that a tribe's application will need 360 hours to complete. The tribe will maintain the records as would any business; the Bureau maintains official files.

During the public comment period on the proposed rule, the Department received two public comments on the information collection. One public comment requested that we add a request for some evidence that the State is authorized to enter into a compact or amendment. In response, the Department added a requirement for a certification that the State official is authorized under State law to enter into the compact or amendment in section 293.8 of the final rule. Because the State would have to determine this authority even without submission of this statement of fact, this certification does not increase the annual burden hours. The other public comment addressed the portion of the information collection stating that the Secretary may request additional documentation as required for the approval determination (section 293.8(d) of the final rule). This comment requested that BIA narrow the scope of what documents it may request as part of the submission. Section 293.8 of the final rule lists specific documents that should be submitted and includes a catch-all provision at paragraph (d) allowing the Secretary to request any additional documentation needed for a determination as to compliance with IGRA. BIA has retained this catch-all provision to avoid defining a universe of documents that inadvertently omits

documents that may otherwise support a determination as to IGRA compliance merely because BIA cannot anticipate all the circumstances or documents that may be appropriate. As such, BIA has not made any changes to the information collection as a result of this comment.

OMB has approved the information collection requirement included in this final rule and has assigned it OMB Control Number 1076–0172 with an expiration of 11/30/2011. Questions or comments concerning this information collection should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

J. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)

In accordance with the President's memorandum of May 14, 1988, ''Consultation and Coordination with Indian Tribal Governments'' (63 FR 27655), and Executive Order 13175, we have conducted consultation sessions with tribal governments on the development of proposed regulations to establish procedures for submitting Tribal-State compacts and compact amendments. Consultation sessions with tribal governments were conducted on the following dates and at the following locations: April 9, 2008 in Albuquerque, New Mexico and on April 23, 2008 in San Diego, California. The draft regulation was modified to reflect comments received during the consultation, as well as written comments received from Indian tribes, among others.

K. Effects on the Nation's Energy Supply (Executive Order 13211)

This rule does not have a significant effect on the nation's energy supply, distribution, or use as defined by Executive Order 13211.

L. Information Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–544).

List of Subjects in 25 CFR Part 293

Indians—business and finance, Indians—gaming.

Dated: October 14, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development—Indian Affairs.

■ For reasons stated in the preamble, the Bureau of Indian Affairs amends 25 CFR chapter 1 by adding part 293, to read as follows:

PART 293—CLASS III TRIBAL STATE GAMING COMPACT PROCESS

Sec.
293.1 What is the purpose of this part?
293.2 How are key terms defined in this part?
293.3 What authority does the Secretary have to approve or disapprove compacts and amendments?
293.4 Are compacts and amendments subject to review and approval?
293.5 Are extensions to compacts subject to review and approval?
293.6 Who can submit a compact or amendment?
293.7 When should the Indian tribe or State submit a compact or amendment for review and approval?
293.8 What documents must be submitted with a compact or amendment?
293.9 Where should a compact or amendment be submitted for review and approval?
293.10 How long will the Secretary take to review a compact or amendment?
293.11 When will the 45-day timeline begin?
293.12 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?
293.13 Who can withdraw a compact or amendment after it has been received by the Secretary?
293.14 When may the Secretary disapprove a compact or amendment?
293.15 When does an approved or considered-to-have-been-approved compact or amendment take effect?
293.16 How does the Paperwork Reduction Act affect this part?

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 2710.

§ 293.1 What is the purpose of this part?

This part contains procedures that:

(a) Indian tribes and States must use when submitting Tribal-State compacts and compact amendments to the Department of the Interior; and

(b) The Secretary will use for reviewing such Tribal-State compacts or compact amendments.

§ 293.2 How are key terms defined in this part?

(a) For purposes of this part, all terms have the same meaning as set forth in the definitional section of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2703 and any amendments thereto.

(b) As used in this part:

(1) *Amendment* means an amendment to a class III Tribal-State gaming compact.

(2) *Compact* or *Tribal-State Gaming Compact* means an intergovernmental agreement executed between Tribal and State governments under the Indian Gaming Regulatory Act that establishes between the parties the terms and conditions for the operation and regulation of the tribe's Class III gaming activities.

(3) *Extensions* means changes to the timeframe of the compacts or amendments.

§ 293.3 What authority does the Secretary have to approve or disapprove compacts and amendments?

The Secretary has the authority to approve compacts or amendments ''entered into'' by an Indian tribe and a State, as evidenced by the appropriate signature of both parties. See § 293.14 for the Secretary's authority to disapprove compacts or amendments.

§ 293.4 Are compacts and amendments subject to review and approval?

(a) Compacts are subject to review and approval by the Secretary.

(b) All amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary.

§ 293.5 Are extensions to compacts subject to review and approval?

No. Approval of an extension is not required if the extension of the compact does not include any amendment to the terms of the compact. However, the tribe must submit the extension executed by both the tribe and the State along with the documents required under paragraphs (b) and (c) of § 293.8.

§ 293.6 Who can submit a compact or amendment?

Either party (Indian tribe or State) to a compact or amendment can submit the compact or amendment to the Secretary for review and approval.

§ 293.7 When should the Indian Tribe or State submit a compact or amendment for review and approval?

The Indian tribe or State should submit the compact or amendment after it has been legally entered into by both parties.

§ 293.8 What documents must be submitted with a compact or amendment?

Documentation submitted with a compact or amendment must include:

(a) At least one original compact or amendment executed by both the tribe and the State;

(b) A tribal resolution or other document, including the date and place of adoption and the result of any vote taken, that certifies that the tribe has approved the compact or amendment in accordance with applicable tribal law;

(c) Certification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment;

(d) Any other documentation requested by the Secretary that is necessary to determine whether to approve or disapprove the compact or amendment.

§ 293.9 Where should a compact or amendment be submitted for review and approval?

Submit compacts and amendments to the Director, Office of Indian Gaming, U.S. Department of the Interior, 1849 C Street, NW., Mail Stop 3657, Main Interior Building, Washington, DC 20240. If this address changes, a notice with the new address will be published in the **Federal Register** within 5 business days.

§ 293.10 How long will the Secretary take to review a compact or amendment?

(a) The Secretary must approve or disapprove a compact or amendment within 45 calendar days after receiving the compact or amendment.

(b) The Secretary will notify the Indian tribe and the State in writing of the decision to approve or disapprove a compact or amendment.

§ 293.11 When will the 45-day timeline begin?

The 45-day timeline will begin when a compact or amendment is received and date stamped in the Office of Indian Gaming at the address listed in § 293.9.

§ 293.12 What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

If the Secretary neither affirmatively approves nor disapproves a compact or amendment within the 45-day review period, the compact or amendment is considered to have been approved, but only to the extent it complies with the provisions of the Indian Gaming Regulatory Act.

§ 293.13 Who can withdraw a compact or amendment after it has been received by the Secretary?

To withdraw a compact or amendment after it has been received by the Secretary, the Indian tribe and State must submit a written request to the Director, Office of Indian Gaming at the address listed in § 293.9.

§ 293.14 When may the Secretary disapprove a compact or amendment?

The Secretary may disapprove a compact or amendment only if it violates:

(a) Any provision of the Indian Gaming Regulatory Act;

(b) Any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or

(c) The trust obligations of the United States to Indians.

§ 293.15 When does an approved or considered-to-have-been-approved compact or amendment take effect?

(a) An approved or considered-to-have-been-approved compact or amendment takes effect on the date that notice of its approval is published in the **Federal Register**.

(b) The notice of approval must be published in the **Federal Register** within 90 days from the date the compact or amendment is received by the Office of Indian Gaming.

§ 293.16 How does the Paperwork Reduction Act affect this part?

The information collection requirements contained in this part have been approved by the OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned control number 1076–0172. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

[FR Doc. E8–28882 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA90

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Exemptions from the Requirement to Report Transactions in Currency

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Final rule.

SUMMARY: FinCEN is issuing this final rule to amend the Bank Secrecy Act (BSA) regulation that allows depository institutions to exempt transactions of certain persons from the requirement to report transactions in currency in excess of $10,000. Modification of the exemption procedures is a part of the Department of the Treasury's continuing effort to increase the efficiency and effectiveness of its anti-money laundering and counter-terrorist financing policies.

DATES: *Effective Date:* January 5, 2009.

FOR FURTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949–2732 and select Option 3.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

The Bank Secrecy Act, Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, authorizes the Secretary of the Treasury (''Secretary''), among other things, to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, regulatory and counter-terrorism matters, and to implement anti-money laundering programs and compliance procedures. The reporting by financial institutions of transactions in currency in excess of $10,000 has long been a major component of the Department of the Treasury's implementation of the BSA. The reporting requirement is promulgated pursuant to 31 U.S.C. 5313(a) requiring reports of domestic coin and currency transactions. The regulations implementing the BSA appear at 31 CFR part 103. The Secretary's authority to administer the BSA has been delegated to the Director of FinCEN.

The Money Laundering Suppression Act of 1994 (MLSA) amended the BSA by establishing a system for exempting transactions by certain customers of depository institutions from currency transaction reporting.[1] In general, the statutory exemption system, 31 U.S.C. 5313(d) through (g), creates two types of exemptions.[2] Under 31 U.S.C. 5313(d) (sometimes called the ''mandatory exemption'' provision), the Secretary is required to provide depository institutions with the ability to exempt from the currency transaction reporting requirement transactions in currency between the depository institution and four specified categories of customers. The four specified categories of customers in the mandatory exemption provision are: (1) Another depository institution; (2) a department or agency of the United States, any State, or any political subdivision of any State; (3) any entity established under the laws of the United States, any State, or any political subdivision of any State, or under an interstate compact between

[1] *See* section 402 of the Money Laundering Suppression Act of 1994 (the ''Money Laundering Suppression Act''), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325 (Sept. 23, 1994).

[2] The enactment of 31 U.S.C. 5313(d) through (g) reflected congressional intent to ''reform * * * the procedures for exempting transactions between depository institutions and their customers.'' *See* H.R. Rep. 103–652, 103d Cong., 2d Sess. 186 (Aug. 2, 1994).

two or more States, which exercises governmental authority on behalf of the United States or any such State or political subdivision; and (4) any business or category of business the reports on which have little or no value for law enforcement purposes.

Under 31 U.S.C. 5313(e) (sometimes called the ''discretionary exemption'' provision) the Secretary is authorized, but not required, to allow depository institutions to exempt from the currency transaction reporting requirement transactions in currency between it and a qualified business customer.[3] A ''qualified business customer,'' for purposes of the discretionary exemption provision, is a business that:

(A) Maintains a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act) at the depository institution;

(B) frequently engages in transactions with the depository institution which are subject to the reporting requirements of subsection (a); and

(C) meets criteria which the Secretary determines are sufficient to ensure that the purposes of [the BSA] are carried out without requiring a report with respect to such transactions.[4]

The Secretary was required to establish by regulation the criteria for granting and maintaining an exemption for qualified business customers,[5] as well as guidelines for depository institutions to follow in selecting customers for exemption.[6] The BSA allowed for the guidelines including a description of the type of businesses for which no exemption would be granted under the discretionary exemption provision. The Secretary also was required to prescribe regulations that require an annual review of qualified business customers and require depository institutions to resubmit information about those customers with modifications if appropriate.[7]

B. Overview of the Current Regulatory Provisions To Exempt Certain Persons From Currency Transaction Reporting

The current exemption procedures, which are codified at 31 CFR 103.22(d), were the result of a five-part rulemaking.[8] The current exemption procedures apply to depository institution customers that fall within one of the classes of exempt persons described in 31 CFR 103.22(d)(2)(i)–(vii), commonly referred to as ''Phase I'' and ''Phase II'' exemptions. Phase I eligible customers include: (i) Other banks[9] operating in the United States; (ii) government departments and agencies; (iii) certain entities that exercise governmental authority; (iv) entities whose equity interests are listed on one of the major national stock exchanges; and (v) certain subsidiaries of entities whose equity interests are listed on one of the major national stock exchanges.[10] Phase II eligible customers include: (i) ''non-listed businesses'' and (ii) ''payroll customers.'' A ''non-listed business'' is any other commercial enterprise that is not ineligible for exemption[11] and that:

(A) Has maintained a transaction account at the bank for at least 12 months;

(B) Frequently engages in transactions in currency with the bank in excess of $10,000; and

(C) Is incorporated or organized under the laws of the United States or a State, or is registered as and eligible to do business within the United States or a State.[12]

A ''payroll customer,'' under 31 CFR 103.22(d)(2)(vii), is any other person (*i.e.*, a person not otherwise covered under the exempt person definitions) that:

(A) Has maintained a transaction account at the bank for at least 12 months;

(B) Operates a firm that regularly withdraws more than $10,000 in order to pay its United States employees in currency; and

(C) Is incorporated or organized under the laws of the United States or a State, or is registered as and eligible to do business within the United States or a State.[13]

A payroll customer is an exempt person ''[w]ith respect solely to withdrawals for payroll purposes.''[14]

Designating an Eligible Customer as Exempt and Other Requirements

Currently, a depository institution exempting a customer must file a FinCEN Form 110, Designation of Exempt Person (''DOEP'') (''FinCEN Form 110'') within 30 days after the first transaction which the bank wishes to exempt with respect to the customer.[15] For a Phase I customer, a depository institution must file the form only once and must conduct an annual review of the customer. For a Phase II customer, a depository institution must also conduct an annual review of the customer, and must biennially renew the customer's exemption by re-filing the form, certifying that it has applied its system of monitoring the customer's transactions in currency for suspicious activity, and reporting any change in control of the customer.

C. The Government Accountability Office (GAO) Report

The United States Government Accountability Office (GAO) issued a report (''the GAO Report'') this year that was helpful to FinCEN in identifying ways the current CTR exemption requirements could be improved.[16] The GAO found that CTRs provide federal, state, and local law enforcement officials with ''unique and reliable information essential to a variety of efforts'' and that advances in technology have made information reported through CTRs that much more useful.[17] In discussing the usefulness of CTRs, the GAO Report noted that the CTR, which captures information based on objective facts that determine its filing, and the SAR, which requires a financial institution to make a subjective determination of what is suspicious prior to its filing, are complementary sources of information for law enforcement.[18] Finally, the GAO Report found that CTR requirements also are useful to law enforcement because they force criminals to act in ways that increase chances of detection as they attempt to avoid conducting reportable transactions.[19]

Recognizing both the value of CTR data and the need to improve the current CTR exemption regulatory requirements, the GAO Report made three main recommendations for changes to the current CTR exemption regulations: (1) Remove the regulatory requirement that depository institutions

[3] For additional information about the terms of 31 U.S.C. 5313(e)–(g), see 63 FR 50147, 50148 (Sept. 21, 1998).

[4] 31 U.S.C. 5313(e)(2).

[5] *See* 31 U.S.C. 5313(e)(3).

[6] *See* 31 U.S.C. 5313(e)(4)(A).

[7] *See* 31 U.S.C. 5313(e)(5).

[8] *See* 61 FR 18204 (Apr. 24, 1996), 62 FR 47141, 47156 (Sept. 8, 1997), 62 FR 63298 (Nov. 28, 1997), 63 FR 50147 (September 21, 1998), and 65 FR 46356 (July 28, 2000) (the rulemakings that comprise the current CTR exemption system).

[9] *See* 31 CFR 103.22 (definition of a bank, which includes other depository institutions).

[10] *See* 31 CFR 103.22(d)(2)(v) (definition of a subsidiary).

[11] *See* 31 CFR 103.22(d)(6)(vii) (lists those non-listed businesses that are ineligible for exemption).

[12] 31 CFR 103.22(d)(2)(vi). (A non-listed business is an exempt person only ''[t]o the extent of its domestic operations.'')

[13] 31 CFR 103.22(d)(2)(vii).

[14] Id.

[15] *See* 31 CFR 103.22(d)(3)(i). FinCEN Form 110 replaced the previous designation form, Treasury Form TD F 90–22.53.

[16] *See* ''Bank Secrecy Act: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts'' GAO–08–355 (GAO: Washington, D.C.: Feb. 21, 2008).

[17] *See* id. at 2.

[18] *See* id. at 17 and 19.

[19] *See* id at 23–24.

file exemption forms, and annually review the supporting information, for banks, federal, state, and local government agencies, and entities exercising federal, state or local governmental authority; (2) remove the regulatory requirement that depository institutions biennially renew Phase II exemptions; and (3) permit depository institutions to exempt otherwise eligible non-listed customers who frequently engage in large cash transactions within a period of time shorter than 12 months.

II. Notice of Proposed Rulemaking

The final rule contained in this document is based on the Notice of Proposed Rulemaking published in the **Federal Register** on April 24, 2008 (''Notice'').[20] With the intent of simplifying the CTR exemption process and taking into account the recommendations made in the GAO Report, the Notice proposed a number of changes to the current regulatory requirements that govern the CTR exemption process. In particular the Notice proposed: removing the initial designation and annual review requirements for Phase I customers that are depository institutions, governments, or those acting with governmental authority; removing the biennial filing requirement for Phase II exempt customers but retaining the requirement to report a customer's change in control once every two years; eliminating the waiting period for exempting otherwise eligible Phase II customers by adopting a risk-based approach to exempting those customers; and requiring depository institutions to report a revocation of an exemption for Phase I and Phase II customers. The Notice also proposed a number of technical edits.

III. Comments on the Notice—Overview and General Issues

The comment period for the Notice ended on June 23, 2008. We received a total of 37 comment letters.[21] Of these, 19 were submitted by banks, five by credit unions, seven by industry associations, and two by individuals.[22] Generally, commenters were supportive of the proposals to eliminate the filing of a DOEP form and the annual review requirement for Phase I customers that are banks, government agencies, and entities exercising government authority. Some commenters suggested extending those proposals to the entire category of Phase I customers, which also includes public companies listed on a major stock exchange and their subsidiaries. Most commenters were supportive of removing the biennial filing requirement for Phase II exempt customers, but were not supportive of having to monitor for and report to FinCEN a change in control for those customers. Most banks that commented on the Phase II proposals also were not supportive of adopting only a risk-based analysis in lieu of the current twelve-month waiting period, though some credit unions were slightly more supportive of the proposal because of its potential to give depository institutions more flexibility in using the exemption process. Almost all commenters supported the current definition of ''frequently'' as meaning engaging in eight or more large currency transactions per year,[23] but many requested that FinCEN permit depository institutions to prorate that number if the waiting period for Phase II was made shorter. Finally, some commenters supported making filing a revocation mandatory, some did not think filing a revocation was overly burdensome but thought filing a revocation should remain voluntary, and others objected to the revocation requirement, which they viewed as being unnecessary and duplicative because they would begin filing CTRs again on customers they no longer exempt.

IV. Section-by-Section Analysis

A. Removing the Initial Designation and Annual Review Requirements for Certain Phase I Customers

FinCEN proposed to amend § 103.22 by (1) removing the requirement that depository institutions file an initial DOEP form (FinCEN Form 110) for Phase I eligible customers that are depository institutions, federal, state, or local governments, or entities exercising governmental authority;[24] and (2) removing the requirement that depository institutions conduct an annual review of the continued eligibility of those customers.[25] FinCEN proposed these amendments to further simplify the process of exempting these Phase I customers, because CTRs filed on them are not likely to be highly useful to law enforcement, and because those entities are unlikely to change the characteristics that made them eligible for exemption at the time of their initial designation.[26] All of the comments received regarding these two proposals were supportive. As a result, the final rule adopts these proposals without change.

Some commenters noted that most of the cost of using these Phase I exemptions results from the practice of creating additional files, separate from the files kept to demonstrate compliance with other BSA requirements, such as the customer identification program (''CIP'')[27] and the anti-money laundering (''AML'') program[28] requirements. While depository institutions will no longer be required to make an initial designation of exemption for these Phase I customers, depository institutions should take the same steps to assure themselves of the customer's initial eligibility for exemption, and to document the basis of its conclusions, that a reasonable and prudent bank would take to protect itself from loan or other fraud or loss based on misidentification of a person's status.[29] If a bank is able to determine a customer's eligibility for an exemption in the course of complying with its other BSA obligations, such as the requirement to maintain a Customer Identification Program (''CIP''), then the bank may make notations within its other BSA documentation, and need not maintain additional, separate documentation for the sole purpose of complying with the Phase I or Phase II exemption requirements. Also, while depository institutions must still comply with their SAR reporting obligations should any of their Phase I customers engage in suspicious activity, they are not required to review and confirm the continued exemption eligibility of Phase I customers that are banks, government agencies, or entities exercising governmental authorities.

[20] *See* 73 FR 22101 (Apr. 24, 2008).

[21] All comments to the Notice are available for public viewing at *www.regulations.gov*.

[22] One comment was blank and three were identical comments submitted by the same bank.

[23] See FinCEN's ''Guidance on Interpreting 'Frequently' Found in the Criteria for Exempting a 'Non-Listed Business' Under 31 CFR 103.22(d)(2)(vi)(B)'' (Nov. 2002).

[24] *See* 31 CFR 103.22(d)(3)(ii). *See* also 31 CFR 103.22(d)(6)(ii) (Operating rules that illustrate what types of entities normally exercise governmental authority).

[25] *See* 31 CFR 103.22(d)(4).

[26] FinCEN estimates that this rule will result in an additional 5,000 exemptions. Based on an analysis of CTR filings in 2007, FinCEN identified approximately 90,000 CTRs filed on 5,000 separate depository institutions. As a result of the revisions contained in the final rule, specifically the elimination of the requirements to file a designation of exempt person form and conduct an annual review on depository institutions, FinCEN expects that an exemption will be exercised for these 5,000 institutions. The actual number of exemptions is likely to exceed this level given the current estimate does not include additional exemptions for non-depository institutions, such as non-listed businesses.

[27] *See* 31 CFR 103.121.

[28] *See* 31 CFR 103.120.

[29] *See* re-designated 31 CFR 103.22(d)(5)(i).

Extending Proposals to Phase I Eligible Listed Public Companies and Their Subsidiaries

Some commenters requested that the proposals to remove the initial designation and annual review requirements for certain Phase I customers be extended to include Phase I eligible customers that are listed public companies and their subsidiaries. In the Notice, FinCEN did not extend these proposals to those Phase I customers that are listed public companies or their subsidiaries, because, unlike other Phase I entities, it is more likely that these customers may lose their exempt status because they no longer are publicly-traded companies. For example, one commenter noted a recent trend of some U.S. public companies being reorganized as private companies, which results in those entities no longer being subject to Securities and Exchange Commission (SEC) reporting requirements. Not having to comply with SEC reporting requirements results in private companies providing far less public information, and therefore being subject to much less scrutiny. FinCEN does not believe that confirming once a year that an exempt business continues to be a listed public company is unduly burdensome. Although it is true, as one commenter suggested, that a previously listed public company that has reorganized as a private company may be eligible for exemption as a Phase II non-listed business, it is also true that such a private company could be engaging in an ineligible line of business and thus potentially may be ineligible for exemption as a non-listed business.[30] Accordingly, FinCEN will not at this time be extending the removal of the initial designation of exemption or annual review requirements to listed public companies and their subsidiaries.

B. Waiting Period Required to Consider Phase II Entities for Exemption

FinCEN proposed amending paragraphs 31 CFR 103.22(d)(2)(vi)(A) and (vii)(A), and paragraph 31 CFR 103.22(d)(3)(iii), to remove any prescribed amount of time before a depository institution may consider a non-listed business or payroll customer for exemption, and instead enabling a depository institution to make a risk-based determination. FinCEN also solicited comment on an alternative proposal in which, instead of adopting a risk-based approach, FinCEN would maintain a reference to the length of time required to consider Phase II entities for exemption, but reduce it from twelve months to two months. Most commenters, especially banks and larger depository institutions, warned FinCEN that if only a risk-based approach were adopted, many depository institutions would no longer use Phase II exemptions because the costs associated with conducting and documenting a subjective risk-based analysis would far outweigh the cost of filing CTRs for those customers. A few of these commenters, though, suggested that in limited circumstances the flexibility of being able to exempt such a customer after conducting a risk-based analysis might be helpful.[31] Some credit union commenters were slightly more receptive to the proposal to adopt a risk-based requirement for Phase II exemptions, but also were apprehensive about the subjective nature of such a requirement. Most comments supported and preferred the proposal to shorten the waiting period for Phase II exemptions to two months, a few commenters suggested adopting both proposals in a hybrid approach, and some argued that they would not consider exempting a customer after so short a time frame as two months.

FinCEN noted in the Notice that much has changed in the regulatory landscape since 1998 when the twelve month waiting period was finalized for Phase II exemptions, and made special note of the additional requirements that depository institutions became subject to under the BSA and its implementing regulations with the enactment of the USA PATRIOT Act.[32] For example, FinCEN recognizes that depository institutions have had to gather more information about their customers at account opening as a result of requirements like the CIP requirements,[33] which must include risk-based procedures for verifying the identity of a customer, and that in general, depository institutions have become increasingly adept and sophisticated at complying with BSA requirements. In the Notice, FinCEN also articulated its intent to simplify the current exemption system, not to make complying with the regulatory requirements for exemptions more difficult and costly.[34] As a result, FinCEN believes adopting a hybrid approach that permits depository institutions to exempt an otherwise eligible Phase II customer after two months, or prior to the passing of two months' time if the institution conducts a risk-based analysis of the customer that allows the institution to form and document a reasonable belief that the customer has a legitimate business purpose for conducting frequent large cash transactions, is now appropriate. Depository institutions should note that the risk-based analysis option should be read as a separate, specific rule of paragraph (d), and is not meant to supersede the operating rules of existing 31 CFR 103.22(d)(6)(i) subject to paragraph (d). In addition, nothing in this final rule is intended to in any way relieve or reduce the obligations of the SAR requirement.[35]

The reasonableness standard for initial designation for Phase II exemption prior to two months and the reasonable standard in the operating rules in paragraph (d) are similar standards, but as they apply to different circumstances, they necessarily result in banks having to conduct different levels of review of their customers to meet those similar standards. If the waiting period has not yet been met and as a result, the bank has less time to observe the normal pattern of transaction activity that a customer engages in and to gain a knowledge of that customer, the depository institution must conduct a risk-based analysis to form a reasonable belief that the customer has a legitimate business purpose for conducting large currency transactions. That analysis may involve a greater level of review of that customer than under the reasonable and prudent standard, depending upon the depository institution's assessment of the risks associated with that customer.

Conducting a Risk-Based Analysis

When conducting a risk-based analysis to determine the Phase II exemption eligibility of a customer, the depository institution should form a reasonable belief that the customer has a legitimate business purpose for conducting frequent transactions in currency. Factors the depository

[30] *See* 31 CFR 103.22(d)(6)(viii) (list of ineligible businesses).

[31] Examples given by commenters included instances when a customer previously exempt under Phase I becomes ineligible under Phase I and the customer has not yet maintained an account with the institution for the prescribed waiting period to be eligible for Phase II exemption, or when a former customer that was previously exempted under the Phase II requirements by the institution reopens their transaction account.

[32] *See* 73 FR 22103 (April 24, 2008). The CIP requirement for depository institutions was implemented as a result of amendments made to the BSA with the enactment of the USA PATRIOT Act.

[33] 31 CFR 103.121(b)(2).

[34] *See supra* note 31 at 22102.

[35] *See* 63 FR 50155 (Sept. 21, 1998) (''FinCEN further notes that maintaining a monitoring system reasonably designed to detect suspicious activity * * * should not pose additional burdens on banks, because they remain subject in any event to the requirement to file reports of suspicious activity * * *''). *See* also 31 CFR 103.18 (bank SAR rule).

institution might consider in order to form a reasonable belief include, but are not limited to: whether the depository institution had a past relationship with the customer, certain specific characteristics of the customer's business model that may be pertinent, the types of business in which the customer engages, and where the business is operating. Exempting an otherwise eligible Phase II customer prior to two months' time may be particularly appropriate when, for example: a returning customer reopens a previously maintained exempt transaction account with the institution; a customer that would now be eligible for Phase II exemption but under the current regulations was previously not eligible because the customer had conducted fewer than eight, but at least five, large cash transactions; or, when a customer that was a publicly listed company or a subsidiary becomes ineligible for exemption under Phase I, but may be designated for exemption under Phase II.

Defining ''Frequently''

The BSA definition of those customers commonly referred to as Phase II customers requires that they ''frequently'' engage in transactions subject to the CTR requirement.[36] In the Notice, FinCEN requested comments on whether its guidance interpreting ''frequently'' as eight or more large cash transactions per year is still reasonable.[37] Almost all commenters were supportive of interpreting ''frequently'' as eight or more transactions per year, and many commenters requested that if FinCEN made the waiting period for Phase II exemption eligibility shorter, that depository institutions be permitted to pro-rate the number of transactions that an otherwise eligible Phase II customer must engage in before the depository institution could designate the customer for exemption.

FinCEN does not believe that prorating the number of transactions in the current guidance is appropriate. Only one or two large, reportable cash transactions are not likely to give a depository institution enough of a transactional history of a customer to determine that the customer will be frequently engaging in large cash transactions. FinCEN does believe, however, that changing its current guidance interpreting ''frequently'' to recommending five or more transactions per year[38] is now appropriate because the waiting period for exempting an otherwise eligible Phase II customer is being greatly shortened and it is FinCEN's intent to simplify the exemption process and encourage an increased use of exemptions. As a result, depository institutions may designate an otherwise eligible customer for Phase II exemption after the customer has within a year conducted five or more reportable cash transactions. In addition to having conducted at least five or more reportable cash transactions within a year, the customer must have maintained a transaction account for two months, or the depository institution may conduct a risk based analysis of the customer's eligibility for Phase II exemption. For example, if the customer does not conduct five reportable cash transactions until it has maintained an account for three months, the depository institution would not be able to exempt that customer until that time. Further, a seasonal customer that conducts large cash transactions only during one part of the year would satisfy the ''frequently'' requirement after it had conducted five or more reportable cash transactions within one year, regardless of whether those transactions were conducted during the time period when the customer conducts transactions with the most frequency.

Finally, some commenters asked for clarification regarding whether the customer must continue to satisfy the ''frequently'' requirement every year after initial designation to retain its exempt status. FinCEN wishes to clarify that to retain eligibility for a Phase II exemption, a customer must have actually conducted at least five reportable cash transactions in each full year following the customer's initial designation. For example, if a depository institution discovers during the annual review of a Phase II exempt customer that the customer had conducted only four reportable cash transactions during the year under review, the depository institution going forward may no longer treat the customer as exempt until the customer conducts at least five reportable cash transactions in an ensuing year and is otherwise eligible for exemption. The depository institution, however, is not required to back file CTRs with respect to a designated Phase II customer that had met the eligibility requirements in a preceding year, but was subsequently found not to have conducted five or more transactions in the year under review.

C. Removing the Biennial Filing Requirement for Phase II Exempt Customers

FinCEN proposed removing paragraph § 103.22(d)(5) to eliminate the requirement that depository institutions biennially file a designation of exempt person for non-listed and payroll customers. In concert with this proposal, FinCEN also proposed amending paragraph 31 CFR 103.22(d)(4) to continue requiring depository institutions to notify FinCEN of any change in control of a Phase II customer, and redesignated paragraph 31 CFR 103.22(d)(9) to require depository institutions to report to FinCEN a decision to revoke the designation of an otherwise eligible customer for exemption. Commenters were supportive of the proposal to remove the biennial filing requirement, and as a result, FinCEN is adopting it in this final rule without change.[39] Commenters also requested that FinCEN remove the annual review requirement for Phase II exempt entities. The annual review of Phase II entities is required by the statutory language of the BSA.[40]

Finally, one commenter also requested guidance on the applicability of the requirements in this final rule to those customers that had been designated for Phase II exemption under the exemption rules currently in place. As of the effective date of this final rule, the requirements in the final rule are applicable to all exempt customers and depository institutions will no longer be required to comply with those requirements that have been removed from § 103.22(d). For example, a depository institution that had designated a customer for Phase II exemption under § 103.22(d) prior to its amendment by this final rule, would remain subject to the requirement to conduct an annual review of the customer on a yearly basis, but, upon the effective date of the final rule, would no longer be required to submit a biennial renewal for that customer.[41]

[36] *See* 31 U.S.C. 5313(e)(2)(B). *See* also 31 CFR 103.22(d)(2)(vi) (definition of a non-listed business) and 31 CFR 103.22(d)(2)(vii) (definition of a payroll customer).

[37] *See* FinCEN's ''Guidance on Interpreting 'Frequently' Found in the Criteria for Exempting a 'Non-Listed Business' Under 31 CFR 103.22(d)(2)(vi)(B)'' (Nov. 2002).

[38] For the purposes of this guidance, a year is defined as any consecutive twelve month period.

[39] While depository institutions will no longer need to certify with biennial renewal that the bank's SAR monitoring system had been properly applied to the currency transactions in currency of an exempt person, this in no way is meant to modify the SAR requirement.

[40] *See* 31 U.S.C. 5313(e)(5).

[41] Similarly, for Phase I exemptions of depository institutions, federal, state, or local governments, or entities exercising governmental authority made under the prior rule, no annual review will be required upon the effective date of this final rule.

Change in Control

The NPRM retained the requirement to file change of control information that originally appeared in the 1998 rulemaking on the CTR exemption system.[42] Most commenters, however, were not supportive of having to continue to report change in control information to FinCEN. Almost all commenters who addressed this issue expressed great confusion about what constitutes a change in control. While reporting a change in control is currently accomplished by checking a box on FinCEN Form 110 to report that some change has occurred without providing any additional information about the change, many commenters suggested that continuing to require this information, either once every two years or on an ongoing basis, would necessitate a level of account monitoring that would make using Phase II exemptions too costly.

In light of these comments and FinCEN's own research on the utility of this information, the final rule will no longer require the reporting of change in control information as part of the CTR exemption system. The former requirement to report change in control was derived from 31 U.S.C. 5313(e)(5)(B), which directs Treasury to issue regulations requiring banks to resubmit information on customers pertaining to modification of those customers. Pursuant to the broad authority contained in 31 U.S.C. 5318(a)(6), FinCEN may grant an exemption from the requirement in section 5313(e)(5)(B). FinCEN believes an exemption is appropriate here because of the limited utility in reporting change in control by checking a box on FinCEN Form 110.

D. Requiring Reporting of Revocation

Most commenters stated that reporting a revocation of an otherwise exempt eligible customer would not be an undue burden, but some questioned the usefulness of the information and requested that reporting a revocation remain voluntary. In light of these comments and FinCEN's own research on the utility of this information, at this time FinCEN is not making the reporting of a revocation mandatory in the final rule. Depository institutions are reminded, though, that if an exemption is revoked because during the annual review of the eligibility of a customer the institution detects suspicious activity, the suspicious activity reporting (SAR) requirement must be met.[43]

E. Limitation on Liability

Except for certain technical edits highlighted in the next paragraph, FinCEN is making no changes to the provisions of the CTR exemption rule that limit liability for banks that do not file CTRs in reliance upon the exemption rule. Thus banks will continue to have a safe harbor from liability unless the bank knowingly files false or incomplete information or has reason to believe that the customer does not meet exemption criteria or that the transaction is not a transaction of an exempt person. Moreover, the limitation on liability provisions will continue to provide a safe harbor to banks when exempting exempt customers for which an annual review must be conducted, applicable between the time of initial designation and the completion of each subsequent annual review, in the absence of specific knowledge that the customer no longer meets the requirements for exemption.

F. Technical Edits

In the Notice, FinCEN proposed making a number of technical edits. All of the comments made regarding the technical edits made in the Notice were supportive of those proposed changes. As a result, FinCEN is adopting the following proposals:

- Amending paragraphs 31 CFR 103.22(d)(1), 31 CFR 103.22(d)(2)(vi), 31 CFR 103.22(d)(5)(i) and (viii), 31 CFR 103.22(d)(7)(ii), 31 CFR 103.22(d)(8)(i) and (ii), and 31 CFR 103.22(d)(9) to change cross references;
- Amending paragraphs 31 CFR 103.22(d)(2)(iv) and redesignated 31 CFR 103.22(d)(5)(iii) to correctly reflect the name of the NASDAQ Capital Markets Companies listing, the NASDAQ and the EDGAR system;
- Amending 31 CFR 103.22(d)(3)(i) by making a specific reference to FinCEN Form 110, removing text that references the exemption requirements that existed prior to 1998, and re-stating that a designation must be made within 30 calendar days of the reportable transaction in currency the institution wishes to exempt;
- Amending 31 CFR 103.22(d)(3)(ii) to reflect that transactions in currency with any of the twelve Federal Reserve Banks continue to be exempt from the requirement to file an exemption form; and
- Amending redesignated 31 CFR 103.22(d)(7)(ii) to correspond to changes made regarding the annual review requirement for certain Phase I customers.

V. Revision of FinCEN Form 110

To assist depository institutions in completing the DOEP, FinCEN Form 110,[44] FinCEN is providing the following guidance for items affected by this final rule.

- Depository institutions should disregard any references to biennial renewals that appear on the face of FinCEN Form 110 (specifically, Part I, Item 1b, ''Biennial renewal''; Part II, Item 11; Part III, Item 19, second sentence; and Part V), as well as in the instructions to the form (specifically in the second paragraph under the heading ''When and where to file''; the second sentence under the heading ''Specific Instructions'' that begins, ''Additionally, with regard to non-listed businesses. * * *''); and the instruction to Item 11 under the heading ''Exempt Person Information.''
- Depository institutions should disregard Part II, Item 10a, ''Bank'' and ''Government agency/Government authority.''

VI. Regulatory Matters

A. Executive Order 12866

This rule is a significant regulatory action for purposes of Executive Order 12866, ''Regulatory Planning and Review,'' as amended, and has been reviewed by the Office of Management and Budget.

B. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (March 22, 1995) (''Unfunded Mandates Act''), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance the rule provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

[42] *See* 31 CFR 103.22(d)(5)(ii). *See also* 63 FR 50153 (Sept. 21, 1998).

[43] *See* 31 CFR 103.22(d)(9).

[44] FinCEN Form 110 is available for review on FinCEN's Web site at *http://www.fincen.gov/forms/fin110_dep.pdf.*

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FinCEN certifies that this final regulation likely will not have a significant economic impact on a substantial number of small entities. The regulatory changes in this final rule likely will reduce the requirements for exempting certain persons from the currency transaction reporting requirements of the BSA and should reduce the obligations associated with complying with those regulatory requirements for financial institutions of all sizes. Accordingly, a regulatory flexibility analysis is not required.

D. Paperwork Reduction Act

The collection of information burden contained in this rule has been approved by the Office of Management and Budget (''OMB'') in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (''Paperwork Reduction Act'') under control number 1506–0012. Based on comments received, this final rule reduces the burden hours associated with this information collection (the Form) that had been previously pre-approved. Treasury submitted the final rule to the OMB for review in accordance with 44 U.S.C. 3507(d), and OMB has approved again the collection of information requirements in today's rule, again under control number 1506–0012. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The regulatory requirement related to the collection of designation of exempt person information that is revised in this final rule is in 31 CFR 103.22(d). If a depository institution voluntarily designates a customer for exemption, the depository institution is required to provide this information,[45] which will be used by law enforcement agencies in the enforcement of criminal and regulatory laws. The likely recordkeepers are businesses.

The reporting burden of designating an eligible customer as an exempt person was reflected in the burden estimates contained in the **Federal Register** notice to renew without change the DOEP form, FinCEN Form 110 (See 73 FR 12250), which is used to report a designation to FinCEN.[46] This figure was one hour and thirty minutes. Based on comments received and on FinCEN's own evaluation of the anticipated result of decreasing burden by removing additional regulatory requirements in this final rule than were proposed in the Notice, this number will be reduced to forty minutes recordkeeping and thirty minutes form completion for each filing, for a total of one hour and ten minutes per filing (a decrease of 20 minutes).

A comment to the Notice provided estimates of the amount of time involved in exempting customers. The commenter estimated that it took 7 hours for a Phase I exemption and 7.8 hours for a Phase II exemption, but the commenter's estimates took into account requirements that are being eliminated by this final rule. Based on the new requirements in the final rule, FinCEN believes a more accurate estimate for complying with the rule, completing the form and maintaining the associated rule and form recordkeeping is a total of 3 hours 10 minutes per response (30 minutes form completion and two hours forty minutes recordkeeping).

Based on the number of DOEPs currently being filed by depository institutions, FinCEN estimates that the final rule will result in an annual filing of a total of 65,000 DOEP forms by affected depository institutions. Some comments to the Notice suggested that the number of DOEPs filed would not increase as a result of the regulatory changes proposed, while others suggested that more DOEPs would be filed as a result of the regulatory changes in the Notice. Based on all of the above information, the total burden for this rule is 205,833 hours. FinCEN will monitor the filing of DOEPs under the final rule in order to determine whether this number should be further revised.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Banks and banking, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Law enforcement, Penalties, Reporting and recordkeeping requirements, Securities, Taxes.

Authority and Issuance

■ For the reasons set forth above, FinCEN is amending 31 CFR Part 103 as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. L. 107–56, 115 Stat. 307.

■ 2. Amend § 103.22 by:
■ a. Revising paragraph (d)(1);
■ b. Revising paragraph (d)(2)(iv);
■ c. Revising the introductory text of paragraph (d)(2)(vi);
■ d. Revising paragraph (d)(2)(vi)(A);
■ e. Revising paragraph (d)(2)(vii)(A);
■ f. Revising paragraph (d)(3);
■ g. Revising paragraph (d)(4);
■ h. Removing paragraphs (d)(5) and (d)(11);
■ i. Redesignating paragraph (d)(6) as (d)(5); (d)(7) as (d)(6); (d)(8) as (d)(7); (d)(9) as (d)(8); and (d)(10) as (d)(9).
■ j. Revising redesignated paragraph (d)(5)(i);
■ k. Revising redesignated paragraph (d)(5)(iii);
■ l. Revising the last sentence of redesignated paragraph (d)(5)(viii);
■ m. Revising redesignated paragraph (d)(7)(ii);
■ n. Revising redesignated paragraph (d)(8)(i);
■ o. Revising the last sentence of redesignated paragraph (d)(8)(ii); and
■ p. Revising the introductory text of redesignated paragraph (d)(9).

The amended regulation reads as follows:

§ 103.22 Reports of transactions in currency.

* * * * *

(d) * * *

(1) *General.* No bank is required to file a report otherwise required by paragraph (b) of this section with respect to any transaction in currency between an exempt person and such bank, or, to the extent provided in paragraph (d)(5)(vi) of this section, between such exempt person and other banks affiliated with such bank. In addition, a non-bank financial institution is not required to file a report otherwise required by paragraph (b) of this section with respect to a transaction in currency between the institution and a commercial bank. (A limitation on the exemption described in this paragraph (d)(1) is set forth in paragraph (d)(6) of this section.)

(2) * * *

(iv) Any entity, other than a bank, whose common stock or analogous equity interests are listed on the New York Stock Exchange or the American Stock Exchange or whose common stock or analogous equity interests have been designated as a NASDAQ National Market Security listed on the NASDAQ Stock Market (except stock or interests listed under the separate ''NASDAQ Capital Markets Companies'' heading), provided that, for purposes of this paragraph (d)(2)(iv), a person that is a financial institution, other than a bank,

[45] *See* 31 U.S.C. 5313. *See also* 31 CFR 103.22(d).
[46] *See* 73 FR 12250 (Mar. 6, 2008).

is an exempt person only to the extent of its domestic operations;

* * * * *

(vi) To the extent of its domestic operations and only with respect to transactions conducted through its exemptible accounts, any other commercial enterprise (for purposes of this paragraph (d), a ''non-listed business''), other than an enterprise specified in paragraph (d)(5)(viii) of this section, that:

(A) Maintains a transaction account, as defined in paragraph (d)(5)(ix) of this section, at the bank for at least two months, except as provided in paragraph (d)(3)(ii)(B) of this section;

* * * * *

(vii) * * *

(vii) * * *

(A) Maintains a transaction account, as defined in paragraph (d)(5)(ix) of this section, at the bank for at least two months, except as provided in paragraph (d)(3)(ii)(B) of this section;

* * * * *

(3) *Designation of certain exempt persons*—(i) *General.* Except as provided in paragraph (d)(3)(ii) of this section, a bank must designate an exempt person by filing FinCEN Form 110. Such designation must occur by the close of the 30-calendar day period beginning after the day of the first reportable transaction in currency with that person sought to be exempted from reporting under the terms of this paragraph (d). The designation must be made separately by each bank that treats the customer as an exempt person, except as provided in paragraph (d)(5)(vi) of this section.

(ii) *Special rules.*—(A) A bank is not required to file a FinCEN Form 110 with respect to the transfer of currency to or from:

(1) Any of the twelve Federal Reserve Banks; or

(2) Any exempt person as described in paragraphs (d)(2)(i) to (iii) of this section.

(B) Notwithstanding subparagraphs (d)(2)(vi)(A) and (d)(2)(vii)(A) of this section, and if the requirements under this paragraph (d) of this section are otherwise satisfied, a bank may designate a non-listed business or a payroll customer, as described in paragraphs (d)(2)(vi) and (vii) of this section, as an exempt person before the customer has maintained a transaction account at the bank for at least two months if the bank conducts and documents a risk-based assessment of the customer and forms a reasonable belief that the customer has a legitimate business purpose for conducting frequent transactions in currency.

(4) *Annual review.* At least once each year, a bank must review the eligibility of an exempt person described in paragraphs (d)(2)(iv) to (vii) of this section to determine whether such person remains eligible for an exemption. As part of its annual review, a bank must review the application of the monitoring system required to be maintained by paragraph (d)(8)(ii) of this section to each existing account of an exempt person described in paragraphs (d)(2)(vi) or (d)(2)(vii) of this section.

(5) *Operating rules*—(i) *General rule.* Subject to the specific rules of this paragraph (d), a bank must take such steps to assure itself that a person is an exempt person (within the meaning of the applicable provision of paragraph (d)(2) of this section), to document the basis for its conclusions, and document its compliance, with the terms of this paragraph (d), that a reasonable and prudent bank would take and document to protect itself from loan or other fraud or loss based on misidentification of a person's status, and in the case of the monitoring system requirement set forth in paragraph (d)(8)(ii) of this section, such steps that a reasonable and prudent bank would take and document to identify suspicious transactions as required by paragraph (d)(8)(ii) of this section.

* * * * *

(iii) *Stock exchange listings.* In determining whether a person is described in paragraph (d)(2)(iv) of this section, a bank may rely on any New York, American, or NASDAQ Stock Market listing published in a newspaper of general circulation, on any commonly accepted or published stock symbol guide, on any information contained in the Securities and Exchange Commission ''EDGAR'' System, or on any information contained on an Internet site or sites maintained by the New York Stock Exchange, the American Stock Exchange, or the NASDAQ.

* * * * *

(viii) * * * A business that engages in multiple business activities may be treated as a non-listed business so long as no more than 50% of its gross revenues are derived from one or more of the ineligible business activities listed in this paragraph (d)(5)(viii).

* * * * *

(7) * * *

(ii) Subject to the specific terms of this paragraph (d), and absent any specific knowledge of information indicating that a customer no longer meets the requirements of an exempt person, a bank satisfies the requirements of this paragraph (d) to the extent it continues to treat that customer as an exempt person until the completion of that customer's next required periodic review, which as required by paragraph (d)(4) of this section for an exempt person described in paragraph (d)(2)(iv) to (vii) of this section, shall occur no less than once each year.

* * * * *

(8) *Obligations to file suspicious activity reports and maintain system for monitoring transactions in currency.* (i) Nothing in this paragraph (d) relieves a bank of the obligation, or reduces in any way such bank's obligation, to file a report required by § 103.18 with respect to any transaction, including any transaction in currency that a bank knows, suspects, or has reason to suspect is a transaction or attempted transaction that is described in § 103.18(a)(2)(i), (ii), or (iii), or relieves a bank of any reporting or recordkeeping obligation imposed by this part (except the obligation to report transactions in currency pursuant to this section to the extent provided in this paragraph (d)). Thus, for example, a sharp increase from one year to the next in the gross total of currency transactions made by an exempt customer, or similarly anomalous transactions trends or patterns, may trigger the obligation of a bank under § 103.18.

(ii) * * * The statement in the preceding sentence with respect to accounts of non-listed business and payroll customers does not limit the obligation of banks generally to take the steps necessary to satisfy the terms of paragraph (d)(8)(i) of this section and § 103.18 with respect to all exempt persons.

(9) *Revocation.* Without any action on the part of the Department of the Treasury and subject to the limitation on liability contained in paragraph (d)(7)(ii) of this section:

* * * * *

Dated: December 2, 2008.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E8–28858 Filed 12–4–08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0648]

RIN 1625–AA09

Drawbridge Operation Regulation; Islais Creek, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the operating regulation for the Illinois Street drawbridge, mile 0.3, and the 3rd Street drawbridge, mile 0.4, over Islais Creek to open on signal if at least 72 hours advance notice is given. This action is warranted due to the minimal amount of vessels requiring drawbridge openings on the waterway.

DATES: This rule is effective January 5, 2009.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–0648 and are available online at *http://www.regulations.gov.* This material is also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, 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 and Commander (dpw), Eleventh Coast Guard District, Building 50–2, Coast Guard Island, Alameda, CA 94501–5100, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On July 24, 2008, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; Islais Creek, San Francisco, CA in the **Federal Register** (73 FR 143). We received no public submissions on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The Port of San Francisco as bridge owner requested a change in the operation regulation of the Illinois Street drawbridge, mile 0.3, over Islais Creek, in the City and County of San Francisco, CA. The drawbridge is required to open on signal under 33 CFR 117.5. The drawbridge provides 5 feet of vertical clearance for vessels above Mean High Water (MHW) in the closed-to-navigation position and unlimited vertical clearance when open.

The San Francisco Department of Public Works owned, 3rd Street drawbridge, mile 0.4, over Islais Creek is required to open for vessels if at least one hour notice is given under 33 CFR 117.163. The drawbridge provides 4 feet of vertical clearance above MHW.

Islais Creek is one mile in length from its mouth to its navigable terminus, an outfall culvert. It is located in an industrial section of southeast San Francisco with no marinas on the waterway. There have been no requests for openings of the 3rd Street drawbridge and no complaints from waterway users since construction of the Illinois Street Drawbridge in 2003.

Due to infrequent calls for drawbridge openings, the San Francisco Department of Public Works requested at least 72 hours advance notice. This final rule will require both drawbridges to conform to the same 72 hour advance notification requirement, creating uniformity on the waterway and allowing bridge owners to manage their personnel more efficiently, while meeting the reasonable needs of navigation.

From 1990–2000, the existing 3rd Street drawbridge, mile 0.4, annually averaged 8 openings for state, federal, and local vessels, 2.3 openings for recreational vessels, and 1.3 openings for tugs and barges. There has been an average of 15.8 openings, including testing of the drawspan, per year, from 1990 to 2000. There are no marinas on the waterway and none are currently planned. The last commercial vessel to request a drawspan opening did so to remove an abandoned vessel from Islais Creek.

Discussion of Comments and Changes

This final rule amends the Illinois Street Drawbridge, mile 0.3, operation regulation from opening ''on signal'' to opening ''on signal, if at least 72 hours advance notice is given.'' This final rule amends the 3rd Street Drawbridge, mile 0.4, operation regulation from opening ''on signal, if at least one hour notice is given'' to opening ''on signal, if at least 72 hours advance notice is given.'' The Coast Guard did not receive any public submissions to the NPRM.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

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

This rule is not a significant regulatory action because it will have little effect on the users of both the affected bridges and the waterway. There are no marinas on the waterway and none are currently planned. Vessel traffic has been minimal since 1990. Recreational vessels that transit close to the shoreline, i.e. kayaks, canoes, and other personal water craft can safely transit under these drawbridges at any time. Vessels which require a vertical clearance greater than four-feet at Mean High Water can schedule an opening.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons. There are no marinas on the waterway and none are currently planned. Vessel traffic has been minimal since 1990. Recreational vessels that transit close to the shoreline, i.e. Kayaks, canoes, and other personal water craft can safely transit under these drawbridges at any time. Vessels which require an opening can schedule one.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in

understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117 Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. § 117.163 Islais Creek (Channel) is revised to read as follows:

§ 117.163 Islais Creek (Channel)

(a) The draw of the Illinois Street drawbridge, mile 0.3 at San Francisco, shall open on signal if at least 72 hours advance notice is given to the Port of San Francisco.

(b) The draw of the 3rd Street drawbridge, mile 0.4 at San Francisco, shall open on signal if at least 72 hours advance notice is given to the San Francisco Department of Public Works.

Dated: November 17, 2008.

P.F. Zukunft,

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

[FR Doc. E8–28809 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2008–0194; A–1–FRL–8717–9]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Enhanced Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving a State Implementation Plan (SIP) revision submitted on December 19, 2007 by the State of Connecticut. This SIP revision includes regulations to update the enhanced motor vehicle inspection and maintenance (I/M) program in Connecticut. The revised program includes a test and repair network and on-board diagnostic (OBD2) testing for 1996 and newer vehicles. The intended effect of this action is to approve the

revised program into the Connecticut SIP. This action is being taken in accordance with the Clean Air Act.

DATES: This direct final rule will be effective February 3, 2009, unless EPA receives adverse comments by January 5, 2009. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R01–OAR–2008–0194 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: arnold.anne@epa.gov.*
3. *Fax:* (617) 918–0047.
4. *Mail:* ''Docket Identification Number EPA–R01–OAR–2008–0194'', Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (mail code CAQ), Boston, MA 02114–2023.
5. *Hand Delivery or Courier:* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, (CAQ), Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R01–OAR–2008–0194. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov*, or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

In addition, copies of the state submittal and EPA's technical support document are also available for public inspection during normal business hours, by appointment at the State Air Agency; the Bureau of Air Management, Department of Environmental Protection, State Office Building, 79 Elm Street, Hartford, CT 06106–1630.

FOR FURTHER INFORMATION CONTACT: Robert C. Judge, Office of Ecosystem Protection, EPA New England, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023; 617–918–1045 (phone); 617–918–0045 (fax); e-mail at *judge.robert@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. The following outline is provided to aid in locating information in this rulemaking.

I. Background and Purpose
II. What Are the Clean Air Act Requirements for I/M Programs?
III. What Are the OBD2 Requirements and How Does Connecticut's Program Address Them?
IV. What Are All the Other I/M Regulatory Requirements and How Does Connecticut's I/M Program Satisfy Them?
A. Applicability
B. Enhanced I/M Performance Standard
C. Network Type and Program Evaluation
D. Adequate Tools and Resources
E. Test Frequency and Convenience
F. Vehicle Coverage
G. Test Procedures and Standards
H. Test Equipment
I. Quality Control
J. Waivers and Compliance via Diagnostic Inspection
K. Motorist Compliance Enforcement
L. Motorist Compliance Enforcement Oversight
M. Quality Assurance
N. Enforcement Against Contractors, Stations, and Inspectors
O. Data Analysis and Reporting
P. Inspector Training and Licensing or Certification
Q. Improving Repair Effectiveness
R. Compliance With Recall Notices
S. On-Road Testing
T. Concluding Statement
V. Final Action
VI. Statutory and Executive Order Reviews

I. Background and Purpose

On December 19, 2007, the State of Connecticut submitted a formal revision to its State Implementation Plan (SIP). This SIP revision includes regulations to update the enhanced motor vehicle inspection and maintenance (I/M) program in Connecticut. EPA is approving Connecticut's revised I/M program because it is consistent with the Clean Air Act I/M requirements and EPA's I/M regulations, and will strengthen the SIP. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

II. What Are the Clean Air Act Requirements for I/M Programs?

The Clean Air Act (CAA), 42 U.S.C. 7401, *et seq.*, requires certain states to implement an enhanced inspection and maintenance (I/M) program to detect gasoline-fueled motor vehicles which emit excessive amounts of certain air pollutants. The enhanced I/M program is intended to help states meet federal health-based national ambient air quality standards (NAAQS) for ozone and carbon monoxide by requiring vehicles with excess emissions to have their emissions control systems repaired. Section 182 of the CAA requires I/M programs in those areas of the nation that are most impacted by carbon monoxide and ozone pollution. 42 U.S.C. 7411c. Section 184 of the CAA also created an ''Ozone Transport Region'' (OTR) and includes I/M

requirements for that region. The OTR geographically includes the 11 states from Maryland to Maine (including all of Connecticut) and the District of Columbia Consolidated Metropolitan Statistical Area. In addition, EPA promulgated I/M regulations at 40 CFR Part 51 Subpart S. Depending on the severity of an area's nonattainment designation and/or geographic location within the OTR, EPA's regulation under 40 CFR 51.350 outlines the appropriate motor vehicle I/M requirements.

As a result of its ozone nonattainment designation (see 40 CFR 81.307), and by virtue of its inclusion in the OTR, Connecticut has implemented an enhanced vehicle emissions testing program throughout the entire State. A vehicle testing program has been operating statewide since 1983 in Connecticut. The Connecticut I/M program was first approved into the SIP on May 21, 1984 (49 FR 10542) and the program has since been revised several times. Most recently the SIP was modified on October 27, 2000 (65 FR 64357). Since that time, the program has been again modified in a number of ways. Most notably it has been changed to a test and repair network, and now also includes on-board diagnostic (ODB2) testing of 1996 and newer vehicles.

III. What Are the OBD2 Requirements and How Does Connecticut's Program Address Them?

On April 5, 2001, EPA published in the **Federal Register** ''Amendments to Vehicle Inspection and Maintenance Program Requirements Incorporating the On-Board Diagnostics Check'' (66 FR 18156). The revised I/M rule requires that electronic checks of the On-Board Diagnostics (OBD2) system on model year 1996 and newer OBD2-equipped motor vehicles be conducted as part of states' motor vehicle I/M programs. OBD2 is part of the sophisticated vehicle powertrain management system and is designed to detect engine and transmission problems that might cause vehicle emissions to exceed allowable limits. OBD2 requirements are a key part of this rulemaking action.

The OBD2 system monitors the status of up to 11 emission control related subsystems by performing either continuous or periodic functional tests of specific components and vehicle conditions. The first three testing categories—misfire, fuel trim, and comprehensive components—are continuous, while the remaining eight only run after a certain set of conditions has been met. The algorithms for running these eight periodic monitors are unique to each manufacturer and involve such things as ambient temperature as well as driving conditions. Most vehicles will have at least five of the eight remaining monitors (catalyst, evaporative system, oxygen sensor, heated oxygen sensor, and exhaust gas recirculation or EGR system) while the remaining three (air conditioning, secondary air, and heated catalyst) are not necessarily applicable to all vehicles. When a vehicle is scanned at an OBD2–I/M test site, these monitors can appear as either ''ready'' (meaning the monitor in question has been evaluated), ''not ready'' (meaning the monitor has not yet been evaluated), or ''not applicable'' (meaning the vehicle is not equipped with the component monitor in question).

The OBD2 system is also designed to fully evaluate the vehicle emissions control system. If the OBD2 system detects a problem that may cause vehicle emissions to exceed 1.5 times the Federal Test Procedure (FTP) standards, then the Malfunction Indicator Light (MIL) is illuminated. By turning on the MIL, the OBD2 system notifies the vehicle operator that an emission-related fault has been detected, and the vehicle should be repaired as soon as possible thus reducing the harmful emissions contributed by that vehicle.

EPA's revised OBD2 I/M rule applies to those areas that are required to implement I/M programs under the CAA, which includes Connecticut. The revised I/M program submitted by Connecticut on December 19, 2007 includes OBD2 testing for 1996 and newer vehicles, and continues to require that 1995 and older vehicles (up to 25 years old) continue to receive the previously SIP approved acceleration simulation mode (ASM) test or, if that test can not be implemented, gasoline powered vehicles up to 10,000 pounds GVWR (gross vehicle weight rating) are tested with a preconditioned two-speed idle test.

EPA's OBD2 program requires scan tool equipment to read the vehicle's built-in computer sensors in model year 1996 and newer vehicles. The OBD2–I/M check consists of two types of examination: A visual check of the dashboard display function and status and an electronic examination of the OBD2 computer itself. The failure criteria for OBD2 testing is any Diagnostic Trouble Code (DTC) or combination of DTCs that results in the Malfunction Indicator Light (MIL) to be commanded on. A DTC is a code that indicates an emission control system or component which may cause emissions to increase to 1.5 times the limit due to malfunction. Connecticut has incorporated this OBD2 component into its program.

If the OBD2 scan reveals DTCs that have not commanded the MIL on, the motorist should be advised of the issue, but the vehicle should not be failed unless other non-DTC-based failure criteria have been met. Vehicles may fail inspection if the vehicle connector is missing, tampered with or otherwise inoperable, if the MIL is commanded on and is not visually illuminated, and if the MIL is commanded on for 1 or more DTCs as defined in Society of Automotive Engineering (SAE) J2012 guidance document, and EPA regulations.

Vehicles are rejected from testing if the scan of the OBD2 system reveals a ''not ready'' code for any OBD2 component. EPA guidance allows states the flexibility to permit model year 1996 to 2000 vehicles with 2 or fewer unset readiness codes, and model year 2001 and newer with 1 unset readiness code to complete OBD2–I/M inspection without being rejected. Vehicles would still fail if the MIL was commanded on or if other failure criteria were met, or be rejected if 3 or more unset readiness codes were encountered. If the MIL is not commanded to be illuminated the vehicle would pass the OBD2 inspection even if DTCs are present. Connecticut's testing program is consistent with the EPA recommended readiness failure criteria. Connecticut's program regulations, at section 22a–174–27(g) require that the program meet all the relevant OBD2 testing ''requirements of 40 CFR 51 and 40 CFR 85 and shall include procedures set forth in 40 CFR 85.2222.''

The EPA believes that for an OBD2–I/M test program to be most effective, it should be designed to allow for: (1) Real-time data link connections to a centralized testing database; (2) quality-controlled input of vehicle and owner identification information; and (3) automated generation of test reports. Connecticut has incorporated these OBD2 program elements into its program.

IV. What Are All the Other I/M Regulatory Requirements and Does Connecticut's I/M Program Satisfy Them?

A. Applicability

The SIP describes in detail the areas subject to the enhanced I/M SIP revision and, consistent with 40 CFR 51.372, includes the legal authority necessary to establish program boundaries. The Connecticut I/M regulations (''Emission standards and on-board diagnostic II test requirements for periodic motor vehicle

inspection and maintenance'' at section 22a–174–27, and ''Periodic Motor Vehicle Emissions Inspection and Maintenance'' at section 14–164c–1a to Section 14–164c–18a) and authorizing legislation (Connecticut Statutes at Chapter 246 and 246a) ensure that the enhanced I/M program be implemented statewide.

B. Enhanced I/M Performance Standard

Today's rulemaking discusses the I/M program designed, in part, to meet the enhanced I/M performance standard for ozone precursors causing air quality problems in Connecticut. EPA's performance standard establishes an emission reduction target that must be met by a program in order for the SIP to be approvable. The program, as documented in the SIP, must meet the performance standard in actual operation, with provisions for appropriate adjustments if the standard is not met.

Included in Connecticut's December 19, 2007 submittal is the appropriate MOBILE6 vehicle emission modeling demonstration considering the required performance standards and the actual Connecticut program as it is currently being implemented statewide, as well as a comparison to the centralized program that the State is no longer implementing. The modeling runs considered evaluations with 2005, 2007 and 2009 compliance dates. Connecticut has demonstrated that reductions from its updated program are better than the pre-existing I/M program and the EPA performance standard.

The MOBILE6 modeling performed by Connecticut reflects the fact that Connecticut tests all gasoline powered vehicles that are less than 25 years old. 1996 and newer vehicles are tested with OBD2, and pre-1996 vehicles (i.e., they are not equipped with OBD2 technology) are tested using the acceleration simulation mode (ASM 2525), or, if ASM 2525 is not feasible for that vehicle, those vehicles will receive a preconditioned two-speed idle (PCTSI) test. Vehicles are tested every other year, and vehicles up to 4 years old are not tested. Vehicle testing requirements are included in section 22a–174–27, and details of meeting the performance standard are included in section 2 of the SIP narrative.

C. Network Type and Program Evaluation

Under the CAA and EPA's I/M rule, the SIP must include a description of the network to be employed and the required legal authority. Also, for enhanced I/M areas, the SIP needs to include a description of the evaluation schedule and protocol, the sampling methodology, the data collection and analysis system, the resources and personnel for evaluation and related details of the evaluation program, as well as the legal authority establishing the evaluation program.

Connecticut has revised its program to be a test and repair I/M network program design utilizing contractors to manage and oversee the inspection portion of the program. In its December 19, 2007 submittal, Connecticut states, in its SIP revision narrative, that it will institute a continuous ongoing evaluation program consistent with the federal I/M rule. The results of the evaluation program will be reported to EPA on a biennial basis (40 CFR 51.353). In addition, Connecticut commits to developing and submitting the annual reports described by 40 CFR 51.366. The State has sufficient legal authority to implement this contractor managed program in concert with local inspection stations and conduct the program evaluation, as necessary to implement I/M consistent with federal requirements. (Connecticut laws at Chapter 246a—Motor Vehicle Emissions, section 14–164c(e)) Details of the network type and program evaluation are included in Section 3 of the SIP narrative.

D. Adequate Tools and Resources

Under the CAA and EPA's I/M rule, the SIP must include a description of the resources that will be used for program operation and must discuss how the performance standard will be met, including: (1) A detailed budget plan describing the source of funds for personnel, program administration, program enforcement, purchase of necessary equipment (such as vehicles for undercover audits), and for other requirements discussed throughout the I/M rule, for the period prior to the next biennial self evaluation required by the federal I/M rule, and (2) a description of personnel resources, the number of personnel dedicated to overt and covert auditing, data analysis, program administration, enforcement, and other necessary functions, and the training attendant to each function.

Connecticut legislation authorizes the State to collect a fee at registration to cover the costs of administrating, overseeing, and enforcing the I/M program. The December 19, 2007 submittal includes additional detail on the funding and description of resources to be used for implementation of the enhanced I/M program. This narrative at Section 4, and its attachments describe the budget, staffing support, and equipment needed to implement the program.

E. Test Frequency and Convenience

Under EPA's I/M rule, the SIP must include a detailed test schedule, including the test year selection scheme if testing is other than annual. The SIP must also include the legal authority necessary to implement and enforce the test frequency requirement and explain how the test frequency will be integrated with the enforcement process. In addition, in enhanced I/M programs, the SIP needs to demonstrate that the network of stations providing testing services is sufficient to ensure consumer convenience by providing short waiting times to get a test, and short driving distances to get to the test center.

The Connecticut SIP revision requires biennial inspections for all subject motor vehicles that are at least four years old. The inspections will be conducted based on when the vehicle is initially registered. This is described in more detail in the December submittal. The authority for enforcing the testing frequency is contained in the revised Connecticut Department of Motor Vehicles' portion of the I/M rule. Short waiting times and short driving distances relating to network design are addressed by ensuring that local gas stations can provide the inspection, and are described in section 5 of the SIP narrative.

F. Vehicle Coverage

Under EPA's I/M rule, the SIP must include a detailed description of the number and types of vehicles to be covered by the program, and a plan for identifying subject vehicles, including vehicles that are routinely operated in the area but may not be registered in the area. Also, the SIP must include a description of any special exemptions which will be granted by the program, and an estimate of the percentage and number of vehicles granted such exemptions. Such exemptions need to be accounted for in the emission reduction analysis. In addition, the SIP needs to include the legal authority necessary to implement and enforce the vehicle coverage requirement.

Connecticut's I/M program covers all gasoline and diesel vehicles, light duty trucks, and heavy duty vehicles that are 25 years old and newer and registered in the State. In addition, United States Postal Service and United States GSA vehicles are also covered. Special classes, which are exempt from the emission testing program, include vehicles weighing more than 10,000 pounds (GVWR), electric vehicles, farm

vehicles, motorcycles, and vehicles which are less than 4 years old. Based on information provided by the State, Connecticut has shown that such exemptions will not prevent the program from achieving the performance standard. Additional detail supporting this conclusion was included in Section 6 of the December 19, 2007 submittal. Legal authority for the vehicle coverage requirement is contained in the Connecticut Department of Environmental Protection (DEP) and Department of Motor Vehicles (DMV) I/M rules and the State's authorizing legislation. (Connecticut laws at Chapter 246a—Motor Vehicle Emissions, Section 14–164c)

G. Test Procedures and Standards

Under EPA's I/M rule, the SIP must include a description of each test procedure used. The SIP also must include the rule, ordinance or law describing and establishing the test procedures. The Connecticut I/M SIP revision and associated regulations obligate the State to perform OBD2 testing on all 1996 and newer vehicles, in accordance with EPA procedures. All 1995 and older covered vehicles up to 8,500 pounds GVWR (excluding full time four wheel drive) will be tested in accordance with EPA procedures for the acceleration simulation mode, or ASM 2525. A vehicle which can not be tested using either OBD2 or ASM 2525, or has a GVWR greater than 8500 GVWR and less than 10,000 GVWR will be given a pre-conditioned two-speed idle (PCTSI) test. Details of the test procedures and standard are included in Section 7 of the SIP narrative, and in the DEP rules at section 22a–174–27.

H. Test Equipment

Under EPA's I/M rule, the SIP must include written technical specifications for all test equipment used in the program and address each of the requirements set forth at 40 CFR 51.358. The specifications must describe the emission analysis process, the necessary test equipment, the required features, and written acceptance testing criteria and procedures.

In its December 19, 2007 submission, Connecticut provided written equipment specifications as contained in EPA's guidance and the appendices of EPA's I/M rule. The Connecticut SIP submission and its appendices address the requirements in 40 CFR 51.358 and include descriptions of performance features and functional characteristics of the computerized test systems. It references 40 CFR Part 51 and 85, and includes the procedures outlined in 40 CFR 85.2222 and associated guidance. For the ASM test, EPA's Acceleration Simulation Mode Test Procedures, Emissions Standards, Quality Control Requirements, and Equipment Specification Final Technical Guidance (EPA420–B–04–011, July 2004) will be used. The necessary test equipment, required features, and acceptance testing criteria are mandated by the testing contract specifications, and section 8 of the SIP narrative.

I. Quality Control

Under EPA's I/M rule, the SIP must include a description of quality control and recordkeeping procedures. The SIP also must include the procedures manual, rule, and ordinance or law describing and establishing quality control procedures and requirements.

The Connecticut I/M SIP narrative and contract contain descriptions and requirements establishing the quality control procedures in accordance with the federal I/M rule and EPA guidance. These requirements will help ensure that equipment calibrations are properly performed and recorded and that the necessary compliance document security is maintained. As described in section 9 of the SIP narrative, the Connecticut SIP complies with all specifications for quality control set forth in Section 51.359 and Appendix A of the federal I/M rule, and EPA's technical guidance.

J. Waivers and Compliance via Diagnostic Inspection

Under EPA's I/M rule the SIP must include a maximum waiver rate expressed as a percentage of initially failed vehicles. This waiver rate is used for estimating emission reduction benefits in the modeling analysis. Corrective action must be taken if the waiver rate exceeds that estimated in the SIP, or the state must revise the SIP and claim emission reductions accordingly. The SIP also must describe the waiver criteria and procedures, including cost limits, quality assurance methods and measures, and administration. Lastly, the SIP must include the necessary legal authority, ordinance(s), or rules to issue waivers, set and adjust cost limits as required, and carry out any other functions necessary to administer the waiver system, including enforcement of the waiver provisions.

Cost limits for the minimum expenditure waivers must be in accordance with the CAA and federal I/M rule. Expenditures of at least $660 for actual, non-tampering related repairs, must be spent in order to qualify for a waiver in the enhanced I/M program. The State intends to annually update the cost to receive a waiver from the emissions testing program. In addition, a time extension, as allowed under EPA's rule, is also allowed in Connecticut's program. Connecticut has demonstrated that it can meet the enhanced I/M performance standard testing with its current program design.

The Connecticut program includes a waiver rate of 1% of initially failed vehicles in the area. These waiver rates are used in the modeling demonstration. The DEP has committed in the December 2007 submittal that, if the waiver rates are higher than estimated as determined by its program reports, the State will take corrective action to address the deficiency. The SIP describes the three types of waivers the State will allow, including: a minimum expenditure, a time extension, and a one-time hardship waiver provision. These issues are dealt with in a manner consistent with the federal I/M rule. The proper criteria, procedures, quality assurance and administration regarding the issuance of waivers, consistent with EPA's I/M rule, will be ensured by the DEP and its contractor and are detailed in the SIP submission in section 10 of the SIP narrative and DMV rules at section 14–164c–11a.

K. Motorist Compliance Enforcement

Under EPA's I/M rule, the SIP must provide information concerning motorist enforcement, including: (1) A description of the existing compliance mechanism if it will continue to be used for this program, and the demonstration that it is as effective or more effective than registration denial enforcement; (2) an identification of the agencies responsible for performing each of the applicable activities in this section; (3) a description of, and accounting for, all classes of exempt vehicles; and (4) a description of the plan for testing fleet vehicles, rental car fleets, leased vehicles, and any other special classes of subject vehicles, such as those operated (but not necessarily registered) in the program area. Also, the SIP must include a determination of the current compliance rate based on a study of the system including an estimate of compliance losses due to loopholes, counterfeiting, and unregistered vehicles. Estimates of the effect of closing such loopholes and otherwise improving the enforcement mechanism must be supported with detailed analyses. In addition, the SIP needs to include the legal authority to implement and enforce the program. Lastly, the SIP must include a commitment to an enforcement level and minimum

compliance level used for modeling purposes and to be maintained, at a minimum, in practice.

The State of Connecticut has chosen to use a program of denying registration to anyone who fails to meet emission testing requirements. The motorist compliance enforcement program will be implemented primarily by the Connecticut Department of Motor Vehicles. The enforcement strategy is described in the December 19, 2007 submittal. The enforcement strategy is designed to ensure a high rate of compliance. Those not receiving the emissions test as scheduled will be subject to fines and late penalties, and also be denied registration when their registration expires. Connecticut presently has a 99 percent compliance rate with the inspection program. The legal authority to implement and enforce the program is included in the Connecticut State law and in DEP and DMV rules as submitted on December 19, 2007. (Connecticut laws at Chapter 246a—''Motor Vehicle Emissions, Section 14–164c''; Connecticut Department of Environmental Protection Regulations entitled ''Emission standards and on-board diagnostic II test requirements for periodic motor vehicle inspection and maintenance'' at Section 22a–174–27; and Connecticut Department of Motor Vehicles Regulation entitled ''Periodic Motor Vehicle Emissions Inspection and Maintenance'' at section 14–164c–1a to section 14–164c–18a). Additional detail of the motorist compliance enforcement program is included in section 11 of the SIP narrative.

L. Motorist Compliance Enforcement Program Oversight

Under EPA's I/M rule, the SIP must include a description of enforcement program oversight and information management activities.

The Connecticut I/M SIP revision provides for regular auditing of its enforcement program and adherence to effective management practices, including adjustments to improve the program when necessary. These program oversight and information management activities are described in the SIP narrative, and include a description of the Emissions Data Base Management System (EDBMS) and how this system interfaces with the Department of Information Technology (DoIT) vehicle registration records. If a vehicle is out of compliance with the emissions testing requirement, registration is denied. This is done through computer matching and is directly available to law enforcement. The SIP describes the procedures to be followed in identifying noncomplying vehicles, along with appropriate follow-up and program documentation audits in section 12 of the SIP narrative.

M. Quality Assurance

Under EPA's I/M rule, the SIP must include a description of the quality assurance program, and written procedure manuals covering both overt and covert performance audits, record audits, and equipment audits.

The December 19, 2007, submittal from Connecticut includes a description of the quality assurance program. The program will include operation and progress reports and overt and covert performance audits. Additionally, all test centers are video audited through remote visual observation during all scheduled hours. Overt audits occur at each station at least 3 times per month and covert audits are conducted at least 4 times per year, both in response to customer complaints and as targeted follow-up. Detailed QA/QC procedures are included in the SIP submittal at section 13 of the SIP narrative and in the inspection agreement.

N. Enforcement Against Contractors, Stations and Inspectors

Under EPA's I/M rule, the SIP must include a penalty schedule and legal authority for establishing and imposing penalties, civil fines, station and inspector license suspension, and revocations. In the case of state constitutional impediments precluding immediate authority to suspend licenses, the state Attorney General shall furnish an official opinion within the SIP explaining the constitutional impediment as well as relevant case law. The SIP also must describe the administrative and judicial procedures and responsibilities relevant to the enforcement process, including the agencies, courts, and jurisdictions involved; personnel to prosecute and adjudicate cases; and other aspects of the enforcement of the program requirements, the resources to be allocated to the enforcement function, and the source of those funds. In states that are without immediate suspension authority, the SIP must demonstrate that sufficient resources, personnel, and systems are in place to meet the three-day case management requirement for violations that directly affect emission reductions.

The Connecticut I/M SIP revision includes specific penalties in its enforcement against contractors, stations and inspectors in accordance with the federal I/M rule. Based on its SIP submittal dated December 19, 2007, the State's enforcement procedures can be pursued through contractual or regulatory action. The State, through the contract that it has been authorized to enter into and directly under Connecticut laws at Chapter 246a—''Motor Vehicle Emissions, section 14–164c(f)(4)'', has the authority to immediately suspend a station inspector for violations that directly affect emission reduction benefits and a variety of other violations of procedures. Details are found in Appendix 14 of the SIP submittal and are included in the contract Inspection Agreement.

O. Data Analysis and Reporting

Under EPA's I/M rule, the SIP must describe the types of data to be collected.

The Connecticut I/M SIP provides for collecting test data to link specific test results to specific vehicles, I/M program registrants, test sites, and inspectors. The SIP in Section 16 of the SIP narrative, lists the specific types of test data and quality control data which will be collected. The data will be used to generate reports concerning test data, quality assurance, quality control, enforcement, as well as necessary changes and identified weaknesses in the program. The state has also committed to collecting all data necessary for the quality assurance and enforcement reports, as required by section 51.366 of the federal I/M rule.

P. Inspector Training and Licensing or Certification

Under EPA's I/M rule, the SIP must include a description of the training program, the written and hands-on tests, and the licensing or certification process.

The I/M SIP submittal from the DEP provides detail on the inspector training program. The Connecticut I/M SIP provides for implementation of training, licensing, and refresher programs for emission inspectors. The SIP and the inspection contract describe this program and curriculum including written and hands-on testing at least once every two years. All inspectors will be required to be certified to inspect vehicles in the Connecticut I/M program. Further details of the Inspector Training Program are included in section 17 of the SIP narrative.

Q. Improving Repair Effectiveness

Under EPA's I/M rule, the SIP must include a description of the technical assistance program to be implemented, a description of the procedures and criteria to be used in meeting the performance monitoring requirements of this section for enhanced I/M programs, and a description of the repair

technician training resources available in the community.

In the December 19, 2007 submittal, Connecticut provided additional detail and a description of the technical assistance, performance monitoring and repair technician training programs to be implemented. The SIP revision, as detailed in section 19 of the SIP narrative, provides for regularly informing repair facilities about changes to the inspection program, training course schedules, common problems, and potential solutions for particular engine families, diagnostic tips, repairs, and other assistance issues. As described in the submittal, the State has also ensured that a repair technician hotline is be available for repair technicians, and issued a contract to serve this purpose. Performance monitoring statistics of repair facilities will be provided to motorists whose vehicles fail the I/M test, as required in enhanced I/M areas. The State has committed to ensure that adequate repair technician training exists by establishing training courses at technical schools in the area.

R. Compliance With Recall Notices

Under EPA's I/M rule, the SIP must describe, for enhanced I/M programs, the procedures used to incorporate the vehicle recall lists provided into the inspection or registration database, the quality control methods used to insure that recall repairs are properly documented and tracked, and the method (inspection failure or registration denial) used to enforce the recall requirements. EPA has not yet established a computerized database listing all recalled vehicles.

The revised Connecticut I/M SIP will ensure that vehicles subject to enhanced I/M programs, that are included in either a voluntary emission recall or a remedial plan determination pursuant to the CAA, have had the appropriate repairs made prior to the inspection. As described in section 20 of the SIP narrative, the State and contractor will implement this when EPA databases exist which identify vehicles that have not completed recall repairs by an electronic database. At that time, motorists with unresolved recall notices will be required to show proof of compliance or will be denied the opportunity for inspection.

S. On-Road Testing

Under the CAA and EPA's I/M rule, the SIP must include a detailed description of the on-road testing program required in enhanced I/M areas, including the types of testing, test limits and criteria, the number of vehicles (the percentage of the fleet) to be tested, the number of employees to be dedicated to the on-road testing effort, the methods for collecting, analyzing, utilizing, and reporting the results of on-road testing and the portion of the program budget to be dedicated to on-road testing. Also, the SIP must include the legal authority necessary to implement the on-road testing program, including the authority to enforce off-cycle inspection and repair requirements. In addition, emission reduction credit for on-road testing programs can only be granted for a program designed to obtain significant emission reductions over and above those predicted to be achieved by other aspects of the I/M program. The SIP needs to include technical support for the claimed additional emission reductions.

The I/M SIP submitted on December 19, 2007, includes a description of Connecticut's on-road testing program in section 21 of the SIP narrative. The testing program will include 0.5% of the subject vehicles, or 20,000 vehicles. Vehicles with emission readings will be measured by remote sensing devices. The State of Connecticut has the legal authority to require a vehicle to obtain an out-of-cycle inspection at a vehicle emission inspection facility (Connecticut laws at Chapter 246a—''Motor Vehicle Emissions, section 14–164c(j)''). The State did not include additional modeling credit for this portion of the program in the modeling demonstrating that EPA's performance standard was met.

T. Concluding Statement

A more detailed analysis of the State's submittal and how it meets the federal requirements is contained in the EPA's technical support document (TSD) prepared for this action. The TSD is available from the EPA New England Regional office listed above. The criteria used to review the submitted SIP revision are based on the requirements set forth in section 182 of the CAA and in the federal I/M regulations. Based on these requirements, EPA developed a detailed I/M approvability checklist to be used nationally to determine if I/M programs meet the requirements of the CAA and the federal I/M rule. The checklist states the federal requirements, referenced by section of the rule, and whether the Connecticut program meets such requirements. This checklist, the CAA, and the federal I/M regulation formed the basis for EPA's technical review. EPA has reviewed the Connecticut I/M SIP revision submitted to the EPA using the criteria stated above. The Connecticut regulations and accompanying materials contained in the SIP submittals from the State represent an acceptable plan to comply with the I/M requirements and meet all the criteria required for EPA to approve the SIP. EPA's review of the materials submitted indicates that Connecticut has revised its I/M program in accordance with the requirements of the CAA, 40 CFR Part 51, and all of EPA's technical requirements for an approvable vehicle inspection and maintenance program, including OBD2.

V. Final Action

EPA is approving the SIP revision submitted by the State of Connecticut of December 19, 2007. This SIP revision contains the State's revised vehicle inspection and maintenance program. Specifically, EPA is approving the Connecticut Department of Motor Vehicles Regulation at section 14–164c–1a to section 14–164c–18a (effective May 28, 2004), and the Connecticut Department of Environmental Protection Regulations at section 22a–174–27 (August 25, 2004) and incorporating these rules into the Connecticut SIP. EPA is approving Connecticut's revised I/M program because it is consistent with the CAA I/M requirements and EPA's I/M regulations and it will strengthen the Connecticut SIP.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective February 3, 2009 without further notice unless the Agency receives relevant adverse comments by January 5, 2009.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 3, 2009 and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt

as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP 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.

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 action 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).

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 February 3, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 12, 2008.

Robert W. Varney,

Regional Administrator, EPA New England.

■ Part 52 of chapter I, title 40 of the Code of Federal Regulations 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 H—Connecticut

■ 2. Section 52.370 is amended by adding paragraph (c)(98) to read as follows:

§ 52.370 Identification of plan.

* * * * *

(c) * * *

(98) Revisions to the State Implementation Plan submitted by the Connecticut Department of Environmental Protection on December 19, 2007.

(i) Incorporation by reference.

(A) Connecticut Department of Environmental Protection Regulations entitled ''Emission standards and on-board diagnostic II test requirements for periodic motor vehicle inspection and maintenance'' at section 22a–174–27 (effective in the State of Connecticut on August 25, 2004).

(B) Connecticut Department of Motor Vehicles Regulation entitled ''Periodic Motor Vehicle Emissions Inspection and Maintenance'' at section 14–164c–1a to Section 14–164c–18a (effective in the State of Connecticut on May 28, 2004).

■ 3. In § 52.385, Table 52.385 is amended by adding new entries to existing state citations for section 22a–174–27 and Section 14–164c to read as follows:

§ 52.385 EPA-approved Connecticut Regulations.

* * * * *

TABLE 52.385—EPA-APPROVED REGULATIONS

Connecticut State citation	Title/subject	Dates		Federal Register citation	Section 52.370	Comments/description
		Date adopted by State	Date approved by EPA			
*	*	*	*	*	*	*
22a–174–27	Emission standards and on-board diagnostic II test requirements for periodic motor vehicle inspection and maintenance.	8/25/04	12/05/08	[Insert **Federal Register** page number where the document begins].	(c)(98)	DEP regulations including emissions standards and OBD2 requirements.
*	*	*	*	*	*	*
14–164c	Periodic Motor Vehicle Emissions Inspection and Maintenance.	5/28/04	12/05/08	[Insert **Federal Register** page number where the document begins].	(c)(98)	DMV regulation revisions for test and repair network and implementing OBD2 and other tests.
*	*	*	*	*	*	*

[FR Doc. E8–28734 Filed 12–4–08; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0788; FRL–8745–4]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from large water heaters and small boilers and process heaters. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on February 3, 2009 without further notice, unless EPA receives adverse comments by January 5, 2009. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2008–0788], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 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 *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 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: Idalia Perez, EPA Region IX, (415) 972–3248, *perez.idalia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule we are approving with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD	1146.2	Emissions of Oxides of Nitrogen From Large Water Heaters and Small Boilers and Process Heaters.	05/05/06	03/07/08

On April 17, 2008, this rule submittal was found to meet the completeness criteria in 40 CFR Part 51, Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved a version of Rule 1146.2 into the SIP on April 8, 2002. The SCAQMD adopted revisions to the SIP-approved version on January 7, 2005 and CARB submitted them to us on March 7, 2008. While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

C. What is the purpose of the submitted rule revision?

NO_X helps produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control NO_X emissions. Rule 1146.2 regulates emissions of oxides of nitrogen from large water heaters and small boilers and process heaters. The amendment of the rule extends the NO_X emissions limits to smaller units, extended the compliance date for units to meet NO_X emissions and made a more stringent emission limit for new units in the future. EPA's technical support document (TSD) has more information about this rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rule?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see sections 182(a)(2) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). The South Coast Air Quality Management District regulates an ozone nonattainment area (see 40 CFR part 81), so Rule 1146.2 must fulfill RACT.

Guidance and policy documents that we use to help evaluate enforceability and RACT requirements consistently include the following:

1. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.
2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
4. ''State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 59 FR 41998 (August 16, 1994).
5. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).
6. ''PM–10 Guideline Document,'' EPA 452/R–93–008, April 1993.
7. ''Alternative Control Techniques Document—NO_X Emissions from Industrial/Commercial/Institutional (ICI) Boilers,'' EPA, March 1994.
8. ''Determination of Reasonably Available Control Technology and Best Available Retrofit Control for Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters,'' CARB, July 18, 1991.

B. Does the rule meet the evaluation criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. The TSD has more information on our evaluation.

C. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rule because we believe it fulfills all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rule. If we receive adverse comments by January 5, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on February 3, 2009. This will incorporate this rule into the federally enforceable SIP.

III. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because

application of those requirements would be inconsistent with the Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP 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.

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 action 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).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 3, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: November 6, 2008.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations 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 F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(354)(i)(A)(*4*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(354) * * *

(i) * * *

(A) * * *

(*4*) Rule 1146.2, ''Emissions of Oxides of Nitrogen From Large Water Heaters and Small Boilers and Process Heaters,'' adopted on January 8, 1998 and amended on May 5, 2006.

* * * * *

[FR Doc. E8–28725 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–0290, FRL–8745–6]

Revisions to the California State Implementation Plan, Great Basin Unified Air Pollution Control District and Kern County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Great Basin Unified Air Pollution Control District (GBUAPCD) and Kern County Air Pollution Control District (KCAPCD) portions of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving local rules that address permitting.

DATES: This rule is effective on February 3, 2009 without further notice, unless EPA receives adverse comments by January 5, 2009. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2007–0290, by one of the following methods:

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

• *E-mail: R9airpermits@epa.gov.*

• *Mail or deliver:* Gerardo Rios (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

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 *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an anonymous access system, 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 IX, 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 below.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were revised or amended by the local air agencies and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Revised or amended	Submitted
GBUAPCD	201	Exemptions	01/23/06 Revised	06/16/06
KCAPCD	205	Permit Renewal	05/02/96 Amended	07/23/96

On July 21, 2006, the submittal of GBUAPCD Rule 201 was determined to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review. On October 30, 1996, the submittal of KCAPCD Rule 205 was determined to meet the completeness criteria.

B. Are there other versions of these rules?

We approved the September 5, 1974 version of GBUAPCD Rule 201 into the SIP on December 8, 1976 (41 FR 53661). We did not act on versions of GBUAPCD Rule 201 revised on February 15, 1989 and May 8, 1996 and submitted to us by CARB on October 25, 1991 and March 3, 1997, respectively.

We approved the April 18, 1972 version of KCAPCD Rule 205 into the SIP on September 22, 1972 (37 FR 19812). We did not act on a version of KCAPCD Rule 205 revised on June 1, 1987 and submitted to us by CARB on June 22, 1987.

While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

C. What are the purposes of the rule revisions?

The purposes of revisions of GBUAPCD Rule 201 relative to the SIP rule are as follows:

- GBUAPCD Rule 201: A blanket provision is added stating that the equipment listed in this rule shall not be exempt from permitting requirements if the equipment emits any pollutants in excess of the quantities stated in GBUAPCD Rule 209–A.B.2.
- GBUAPCD Rule 201.D.3: The exemption from permitting for internal combustion engines is modified to no longer exempt diesel engines larger than 50 brake horsepower that are also subject to the State air toxic control measure.
- GBUAPCD Rule 201.P: An exemption from permitting for open burn/open detonation operations on military bases, provided the operations comply with the requirements of GBUAPCD Rules 217 and 432, is added.

The purposes of revisions to KCAPCD Rule 205 relative to the SIP rule are as follows:

- KCAPCD Rule 205.I: The requirement for an application for a Permit to Operate (PTO) to expire in two years is added. The requirement for the PTO to be renewed each year by payment of a renewal fee is added. A PTO for non-operating equipment may be renewed if the equipment is intact and operable. A PTO for removed equipment may be renewed if the equipment is returned intact within one year.
- KCAPCD Rule 205.II: The allowance to renew an Authority to Construct (ATC) for one two-year period is added, providing onsite construction has begun or the applicant has entered into binding agreements or contractural obligations that may realize substantial economic loss if cancelled.
- KCAPCD Rule 205.II.A: The allowance to renew an ATC for one two-year period if construction is delayed due to an economic downturn, is added.

The TSD has more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

These rules describe administrative provisions that support emission controls found in local agency requirements. In combination with the other requirements, these rules must be enforceable (see section 110(a) of the CAA) and must not relax existing requirements (see sections 110(l) and 193). The EPA guidance and policy documents that we used to define specific enforceability and relaxation requirements is as follows:

- *Review of New Sources and Modifications*, U.S. EPA, 40 CFR part 51, subpart I.
- *Guidance Document for Correcting Common VOC & Other Rule Deficiencies*, EPA Region 9, (August 21, 2001). (The Little Bluebook)

B. Do the rules meet the evaluation criteria?

GBUAPCD Rule 201 and KCAPCD Rule 205 are consistent with relevant policy and guidance regarding enforceability and SIP relaxations. The TSD has more information on our evaluation.

C. EPA Recommendations To Further Improve the Rules

The TSDs describe additional revisions to GBUAPCD Rule 201 and KCAPCD Rule 205 that do not affect EPA's current action but are recommended for the next time the local agencies modify the rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the CAA, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by January 5, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on February 3, 2009. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a

SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP 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.

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 action 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).

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 February 3, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 24, 2008.

Alexis Strauss,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations 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 F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(239)(i)(C)(*5*) and (345)(i)(D) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(239) * * *

(i) * * *

(C) * * *

(*5*) Rule 205, (a part of regulation II), ''Permit Renewal,'' adopted on April 18, 1972 and amended on May 2, 1996.

(*i*) Resolution of May 2, 1996.

* * * * *

(345) * * *

(i) * * *

(D) Great Basin Unified Air Pollution Control District

(*1*) Rule 201, ''Exemptions,'' adopted on September 5, 1974 and revised on January 23, 2006.

* * * * *

[FR Doc. E8–28732 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 419

RIN 1006–AA48

Truckee River Operating Agreement

AGENCY: Bureau of Reclamation, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Reclamation is publishing this rule to comply with the requirements of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act. The Settlement Act requires that the operating agreement negotiated with the States of California and Nevada for the operation of Truckee River Reservoirs (the five Federal reservoirs in the Truckee River basin) be promulgated as a Federal Regulation.

DATES: This rule is effective January 5, 2009. The Truckee River Operating Agreement provides that it cannot be implemented until the last of the conditions set forth in Sections 12.A.4(a) through 12.A.4(g) is satisfied. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of January 5, 2009.

FOR FURTHER INFORMATION CONTACT: Kenneth Parr, Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701; telephone (775) 882–3436; or for a copy of TROA, visit the TROA Web site at *http://www.usbr.gov/mp/troa/*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 205(a) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, title II of Public Law 101–618, November 16, 1990 (Settlement Act), directs the Secretary (Secretary) of the Department of the Interior (Interior) to negotiate an operating agreement that must:

- Satisfy all applicable dam safety and flood control requirements;
- Provide for the enhancement of spawning flows available in the Lower

Truckee River for the Pyramid Lake fishery (endangered cui-ui and threatened Lahontan cutthroat trout [LCT]) in a manner consistent with the Secretary's responsibilities under the Endangered Species Act, as amended (ESA);

- Carry out the terms, conditions, and contingencies of the Preliminary Settlement Agreement between the Pyramid Lake Paiute Tribe (Pyramid Tribe) and Sierra Pacific Power Company (Power Company), as modified by the Ratification Agreement of the United States (PSA);
- Ensure that water is stored in and released from Truckee River Reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch and Truckee River General Electric (TRGE) decrees, except for any rights voluntarily relinquished by the parties to the operating agreement; and
- Minimize the Secretary's costs associated with operation and maintenance of Stampede Reservoir.

The Settlement Act further provides that the following may be addressed in the operating agreement:

- Administration of the operating agreement;
- Means of assuring compliance with PSA;
- Operations of Truckee River system that will not change;
- Operations and procedures for using Federal facilities to meet the Secretary's responsibilities under ESA;
- Methods of reducing the likelihood that Lake Tahoe will drop below its natural rim and improving the efficient use of Lake Tahoe during extreme drought situations;
- Procedures for managing and operating Truckee River Reservoirs;
- Procedures for operating Truckee River Reservoirs for instream beneficial uses;
- Operation of other reservoirs in the Truckee River basin to the extent owners of affected storage rights become parties to the operating agreement; and
- Procedures and criteria for implementing California's allocation of Truckee River water.

The Truckee River Operating Agreement (TROA) was signed by all signatory parties on September 6, 2008. TROA, among other things, will: (1) Enhance conditions for threatened and endangered fishes in the Truckee River and its tributaries; (2) increase municipal and industrial (M&I) water supplies to provide drought protection for the Truckee Meadows (the Cities of Reno and Sparks, Nevada, metropolitan area); (3) improve river water quality downstream from the City of Sparks and Derby Dam; (4) enhance stream flows and recreational opportunities in the Truckee River basin; and (5) provide procedures for implementing the interstate allocation of Lake Tahoe basin and Truckee River basin waters between Nevada and California. While the Settlement Act also confirms the allocation of the waters of the Carson River and its tributaries between California and Nevada represented by the Alpine Decree, TROA does not affect the Carson River.

Section 205(a)(9) of the Settlement Act requires the Secretary to satisfy the requirements of the National Environmental Policy Act (NEPA). Because the State of California is a mandatory signatory party, it is also necessary to comply with the California Environmental Quality Act (CEQA). Consequently, Interior and the California Department of Water Resources jointly prepared an Environmental Impact Statement/Environmental Impact Report (EIS/EIR). The final EIS/EIR concludes that TROA will:

- Provide better conditions for threatened LCT and endangered cui-ui in many reaches of the Truckee River and its tributaries;
- Provide greater potential for enhancing riparian vegetation along some reaches of the Truckee River in median hydrologic conditions and along all mainstem and tributary reaches under dry and extremely dry hydrologic conditions; and
- Enhance riparian habitat along some mainstem and tributary reaches under wet and median hydrologic conditions and along most mainstem reaches in dry and extremely dry hydrologic conditions.

Section 205(a)(9) also provides that the Secretary may not become a party to TROA if the Secretary determines that the effects of TROA, together with cumulative effects, are likely to jeopardize the continued existence of any threatened or endangered species or be adverse to designated critical habitat of such species. The final EIS/EIR concludes that implementation of TROA will not adversely affect LCT or cui-ui, but in fact is likely to benefit both species. The U.S. Fish and Wildlife Service has concurred in that determination through the consultation process required by Section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Since TROA is the result of negotiations and agreement among at least the five mandatory signatory parties and must be promulgated as a Federal regulation, this rule incorporates by reference the signed agreement exactly as negotiated.

II. Overview of Rule

The main provisions of TROA were summarized in the Notice of Proposed Rulemaking, published in the **Federal Register** on September 15, 2008 (73 FR 53180). TROA, which constitutes the rule, is incorporated by reference. It provides the framework, rules, and procedures for the operation of Truckee River Reservoirs, Independence Lake, and Donner Lake (to the extent Donner Lake is made available), and for management of flows in the Truckee River with more flexibility than is available under current operations. It also provides for implementation of the interstate allocation of waters of the Lake Tahoe and Truckee River basins between California and Nevada, as provided in Sections 204 and 210(a)(2) of the Settlement Act. The maintenance of Floriston Rates and Reduced Floriston Rates (prescribed rates of flow in the Truckee River at the California-Nevada State border) is the basic foundation of TROA.

TROA retains most current procedures and management authorities for operating Truckee River Reservoirs, including maintaining the storage priorities for project water (water associated with the license or permit for a particular reservoir) and water dedicated to maintenance of Floriston Rates. Applicable flood control and safety of dams requirements will continue to be in effect. Truckee River Reservoirs will continue to be operated to satisfy the exercise of water rights in conformance with the decrees entered in *United States* v. *Orr Water Ditch Company, et al.*, In Equity No. A3, Case No. 73–cv–00003 (D. Nev. 1944) and *United States* v. *Truckee River General Electric Co.*, No. 14861 (N.D. Cal. 1915) now designated Case No. 68–cv–643 (E.D. Cal.), except for any water rights that are voluntarily relinquished by any persons or transferred under State law. The Federal Water Master will continue to assure that Truckee River operations satisfy the exercise of water rights recognized by the Orr Ditch Decree.

III. Comments on the Proposed Rule

Fourteen comment letters were received from the public during the comment period. Eleven letters expressed support for TROA, and three letters opposed TROA. Letters in support were received from the City of Fernley, City of Reno, City of Sparks, Washoe County, Truckee Meadows Water Authority (Water Authority) (two letters), Pyramid Lake Paiute Tribe, Fallon Paiute-Shoshone Tribe, State of California, State of Nevada, and Senator Harry Reid of Nevada. These letters of

support generally encouraged the expeditious implementation of TROA and required no response.

Letters in opposition were received from the City of Fallon, Churchill County, and Truckee-Carson Irrigation District (TCID).

No change was made to the rule as a result of the comments as compared to the previously proposed rule.

Comments are addressed by subject; related comments have been combined. A response follows each comment.

Comment: The Fallon Paiute-Shoshone Tribe wishes to become a signatory party to TROA.

Response: The Fallon Paiute-Shoshone Tribe may become a signatory party to TROA as provided in Section 14.E of TROA with the prior unanimous consent of the mandatory signatory parties to TROA. Mandatory signatory parties are the United States, State of California, State of Nevada, Pyramid Tribe, and Water Authority.

Comment: TROA is incomprehensible, partly because Churchill County did not participate in negotiations.

Response: All TROA negotiation plenary sessions and most working group and committee meetings were open to any interested persons. If Churchill County was not represented at any TROA sessions or meetings, it was because it chose not to participate.

Comment: Newlands Project water right owners have had no role in the complex and lengthy negotiation process. TROA does not include these entities as signatories.

Response: Consistent with Section 205(a)(1) of the Settlement Act, the TROA negotiations were open to all parties who expressed an interest in participating and becoming a signatory party to TROA. To the extent the Newlands Project water right holders, TCID, Churchill County, and City of Fallon were not represented at TROA sessions or meetings, it was because they chose not to participate.

Comment: TROA negotiation meetings were not conducted under the auspices of the Federal Advisory Committee Act (FACA).

Response: The United States has complied with all applicable laws, including the Settlement Act, in negotiating TROA.

Comment: The potential of replacing the Water Master with the Administrator who is appointed based on the preference of the TROA signatories interferes with the Orr Ditch court's authority and violates the separation of powers doctrine.

Response: The TROA Administrator will not replace the Federal Water Master. The Federal Water Master position will still exist and is different from the TROA Administrator position. The same person will serve as both the Federal Water Master and the TROA Administrator. Section 2.A of TROA provides that the Federal Water Master in office on the date TROA enters into effect will be the first Administrator. When there is a vacancy, the TROA parties nominate replacement candidates for consideration by the Orr Ditch court. The Orr Ditch court ultimately appoints the Administrator.

TROA keeps the powers of the Federal Water Master and Administrator separate. According to TROA Section 1.C.1, the Federal Water Master under the Orr Ditch Decree will retain full authority to ensure that Orr Ditch Decree water rights are fully enforced, while TROA Section 2.A.1 states the Administrator will be responsible for carrying out the terms and conditions of TROA.

Comment: Under TROA Section 2.B.2(a), the Special Hearing Officer is appointed by a four-member appointing committee comprised of one representative appointed by each of the Sovereign Parties. These provisions grant entirely too much decision-making power related to the management of the Truckee River to the TROA signatories.

Response: Parties not signatory to TROA are not constrained by proceedings before the Special Hearing Officer and will retain access to the remedies that are currently available. Disputes under the authorities of the Orr Ditch Decree and TROA would be considered separately. TROA Section 2.B.1 states, ''[d]isputes arising under the Orr Ditch Decree shall remain subject to the jurisdiction of the Orr Ditch court and the Federal Water Master.'' Disputes arising under TROA would be submitted to the Truckee River Special Hearing Officer pursuant to TROA Section 2.B.2.

Comment: TROA or its associated documents do not set forth any factual scenarios that attempt to describe how TROA works.

Response: Selected TROA operational scenarios were presented in Exhibit 16 of the Water Resource Appendix of the final EIS/EIR.

Comment: The computer model used for TROA is not understandable, was never fully explained, and is flawed in various aspects that make it inappropriate to use to support the TROA ''management scheme.''

Response: The Truckee River Operations Model was explained in detail in the NEPA/CEQA process for TROA, including the revised draft and final EIS/EIR. In response to numerous comments on the model, the section in chapter 3, ''Use of the Truckee River Operations Model,'' was greatly expanded in the final EIS/EIR to further explain development and limitations of the operations model, as well as its use as a comparative tool in the negotiations and EIS/EIR process.

In the development and analysis of TROA, the negotiating parties relied on their respective goals and objectives for TROA; professional judgment of their respective staffs; professional judgment of experienced Truckee River system water managers; the historic hydrograph and other records for the system; and the results produced by use of the operations model with consideration of its recognized limitations.

No comment on the model was received following publication of the final EIS/EIR.

Comment: TROA cannot supersede the Truckee River Agreement (TRA) without agreement of TCID, and it is presumptuous to discard TRA in favor of a ''management scheme'' that benefits only certain entities. TROA violates many provisions of TRA, which is incorporated into the Orr Ditch Decree; thus, TROA violates the Orr Ditch Decree.

Response: The Congress, in Section 205(a)(1) of the Settlement Act, directed the Secretary to negotiate an agreement for the operation of Truckee River Reservoirs that includes the required provisions set forth in Section 205(a)(2) of the Settlement Act. The Settlement Act requires the Secretary, the State of Nevada, and the State of California, in consultation with other parties, to negotiate an operating agreement to carry out the terms of the PSA between Power Company (now Water Authority) and the Pyramid Tribe, and that the Secretary promulgate the operating agreement as the exclusive Federal regulation governing the operation of Truckee River Reservoirs.

Further, Section 205(a)(4) of the Settlement Act requires that TROA be submitted to the Orr Ditch and TRGE courts for approval of any necessary modifications to the Orr Ditch Decree (which incorporates TRA) and the TRGE Decree. Section 205(a)(2)(D) of the Settlement Act directs that, under TROA, Truckee River Reservoirs are to be operated to ''ensure that water is stored in and released from [those reservoirs] to satisfy the exercise of water rights [including those for the Newlands Project] in conformance with the Orr Ditch Decree and [TRGE] Decree * * *'' The provisions of TROA have been negotiated to satisfy the statutory requirements.

No interested and potentially affected entity was excluded from TROA negotiations or prevented from being a signatory to TROA.

Comment: Any unused water in the Truckee River is to inure to the benefit of the Washoe County Water Conservation District (Conservation District) and TCID. Attempts to alter the division of unused water are in violation of TRA and undermine the Orr Ditch Decree.

Response: As to TCID, the amount of Truckee River water which can be diverted to the Newlands Project is governed by the Operating Criteria and Procedures for the Newlands Project (OCAP), not by TROA. The Conservation District is a signatory to TROA.

Comment: The parties to TRA agreed that saved water would flow in the river and that 31 percent of this diverted flow would be available for TCID to divert and place to beneficial use. TROA makes no provision for this term in TRA.

Response: The Ninth Circuit Court of Appeals held that the TRA's diverted flow provisions did not confer any water rights on the TCID, but instead that ''TCID's rights were strictly managerial.'' *Truckee Carson Irrigation District* v. *Secretary of Interior*, 742 F.2d 527, 531 (1984).

Comment: The resolution of unappropriated water as required in the Settlement Act and TROA has not occurred, and unappropriated water cannot be managed as envisioned under TROA.

Response: TROA parties recognize the concerns expressed in this comment. Settlement Act Section 210(a)(2)(B) and TROA Section 12.A.4 expressly provide that TROA will not go into effect until the unappropriated water issue is finally resolved in a manner satisfactory to the State of Nevada and the Pyramid Tribe.

Comment: No transportation losses are assigned to credit waters, elevating these waters above other decreed water rights with clearly higher priority.

Response: TROA Section 5.E.1 specifies that conveyance losses shall be calculated by the Administrator. Section 5.E.2 provides that when project water or credit water is released, conveyance loss shall be allocated to each release using the proportion that each category of water in each stream reach bears to the total flow in each stream reach. In determining conveyance losses, the Administrator must comply with Section 205(a)(2) of the Settlement Act, which requires TROA to satisfy the exercise of Orr Ditch Decree water rights, including Newlands Project water rights, but excludes those that are voluntarily relinquished or transferred under State law. Credit water operations would not affect this requirement.

Comment: Donner Lake water cannot be used for TROA purposes.

Response: The TROA parties in TROA Section 1.C.5 recognize the ongoing dispute between TCID and Water Authority over their respective ownership interests in and use of Donner Lake water and that the water will be used to the extent it is available.

Comment: Under what authority can Privately Owned Stored Water (POSW) owned by TCID be used to meet the increased minimum releases specified in TROA?

Response: Minimum releases from Donner Lake under TROA are made pursuant to the Donner Lake Indenture. Under TROA, TCID's POSW in Donner Lake may only be used for enhanced minimum releases with the approval of TCID.

Comment: Newlands Project water right owners do not appear to benefit from Newlands Project Credit Water (NPCW) as described in TROA, and the NPCW provisions are contrary to the water rights of such owners.

Response: The concept of NPCW is neither intended to benefit nor adversely affect the Newlands Project. NPCW provisions are predicated on the authority in OCAP (referred to in TROA as Truckee Canal Diversion Criteria) to ensure, to the extent possible, that the water supply for the Carson Division stored in Lahontan Reservoir meets but does not exceed Lahontan Reservoir storage targets. (See Newlands Project Credit Water in chapter 2 of the final EIS/EIR, TROA Section 7.H, and TROA Appendix 7.D.) The model analysis for NPCW in the final EIS/EIR incorporates operations that are consistent with both OCAP and TROA.

Comment: There may not be sufficient room to accommodate all of the entities seeking credit water storage.

Response: The priorities for accumulating, exchanging, releasing, and spilling credit water categories as well as the amounts of each category were negotiated by the TROA parties and based in part on provisions of PSA. TROA parties recognize that all categories of credit water may not simultaneously be in storage or that the amount of credit water stored may be limited by hydrologic conditions.

Comment: TROA provisions regarding credit water and Floriston Rates would impair Orr Ditch Decree water rights in the Newlands Project.

Response: As required in Section 205(a)(2)(D) of the Settlement Act, operation of Truckee River Reservoirs under TROA must satisfy the exercise of water rights in conformance with the Orr Ditch Decree, meaning that Newlands Project water rights will not be impaired by TROA. Water that may previously have been available for diversion to the Newlands Project may no longer be available under TROA because senior upstream water right owners can more efficiently and fully exercise their water rights. TROA also complies with Section 210(b)(13) of the Settlement Act, which expressly recognizes the authority of the Orr Ditch court ''to ensure that the owners of vested and perfected Truckee River water rights receive the amount of water to which they are entitled under the Orr Ditch decree or the Alpine decree.'' TROA protects Orr Ditch Decree water rights, including the water which may be legally diverted at Derby Diversion Dam pursuant to the Orr Ditch Decree and Newlands Project OCAP.

Comment: The provisions of TROA are contrary to Nevada water code and supplant the authority of the State Engineer to review and approve changes to existing water rights.

Response: TROA does not supplant the authority of either the Nevada State Engineer or the California State Water Resources Control Board to review and approve changes to existing water rights that will be managed in accordance with the provisions of TROA.

Comment: TROA Section 5.E.1 specifies conveyance losses shall be calculated by the Administrator using procedures developed by the Administrator. This is a clear violation of Nevada Revised Statutes Section 533.055 and directly interferes with the authority of the State Engineer.

Response: Section 210(b)(12) of the Settlement Act states: ''Nothing in this title is intended to abrogate the jurisdiction of or required approvals by the Nevada State Engineer or the California State Water Resources Control Board.'' TROA will be implemented in accordance with procedures of the State Engineer for determining conveyance losses.

Comment: It is not clear that TROA benefits cui-ui or LCT; cui-ui is better off without TROA.

Response: Section 7 consultation pursuant to ESA concluded that TROA is not likely to adversely affect endangered cui-ui and threatened LCT and, in fact, is likely to directly or indirectly benefit both species. This conclusion satisfies Section 205(a)(9) of the Settlement Act.

Comment: The United States did not consult with the City of Fallon pursuant to Section 210(b)(16) when negotiating TROA.

Response: Section 210(b)(16) of the Settlement Act is independent of and not related to TROA.

Request for Extension: In its letter, TCID requested a 120-day extension. No other member of the public requested an extension. TCID has been involved in the TROA process since it began 18 years ago and provided substantial comments that were responded to during the NEPA/CEQA process. No extension of time is warranted.

IV. Procedural Requirements

1. Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this rule is not a significant rule and has not reviewed it under the requirements of Executive Order 12866. We have evaluated the impacts of the rule as required by E.O. 12866 and have determined that it is not a significant regulatory action. The results of our evaluation are given below.

a. This rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

TROA is a mechanism negotiated by its signatories to facilitate more flexibility in water use and storage and more effective coordination of reservoir operations on the Truckee River. The increased flexibility and more effective coordination of operations will provide a more stable water supply for Reno, Sparks, and Washoe County, Nevada, will enhance stream flow in the Truckee River below Derby Dam for threatened and endangered fishes, and will improve water quality.

The credit water and exchange provisions of TROA allow parties to more efficiently use the water resource and, more particularly, realize more efficient and effective utilization of their own water rights. Historically, senior water right holders could not always fully divert the water to which they were entitled under their water right because of their inability to use or store the water when available. At times some junior water right holders have been able to benefit from this water. The additional storage options made available under TROA will permit senior water right holders to more fully exercise their water rights. To the extent the exercise of senior Orr Ditch Decree water rights under TROA makes less water available to junior water right holders than has in the past been available because the senior rights could not be fully exercised, there is no unlawful injury to junior water right holders.

The total cost of implementing TROA is estimated to be approximately $15.8 million annually ($2.1 million for storage fees, operation and maintenance, and administration; $1.4 million in lost income from water transfers; and approximately $12.3 million annually for the purchase of water rights until 10,000 acre feet of water rights have been acquired to meet future water demand). Operation of Truckee River Reservoirs under TROA will result in new storage contracts which will reflect average storage and operation costs of approximately $1.5 million annually. The administration cost associated with implementing TROA is estimated to be $600,000 annually to be shared by the Federal Government and the States of California and Nevada. Under TROA irrigation water rights acquired by Water Authority and others are to be transferred in accordance with applicable State law to meet water conservation and water quality objectives. This reduction of water rights used for irrigation is projected to result in a loss of approximately 100 agricultural jobs and the loss of $1.4 million in personal income. Water rights will also be purchased from willing sellers to meet future water demand. The cost of such purchases is approximately $12.3 million annually based on current market value of water rights. Because TROA implementation actions rely on market mechanisms, any reductions in economic activity or productivity, including employment or income reductions occasioned by the sale of irrigation water rights and reduced agricultural activity, will be fully compensated by the monetary or other compensation derived from the sale of the water rights.

One of the benefits of TROA would be the avoided costs to the water users in the area of developing additional water storage facilities to meet increasing water demands in the region. The construction costs and operation and maintenance for new water storage facilities to meet that demand would be approximately $5 million annually. In addition to the avoided costs from implementing TROA, there is the additional benefit of supporting the Reno-Sparks economy by providing the storage capacity for M&I water demand in the future. It is estimated that in 2033, through the operation of TROA, the stored M&I water will support approximately 74,000 jobs and approximately $2.6 billion in associated personal income annually. There are also the annual nonmonetary benefits of improving water quality, improving fish and wildlife habitat, and meeting Indian trust responsibilities. Accordingly, TROA is not an economically significant rule under E.O. 12866.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency. Bureaus within Interior are the only Federal agencies directly affected by the agreement. For instance, all TROA actions are specifically subordinated to Army Corps of Engineers (Corps) flood control criteria so that the Corps is free to adjust them as necessary apart from this regulation. In addition, TROA specifically provides that any use of the Corps' Martis Creek Reservoir for a TROA purpose (e.g., for conservation or credit water storage) would require a written agreement with the Corps. Upon TROA taking effect, Section 206(c) of the Settlement Act, which pertains to water use on the U.S. Naval Air Station, Fallon, Nevada, will also become effective. This is a consequence of the Settlement Act and not a direct effect of the provisions of TROA.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The rule is a negotiated agreement, and it directly affects only the signatories of that agreement.

d. OMB has determined that this rule does not raise novel legal or policy issues. TROA explicitly incorporates or accommodates all relevant laws and judicial decisions. By law TROA cannot have an adverse effect on any other person's water rights under the Orr Ditch or TRGE Decrees, and any modifications to those decrees necessary to implement TROA must be approved by the two courts with jurisdiction over the two decrees before TROA can become effective. TROA is required to be consistent with the decision in *Pyramid Lake Paiute Tribe* v. *Morton,* 354 F. Supp. 252 (D.D.C. 1973) and with the Secretary's responsibilities under ESA.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The rule will not affect a substantial number of small entities. TROA directly affects only its signatories. While TCID may be considered a small entity, TROA neither directly affects TCID nor the water rights of the individual water

right holders on the Newlands Project. Specifically, the parties likely to be directly affected by TROA are:

- U.S. Department of the Interior;
- State of California;
- State of Nevada;
- Pyramid Lake Paiute Tribe;
- Truckee Meadows Water Authority;
- Washoe County Water Conservation District;
- City of Reno, Nevada;
- City of Sparks, Nevada;
- City of Fernley, Nevada;
- Washoe County, Nevada;
- Sierra Valley Water Company;
- Carson-Truckee Water Conservancy District;
- North Tahoe Public Utilities District; and
- Truckee Donner Public Utilities District.

Power Company joined in the execution of TROA for a limited purpose through a Special Joinder on September 6, 2008.

Water operations of the Water Authority (successor in interest to Power Company), Conservation District, City of Reno, City of Sparks, and Washoe County, Nevada, are all intertwined within one geographic area in western Nevada. The criterion for a small entity is less than 50,000 population. All of these entities are located within Washoe County, Nevada. The population of Washoe County is approximately 346,000 people (2000 Census). The Reno-Sparks division of Washoe County has a population of approximately 256,000. Only if Conservation District, a taxing authority water purveyor of M&I and irrigation water supplies, were considered a separate entity would it be considered small as it has 33,000 people within its taxing jurisdiction; Water Authority serves 77,000 customers. The City of Fernley, in Lyon County, with a population of approximately 8,600 (2000 Census), would be considered small.

Carson-Truckee Water Conservancy District's office is located in Reno, Nevada, and the District has no service population. It is authorized under Nevada State statutes to collect fees and taxes to do conservation work.

North Tahoe Public Utility District, Tahoe Vista, Placer County, California, has a service population of 5,300 and, therefore, is considered a small entity. It consists of the Sewer and Water Department, Recreation and Parks Department, North Tahoe Beach Center, and the North Tahoe Community Conference Center.

Truckee Donner Public Utilities District, Truckee, California, is a non-profit utility providing electric and water service in the Truckee area. The District serves 12,000 electric customers and 12,000 water service connections. It is considered a small entity.

Sierra Valley Water Company is a small water purveyor in Sierra and Plumas Counties, California. It provides domestic and irrigation water to 29 customers. It is, therefore, considered small.

Pyramid Lake Paiute Indian Reservation is located in Washoe County, with approximately 1,734 tribal members residing on the reservation. Indian tribes are not covered by the Regulatory Flexibility Act.

Power Company's service territory covers approximately 50,000 square miles in northern Nevada including the cities of Reno, Sparks, and the Lake Tahoe area of northeastern California. It employs in excess of 1,100 people and services approximately 500,000 electric and gas customers. It has assets in excess of $2.5 billion and revenue in excess of $1 billion. It is not, therefore, considered a small entity.

Of the current signatories, only five are considered to be small entities. There is, therefore, not a significant effect on a substantial number of small entities.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The availability of additional water management options is expected in the long term to lower overall operation costs.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. TROA has only regional effects and will not have national or international implications.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The costs of the new water management opportunities made available by the agreement will only accrue to the signatories, and the costs will be small relative to the benefits and will apply only if a signatory avails itself of the options under the agreement. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, the rule does not have significant takings implications. The provisions of the agreement are accepted voluntarily by the signatories and the exercise of water rights under existing decrees is expressly provided for. Therefore, this rule will not result in a taking of private property, and a takings implication assessment is not required.

6. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The State of California and the State of Nevada are signatories to TROA and participated fully in negotiations that culminated in the agreement. TROA would have two principal effects on the State governments.

First, when TROA enters into effect, an allocation of the waters of the Lake Tahoe and Truckee River basins, and confirmation of the allocation of the Carson River and its tributaries represented by the Alpine Decree, automatically enters into effect in a manner similar to an interstate compact. Generally, these allocations limit the amount of water that can be used or diverted from Lake Tahoe basin for use within the basin under procedures of the two States, and the amount of water that can be used or diverted from the California portions of the Truckee River basin and the Carson River and its tributaries under relevant decrees and procedures of the State of California. The balance of the water of these two rivers that flows into Nevada can be allocated pursuant to the water allocation procedures of the State of Nevada and various court decrees. Generally, these allocations were negotiated by and agreed to by the two States. Though not required by law to do so, both States have voluntarily abided by their provisions pending passage of the Settlement Act, initially, and pending implementation of TROA, subsequently. TROA merely aids in the implementation of the allocation of the waters of the Lake Tahoe and Truckee River basins provided for in the Settlement Act. By signing TROA, the two States have, effectively, bound themselves to this interstate allocation.

Second, there are modest (i.e., expected to be approximately $600,000 in total) financial requirements for funding the annual administration of TROA. Subject to the limits on the authority in the constitutions of the two States to commit future appropriations, it is reasonable to expect the two States to pay their allocated shares of the funding. By signing TROA, the two States signaled their intention to secure funding for their shares of the administration of TROA. Neither of these effects is considered to rise to the level of significance requiring a Federalism Assessment. The rule, which governs only the responsibilities of the signatories, 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. The rule provides for the application of State law in its implementation in the same manner as does the Settlement Act. Therefore, a Federalism Assessment is not required.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

a. Does not unduly burden the judicial system;

b. Meets the criteria of Section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

c. Meets the criteria of Section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in Executive Order 13175, we have evaluated this rule and determined that it has no potential effects, within the requirements of the Executive Order, on Federally recognized Indian tribes. Implementation of this rule will benefit the Pyramid Tribe, as described below.

Indian trust resources are legal interests in property or natural resources held in trust by the United States for Indian Tribes or individuals. The Secretary is the trustee for the United States on behalf of Indian Tribes. Examples of trust resources are lands, minerals, hunting and fishing rights, and water rights. Indian trust resources have been assessed in consultation with the following tribes during the development of TROA: Pyramid Lake Paiute Tribe—Pyramid Lake Indian Reservation in Nevada; Reno-Sparks Indian Colony—Reno and Hungry Valley, in Nevada; Fallon Paiute-Shoshone Tribe—Fallon Paiute-Shoshone Reservation and Fallon Colony in Nevada; and Washoe Tribe of Nevada and California—colonies in Nevada and in California with cultural interests at and near Lake Tahoe.

For the Pyramid Tribe, flow in the Truckee River below Derby Dam and discharge to Pyramid Lake will increase slightly under TROA. With increased flow and the increased capacity to manage Truckee River water, TROA will: Assist in improving lower river water quality; enhance slightly the elevation of Pyramid Lake; enhance the riparian canopy; assist in stabilizing the lower river; enhance recreational opportunities at Pyramid Lake; enhance spawning opportunities for cui-ui and LCT; and enhance river habitat for Pyramid Lake fishes. In addition, the exercise of Truckee River agricultural and M&I water rights below Derby Dam, including those of the Pyramid Tribe, will continue to be satisfied. For Reno-Sparks Indian Colony, TROA will have no effect on the exercise of Truckee River water rights. The Fallon Paiute-Shoshone Tribe will receive a full water supply with the same frequency as at present. TROA will have no effect on flows of the Carson River or on resources of the Washoe Tribe.

The Federal Government negotiated TROA on a government-to-government basis with the Pyramid Tribe, as well as with the States of California and Nevada. As a result, TROA incorporates the principles of sovereignty for each sovereign signatory.

9. Paperwork Reduction Act

This rule does not contain any requirement for information collection by a Federal entity or Federal employee, and a submission under the Paperwork Reduction Act (PRA) is not required.

There are several provisions of TROA which require information to be submitted by the signatory parties to the TROA Administrator. With respect to the Paperwork Reduction Act, it is important to note that the TROA Administrator is not a Federal employee and the Office of the TROA Administrator is not a Federal entity. The signatory parties have agreed to provide to the Administrator the information requested and necessary for proper implementation and administration of TROA. Thus, even though there are requirements to provide information contained in the negotiated TROA and, as required by Congress, are provisions of the rule, the information is not sought or requested by a Federal employee or a Federal agency. Accordingly, the subject provisions are not information collection requirements for purposes of the Paperwork Reduction Act.

10. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. The final EIS/EIR has concluded that implementation of TROA would not significantly affect the quality of the human environment and that no unavoidable adverse impacts are expected as a result of implementing TROA. No mitigation measures are identified or required. Because of exchanges and storage agreements that are components of TROA, a more assured long-term drought water supply for Truckee Meadows would be obtainable, and improved flow conditions would be possible for Pyramid Lake fishes and aquatic species in general. California's allocation of water for M&I purposes in the long run would be assured and could be utilized in the short run to improve environmental conditions in the Truckee River. Compliance with NEPA has been accomplished.

11. Data Quality Act

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

12. Effects on Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

Analysis contained in the final EIS/EIR shows that under TROA, hydropower generation and gross revenues are about 3.5 percent less under wet hydrologic conditions than under current conditions due to the increased conservation and improved water quality applications of TROA; about 6.0 percent less in median hydrologic conditions, and about 55.0 percent greater in dry hydrologic conditions. Net reduced hydroelectric power generation, if any, resulting from implementation of TROA would be compensated consistent with the provisions of the Agreement.

13. Clarity of This Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

a. Be logically organized;

b. Use the active voice to address readers directly;

c. Use clear language rather than jargon;

d. Be divided into short sections and sentences; and

e. Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 419

Agriculture, Endangered and threatened species, Incorporation by reference, Irrigation, Natural resources, Reclamation, Reservoirs, Water resources, Water supply.

Dated: November 28, 2008.

Kameran L. Onley,

Acting Assistant Secretary—Water and Science.

■ For the reasons given in the preamble, the Bureau of Reclamation is adding to title 43 of the Code of Federal Regulations a new part 419 to read as follows:

PART 419—TRUCKEE RIVER OPERATING AGREEMENT

Sec.
419.1 What is the purpose of this part?
419.2 What are the definitions used in this part?
419.3 What general principles govern implementation of the TROA?
419.4 What specific provisions govern operations of the reservoirs?

Authority: Public Law 101–618 (104 Stat. 3289, 3294).

§ 419.1 What is the purpose of this part?

(a) This part satisfies the requirement of Section 205(a)(5) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Settlement Act) that the negotiated agreement for operation of Truckee River Reservoirs be promulgated as a Federal regulation. The Truckee River Operating Agreement (TROA), published in September 2008 by the Bureau of Reclamation, is the agreement negotiated pursuant to Section 205(a) of the Settlement Act and is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 522 (a) and 1 CFR part 51. All approved material is available for inspection 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.* Also, a copy of TROA may be obtained from or inspected at the Bureau of Reclamation, 705 N. Plaza St., Carson City, NV 89701, 775–884–8356, where copies are on file, or at the following Web site: *http://www.usbr.gov/mp/troa/.*

(b) This part implements the Settlement Act by providing for operation of the Truckee River Reservoirs and other reservoirs in a manner that:

(1) Implements California's allocation of Truckee River basin water and the Nevada and California allocations of Lake Tahoe basin water;

(2) Enhances fish, wildlife, and recreational beneficial uses of water in the Truckee River basin;

(3) Carries out the terms, conditions, and contingencies of the Preliminary Settlement Agreement;

(4) Ensures that water is stored in, released from, and passed through Truckee River Reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch Decree and Truckee River General Electric Decree, except for rights voluntarily relinquished by any persons or transferred under State law;

(5) Provides for the enhancement of spawning flows available in the Lower Truckee River for Pyramid Lake Fishes in a manner consistent with the Secretary of the Interior's responsibilities under the Endangered Species Act, as amended;

(6) Satisfies all applicable dam safety and flood control requirements; and

(7) Minimizes the Secretary of the Interior's costs associated with operation and maintenance of Stampede Reservoir.

§ 419.2 What are the definitions used in this part?

Act means the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, title II, Public Law 101–618 (104 Stat. 3289, 3294).

Administrator means the individual appointed in accordance with Sections 2.A.2 through 2.A.3 of the Truckee River Operating Agreement (incorporated by reference at § 419.1).

Preliminary Settlement Agreement means that Agreement between the Pyramid Lake Paiute Tribe and Sierra Pacific Power Company of May 23, 1989, as subsequently modified and ratified by the United States.

TROA means the Truckee River Operating Agreement.

Truckee River basin means the area which naturally drains into the Truckee River and its tributaries and into Pyramid Lake, including Pyramid Lake, but excluding the Lake Tahoe basin.

Truckee River Reservoirs means Boca Reservoir, Prosser Creek Reservoir, Martis Creek Reservoir, Stampede Reservoir, and the storage provided by the dam at the outlet of Lake Tahoe.

§ 419.3 What general principles govern implementation of the TROA?

The following are general operational principles which provide a framework for the Administrator in implementing the TROA (incorporated by reference at § 419.1). These general principles are intended to be consistent with the specific provisions of TROA, but if they conflict with those specific provisions, the specific TROA provisions control. Operations should meet all of the following criteria:

(a) Be conducted, consistent with the TROA and applicable legal requirements, so that the available water supply in the Truckee River basin satisfies, to the maximum extent possible, multiple beneficial purposes, including municipal and industrial, irrigation, fish, wildlife, water quality, and recreation purposes.

(b) Satisfy vested and perfected rights to use the water of the Truckee River and its tributaries, to the extent that water rights are scheduled to be exercised, and to the extent that water is lawfully available. This includes, but is not limited to, the exercise of water rights under the provisions of the Orr Ditch Decree, except as expressly provided in the Settlement Act and the TROA.

(c) Maintain minimum releases and, to the extent practicable consistent with existing water rights and the TROA, maintain enhanced minimum releases, preferred stream flows, and reservoir recreation levels as described in Article Nine of the TROA.

(d) Comply with applicable flood control requirements for Prosser Creek, Stampede, Boca, and Martis Creek Reservoirs.

(e) Comply with all applicable dam safety requirements.

(f) Use the integrated schedules developed by the Administrator through coordination with the scheduling parties.

(g) Respond to declared Federal, State, or local water-related emergencies presenting a clear and immediate danger to public health, life, property, or essential public services involving an upset or other unexpected occurrence to facilities and resources addressed in the TROA.

§ 419.4 What specific provisions govern operations of the reservoirs?

The specific provisions governing operations of the Truckee River Reservoirs and other reservoirs are contained in the TROA (incorporated by reference at § 419.1). The following table shows the location of the provisions in the TROA.

Provisions governing . . .	Are in the following sections of the TROA . . .
Recitals, Definitions	Recitals 1 through 9. Definitions (1) through (106).
Satisfaction of provisions of law, general operational principles, protection of water rights, imported water, remaining water of the Truckee River, and emergencies.	Sections 1.A through 1.F.
Administration	Sections 2.A through 2.C.
Accounting, reporting, forecasting, and monitoring	Sections 3.A through 3.E.
Incorporation of certain provisions of the preliminary settlement agreement	Sections 4.A through 4.G.
Operation of Floriston Rate and Project Water	Sections 5.A through 5.E.
Truckee River and Lake Tahoe Basin Allocation and Accounting	Sections 6.A through 6.E.
Credit Water Establishment, Storage, and Conversion	Sections 7.A through 7.H.
Priorities and Rules for Operations Following Impoundment or Accumulation of Water in Reservoirs	Sections 8.A through 8.V.
Beneficial Uses of Water for Instream Flows and Recreation in California	Sections 9.A through 9.F.
Design of Water Wells in the Truckee River Basin in California	Sections 10.A through 10.H.
Scheduling	Sections 11.A through 11.H.
Effectiveness of the TROA	Sections 12.A and 12.B.
Relation of TROA to Settlement Act, Adjustments to Operations and Changes to Agreement	Sections 13.A through 13.E.
Miscellaneous areas	Sections 14.A through 14.Q.

[FR Doc. E8–28738 Filed 12–4–08; 8:45 am]
BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2300

[LLWO35000.L14300000.PN0000.24–1A]

RIN 1004–AE05

Land Withdrawals; Amendment of Regulations Regarding Emergency Withdrawals

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: This final rule amends the Bureau of Land Management's (BLM) emergency withdrawal regulation to remove language that directs the Secretary of the Interior (Secretary) to immediately make an emergency withdrawal upon notification by one of two congressional committees. Constitutional questions have arisen when this regulation and corresponding provisions in Section 204(e) of the Federal Land Policy and Management Act (FLPMA) have been used by a congressional committee to direct Secretarial action. A district court, however, found it unnecessary to rule on the constitutionality of the committee-directed provision in Section 204(e) of FLPMA because the Secretary had bound himself through regulations regarding special action on emergency withdrawal. This final rule removes from regulations only the provision that has been the subject of past constitutional questions.

DATES: This rule is effective January 5, 2009.

FOR FURTHER INFORMATION CONTACT: For information on the substance of the rule, please contact Jeff Holdren at 202–452–7779 or Vanessa Engle at 202–452–7776. For information on procedural matters, please contact Jean Sonneman at 202–785–6577. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individuals. FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of the Final Rule
III. Discussion of Public Comments
IV. Procedural Matters

I. Background

Section 204(e) of FLPMA provides that the Secretary of the Interior shall withdraw lands immediately upon a determination, either by the Secretary or by either of two committees of the Congress, that an emergency exists and that extraordinary measures need to be taken to protect natural resources or resource values that otherwise would be lost. The congressional notification authority may be exercised by the Committee on Natural Resources of the House of Representatives or by the Committee on Energy and Natural Resources of the Senate. 43 U.S.C. 1714(e). The BLM's regulations at 43 CFR 2310.5 state that the Secretary shall immediately withdraw lands when the Secretary determines, or when the Secretary is notified by a Committee, that an emergency exists and that extraordinary measures must be taken to protect natural resources or resource values that would otherwise be lost.

Over the years the Secretary has rarely invoked his authority to make an emergency withdrawal. In addition, the committee-directed emergency withdrawal provision has been controversial; the constitutionality of Section 204(e) has been the subject of litigation.

In 1991, the BLM published a proposal to remove all regulations in 43 CFR part 2300 related to emergency withdrawals (56 FR 59914 (Nov. 26, 1991)). In addition to raising the constitutional issue, the preamble for that proposed rule included an explanation that the first sentence of Section 204(e) is redundant, since public lands can be protected rapidly through the normal exercise of the general withdrawal authority, without invoking FLPMA Section 204(e). That proposed rule was never finalized, and it was withdrawn from the Semi-Annual Regulatory Agenda in 1993.

The BLM published another proposed rule on October 10, 2008 (73 FR 60212 (2008)) that would remove all regulations that provide for emergency withdrawals. The rationale for that proposed rule was the same as that for the 1991 proposal—i.e., that the existing regulations are redundant and that the committee-directed withdrawal presents constitutional issues. The public comment period on the proposed rule closed on October 27, 2008.

We received approximately 800 comments during the comment period. All comments were carefully reviewed. More than 90 percent of the comments were form letters or duplicates, some of which opposed the proposed rule, and some of which supported it. All relevant comments are discussed below.

In response to many of these comments and after additional internal deliberation, we are now promulgating a final rule that, instead of removing the BLM's regulations regarding emergency withdrawals in their entirety, removes

only that portion of 43 CFR 2310.5 that implements the committee-directed withdrawal provision of Section 204(e) of FLPMA. As set forth more fully below, the BLM continues to believe that the Secretary-initiated emergency withdrawal regulations are redundant and unnecessary. However, in response to public comments desiring minimal changes to the Secretary's regulatory authority, the BLM has decided not to amend the regulations as they relate to the Secretary's authority to make emergency withdrawals. In addition to removing language pertaining to committee-directed withdrawals, this rule makes clarifying changes that do not affect the substance of the emergency withdrawal regulation (43 CFR 2310.5).

II. Discussion of the Final Rule

The proposed rule would have removed the BLM's emergency withdrawal regulations in their entirety, although the statutory authority for those withdrawals would have remained in place. Part of the rationale for the proposed rule was that the emergency withdrawal process is redundant, as the BLM can protect public lands quickly via the segregative effect contained in the conventional withdrawal process found in Section 204 of FLPMA and in the BLM's regulations at 43 CFR part 2300.

More specifically, the BLM's view is that the conventional withdrawal process results in the protection of lands quickly and just as effectively as the emergency withdrawal process. Conventional procedures enable the BLM to protect public lands, without substantial delay, for as long as 2 years by requiring that the BLM publish a **Federal Register** notice of the filing of a withdrawal application or proposal. Such publication temporarily segregates the public lands from settlement, sale, location, or entry under the public land laws, including the mining laws, to the extent specified in the notice. 43 CFR 2310.2(a). The 2-year segregation period ends when an order is published withdrawing the lands, or when the Secretary denies or cancels a withdrawal application. 43 CFR 2310.2–1.

If a petition seeks an emergency withdrawal, the petition is filed simultaneously with an application for withdrawal. 43 CFR 2310.1–3(d). If the Secretary approves a petition for an emergency withdrawal, the publication and notice provisions pertaining to emergency withdrawals are applicable. 43 CFR 2310.1–3(e). Those provisions, at 43 CFR 2310.5, include the immediate issuance of a withdrawal order signed by the Secretary which is effective when signed, does not exceed 3 years in duration, and may not be extended by the Secretary. 43 CFR 2310.5(a). The Secretary also must send a notice of the emergency withdrawal to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate the same day it is signed, and send a report to both committees within 90 days. 43 CFR 2310.5(b) and (c).

The 2-year segregation that occurs immediately upon notice of a conventional withdrawal proposal or application has the same effect as the first 2 years of a 3-year emergency withdrawal. However, the conventional process permits the extension of a withdrawal that is granted during the 2-year segregative period, if warranted by the purpose for which the withdrawal was first made. 43 CFR 2310.4(a). In addition, public notice and opportunities for comment under conventional withdrawal procedures (43 CFR 2310.3–1(b)(2)(iv)–(v) and (c)) do not occur for emergency withdrawals. Unlike the emergency process, the conventional process ensures that the BLM casts a wide net for information and takes appropriate account of, and considers the interests of, persons with legally recognized interests in land or other natural resources. An additional difference between segregation and an emergency withdrawal is that along with the notice to Congress, the Secretary must also undertake certain steps set forth at 43 U.S.C. 1714(c)(2) within 3 months after an emergency withdrawal is made. Those steps are not required for segregation. An emergency withdrawal may not be extended by the Secretary. 43 CFR 2310.5(a). Lands involved in an emergency withdrawal may continue to be withdrawn past the expiration of the emergency withdrawal only via the conventional withdrawal procedures. *Id.* Thus, in sum, the emergency withdrawal process is unnecessary because of the segregative effect provided by the conventional withdrawal process.

As set forth more fully in Part III below, many comments opposed the proposed rule out of a concern that the BLM was removing the authority granted to it by Congress to protect public lands on an emergency basis and that the emergency withdrawal regulations were not redundant. The BLM does have a strong desire to preserve its regulatory authority to protect public lands and continues to believe that such protection can occur quickly and just as effectively through the conventional process, with the added benefit of providing more opportunity for the public to participate. However, the assertion of redundancy did not resonate with some of the commenters. Therefore, the BLM has decided not to remove the emergency withdrawal regulations in their entirety. After today's rule becomes effective, the Secretary's regulatory authority to make emergency withdrawals (or any withdrawals, for that matter) remains unchanged. The regulations will continue to provide a procedure whereby the Secretary can protect natural resources or other values quickly via either the conventional or emergency withdrawal process.

The rule, instead, removes the committee-directed withdrawal provision of the regulation. Constitutional questions about Section 204(e) have arisen in some instances when a congressional committee has directed the Secretary to make an emergency withdrawal. By removing the corresponding provision in the regulation, a potential impediment to a judicial resolution of the issue of the constitutionality of the statutory provision is removed. As noted above, the Secretary's ability to protect lands via the conventional and emergency withdrawal process will remain unchanged by this rule.

Two previous committee notices (both from the House Committee on Interior and Insular Affairs) led to litigation in which the constitutionality of Section 204(e) was challenged. See *Pacific Legal Foundation* v. *Watt,* 529 F. Supp. 982 (D. Montana 1981); *National Wildlife Federation* v. *Watt,* 571 F. Supp. 1145 (D.D.C. 1983) (granting preliminary injunction); *National Wildlife Federation* v. *Clark,* 577 F. Supp. 825 (D.D.C. 1984) (granting summary judgment).

In *Pacific Legal Foundation,* the Secretary and other parties argued that FLPMA Section 204(e) was unconstitutional because its application through unilateral action by the committee: (a) Violated the separation of powers doctrine; (b) delegated executive power to the committee; (c) violated the requirement of bicameralism (i.e., legislation must be approved by both Houses of Congress); and (d) deprived the President of his veto power (known as the presentment requirement). At the time of that case, the U.S. Court of Appeals for the Ninth Circuit had set aside, as unconstitutional, a statutory provision that authorized either House of Congress to execute a legislative veto over decisions made by the Attorney General. *Chadha* v. *Immigration and Naturalization Service,* 634 F.2d 408 (9th Cir. 1980). Relying in part on that

decision, the U.S. District Court in Montana held that, but for one distinguishing feature of Section 204(e), the Ninth Circuit's ruling in *Chadha* would have ''compelled'' the district court to declare Section 204(e) unconstitutional. *Pacific Legal Foundation* v. *Watt,* 529 F. Supp. 982, 1002 (D. Montana 1981). According to the district court, the saving feature of Section 204(e) was Secretarial discretion to determine the scope and duration of an emergency withdrawal. *Id.* at 1000.

Subsequently, the Supreme Court affirmed the Ninth Circuit's decision in *Immigration and Naturalization Service* v. *Chadha,* 462 U.S. 919 (1983). The breadth of the Supreme Court's ruling casts doubt on the validity of the Montana court's decision. For example, the Court stated, ''Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.'' 462 U.S. at 953 n.16.

The second case in which the constitutionality of FLPMA Section 204(e) was at issue, *National Wildlife Federation* v. *Watt,* began when plaintiffs brought suit against the Secretary seeking review of a notice to receive and accept bids for the sale of coal leases. The plaintiffs argued that the notice was in contravention of a resolution adopted by the Interior and Insular Affairs Committee of the House of Representatives, directing the Secretary to withdraw certain lands from coal leasing temporarily. The court held that a forced withdrawal, like the legislative veto that was invalidated by the Supreme Court in *Chadha,* would probably be held to be legislative in character, since it alters the legal rights and duties of the Secretary of the Interior. Accordingly, the court found that the plaintiffs' attempt to distinguish Section 204(e) from an invalid legislative-veto provision, on the grounds that the withdrawal was temporary, was unlikely to succeed. *National Wildlife Federation* v. *Watt,* 571 F. Supp. 1145, 1155 (D.D.C. 1983). However, the court found that the plaintiffs were likely to prevail on the merits of their claim that the emergency-withdrawal regulation (43 CFR 2310.5) was binding on the Secretary irrespective of the validity of Section 204(e), since no action had been taken to remove the regulation through notice-and-comment procedures. 571 F. Supp. at 1158. In a subsequent decision granting the plaintiffs' motion for summary judgment, the court found that it was unnecessary to reach the constitutional question, and instead required that the Secretary ''honor his own regulation unless and until he has rescinded or amended it after an appropriate rulemaking proceeding, or until the Committee has vacated its Resolution.'' *National Wildlife Federation* v. *Clark,* 577 F. Supp. 825, 828–29 (D.D.C. 1984).

Thus, whenever a congressional committee directs the Secretary to withdraw lands immediately, issues with regard to the constitutionality of that action are likely to arise. Such issues do not arise when the Secretary initiates and utilizes his conventional or emergency withdrawal authority. This rulemaking is not a forum for resolving the validity of the committee-directed withdrawal provision of Section 204(e). However, in view of the district court's ruling in *National Wildlife Federation* v. *Clark,* the existing committee-directed provision of the emergency-withdrawal regulation may be an impediment to resolving that question in the future in an appropriate forum. Further, as a matter of policy, the BLM does not wish to implement a statute of such questionable constitutionality. However, the statutory language in FLPMA Section 204(e) for a committee-directed emergency withdrawal remains unchanged by this rulemaking and does remain in effect. We should note that we received a June 25, 2008 communication from the House Committee on Natural Resources, citing the committee-directed provision in FLPMA Section 204(e) and the BLM's corresponding regulation at 43 CFR 2310.5. As discussed above, this rule is prospective and only affects the regulation, not the statute. Thus, this rule has no impact on the June 25, 2008 communication.

In addition to removing language pertaining to committee-directed withdrawals, this rule makes clarifying changes that do not affect the substance of the emergency withdrawal regulation.

This final rule is a ''logical outgrowth'' of the proposed rule and the public has therefore had adequate notice and opportunity for comment. The proposed rule would have eliminated all of the emergency withdrawal regulations, including the portion implementing the committee-directed withdrawal provision of FLPMA Section 204(e) that is removed by today's rule. Today's rule, in response to comments and upon further deliberation, implements a portion of what was proposed. The public has therefore had adequate notice and opportunity to comment on the removal of the committee-directed withdrawal provision of the regulation.

III. Discussion of Public Comments

Difficulty Submitting Comments

One comment complained of trying for 3 days to fax comments from several locations, but was never able to get a fax through, and remarked that it was convenient for the BLM to be able to say that they received little public comment on this matter.

This commenter successfully submitted comments by one of the methods provided for in the proposed rule: Hand-delivery, postal mail, or posting on the Internet at regulations.gov. We believe that the commenter received a BLM fax number from an organization that, at our invitation, had faxed a copy of a letter to us. Subsequently, the organization distributed the fax number widely to prospective comments. When we began to receive comments by fax, we advised the organization that we normally do not accept comments that are sent by fax. A representative of that organization said a message would be sent that comments should not be submitted by fax.

In any event, while we normally do not accept faxed comments and faxing was not one of the methods for submitting comments provided for in the proposed rule, in the circumstances of this rulemaking we have included paper copies of all the faxed comments in the administrative record and have considered the substance of the comments in our deliberations. We will also post representative samples of repeated faxed comments, as well as unique faxed comments, on regulations.gov.

Length of the Comment Period

Several comments indicated that the comment period should be longer than the 15 days provided in the proposed rule. Generally, those comments claimed that Executive Order 12866, Section 309(e) of FLPMA, or the Administrative Procedure Act (APA) require longer periods. They also claimed that the fact that the public already had a chance to comment on the 1991 proposed rule was not an adequate justification for the 15-day comment period. In addition, two organizations sent letters requesting that the comment period be extended. Our letters denying those organizations' requests are posted at regulations.gov.

For several reasons, these comments have not been adopted and the comment period was not extended. First, as discussed in the preamble to the proposed rule, Executive Order 12866 does not apply because the Office of Management and Budget (''OMB'') has

determined that the rule is not ''significant'' as defined in that Order. More specifically, one comment stated that the rule is ''significant'' and the comment period should be extended because the rule may adversely affect the environment (including historical, cultural, and governmental resources) across the West. The comment specifically referenced a June 25, 2008 communication from the Chairman of the House Natural Resources Committee directing the Secretary to withdraw certain lands surrounding the Grand Canyon from mineral location and entry.

As explained in the preamble to the proposed rule, segregation of lands provided for in the conventional withdrawal process is equally as effective to protect resources as are emergency withdrawals. Moreover, contrary to the comments' suggestion, the rule does not have any on-the-ground effects. The rule does not open or close any lands to or from any public land laws; rather, this rule simply removes the procedure for a committee-directed emergency withdrawal of lands from the BLM's regulations. This rule is prospective only and will have no effect on the June 25, 2008 communication from the House Committee Chairman. Several commenters appear to believe that this rule will have environmental effects because an as-yet-unidentified tract of land may not be withdrawn in the future. But the amendment of the regulation to remove the committee-directed withdrawal portion is not tied to a particular tract of land and to link this rule with effects that may occur in the future is purely speculative. In any event, as explained above, we have chosen not to eliminate the Secretary-driven emergency withdrawal process from the regulations. Therefore, the Secretary's authority to make emergency withdrawals remains unchanged by this rule.

Second, the APA does not prescribe a minimum comment period for informal rulemaking. The BLM believes a reasonable amount of time has been provided in this instance because the proposed rule is not complex. The proposed change removes regulatory text that sets forth a process that is articulated in FLPMA. The rule does not alter the relevant FLPMA language. Finally, the BLM believes the comment period was also reasonable in light of the 1991 rulemaking. At that time, the public had the opportunity to comment on the 1991 proposed rule. Those comments have been reviewed as part of this rulemaking. The substance of the proposed rule was identical to the rule proposed in 1991, and the issues remain the same. Furthermore, this final rule only implements a portion of that proposed rule. For these reasons, we also disagree with the comments indicating that the 1991 process is irrelevant.

The Constitutional Issue

Some comments not in favor of the proposed rule argued that the statute was not unconstitutional and that the constitutional issue was not a valid reason for the proposed rule. In contrast, some comments in favor of the rule stated that Section 204(e) is unconstitutional. Some of those comments noted that the Department of Justice's Office of Legal Counsel (OLC) issued an opinion in 1983 stating that the committee-directed withdrawal provision of FLPMA Section 204(e) is unconstitutional.

The BLM disagrees that the recurring constitutional questions that have been raised during the history of these regulations is not a valid reason for this rule. History has demonstrated that whenever a congressional committee directs the Secretary to withdraw lands immediately, issues with regard to the constitutionality of that action are likely to arise. The committee-directed withdrawal provision of the regulation implements a portion of FLPMA Section 204(e) that is of questionable constitutionality under *Chadha,* 462 U.S. 919, as a committee-directed withdrawal arguably alters the legal rights and duties of the Secretary of the Interior. This rulemaking is not the forum to finally resolve that issue. It is a decision for the courts. However, as noted above, under a DC District Court decision, the regulation itself is a potential impediment to judicial resolution of that issue. See *Clark,* 577 F.Supp. at 828–29. The BLM wishes to remove the regulation so as to avoid implementing a statute that is of such questionable constitutionality, and to remove a potential impediment to a future Court decision on that issue. Again, however, we note that this rule would have no effect on the relevant statutory language. The BLM believes that without the change, the uncertainty surrounding the constitutionality of the statute and the respective roles of the Legislative and Executive Branches will continue.

Some comments stated that the Executive Branch has the duty to faithfully execute the laws and should therefore not challenge the constitutionality of a statute. They also stated that the BLM should leave the committee-directed emergency withdrawal provisions in place in order to maintain a harmonious relationship with Congress.

The BLM disagrees with these comments. First, in this rulemaking the BLM is removing a potential impediment to judicial resolution of the constitutional issue based on past litigation on the provision, and is not making a direct constitutional challenge to the statute. Second, the Executive Branch has in the past taken the position that a statute is unconstitutional. In fact, that was exactly the position of the Executive Branch in *Chadha,* in which the Supreme Court agreed with the executive that the statute in that case was unconstitutional. As for maintaining a harmonious relationship with Congress on this topic, the BLM believes that by promulgating this final rule and thus potentially facilitating future resolution of this issue, there will be an opportunity to establish clearer expectations regarding committee-directed emergency withdrawals.

Redundancy

The BLM's view is that the conventional withdrawal process results in the protection of lands quickly and just as effectively as the emergency withdrawal process. This is because the conventional process authorizes the BLM to quickly segregate the lands from the public land laws, including the mining laws, while the withdrawal is considered. Segregation has the same practical effect as a withdrawal. Thus, natural resource values can be protected quickly by way of the conventional withdrawal process. In addition, the conventional withdrawal process is preferred because, unlike the emergency withdrawal process, it provides for substantial public participation and input.

Several comments disagreed that the emergency withdrawal regulations were redundant, stating that the committee-directed withdrawal provision is not part of the conventional withdrawal process, and segregation under conventional withdrawal procedures does not provide the same level of protection as an emergency withdrawal. One comment argued that the two procedures do not provide the same level of protection because validity exams (i.e., examinations by the appropriate agency to determine the validity of a particular mining claim) are only required on withdrawn lands and are at the agency's discretion on segregated lands. Another comment stated that the conventional withdrawal procedures and emergency withdrawal procedures are not redundant because the Secretary must seek approval to

conventionally withdraw lands under the jurisdiction of another agency, while there is no such requirement for an emergency withdrawal. Another comment stated that the rule creates an inconsistency between the statute and the regulations and confuses Congress and the public and that the removal of the emergency regulations will seriously undermine the capacity of the Federal government to act quickly in extraordinary circumstances that threaten irreplaceable public resources. Other comments stated that the Secretary should not voluntarily remove one of the tools granted to him by Congress to protect public lands.

Although the BLM disagrees with the conclusions of those comments they do highlight an area of possible confusion. The BLM agrees that the committee-directed withdrawal provision of the regulation (43 CFR 2310.5) is not redundant in the sense that there is no analogous provision in the conventional withdrawal process. However, the same goal can be met by the Secretary; that is, he can ''preserve values that might otherwise be lost'' on an emergency basis via segregation. The remainder of the emergency withdrawal regulation (i.e., the emergency withdrawals made by the Secretary without direction from a congressional committee) is clearly redundant because of the BLM's authority to segregate the lands during the conventional withdrawal process. As pointed out above, segregation does in fact have the same effect as an emergency withdrawal whether the Secretary is reacting to a committee-directed withdrawal or on his own: it closes the specified land to application of the mining laws in the particular area at issue to the extent specified. See, e.g., Preamble to the BLM's final rule amending mining regulations, 65 FR 69998, at 70026 (2000) (''there is no difference between 'segregated' lands and 'withdrawn' lands during the period of the segregation''). In other words, if the Secretary believes that an emergency situation exists, he can protect the lands quickly and effectively through the conventional withdrawal process (because the lands will be segregated while the withdrawal is considered) as he could by invoking his authority to make an emergency withdrawal. Of course, a segregation is limited to 2 years, while an emergency withdrawal can be up to 3 years. However, the protection of the lands at the end of the segregation period can be continued if the lands are in fact withdrawn. In addition, the validity examination process is in fact applicable to both withdrawn and segregated lands. As pointed out in the preamble to the mining regulations referenced above, the BLM will examine the purpose of the segregation to determine if a validity exam is necessary on segregated lands; and, if so, perform that validity exam. 65 FR at 70026. A determination of invalidity has the same effect on both withdrawn and segregated lands.

Finally, for similar reasons, the BLM disagrees with the comment stating that the two processes are not redundant because the Secretary must seek approval of conventional withdrawals on lands under another agency's jurisdiction. This comment compares the conventional withdrawal to an emergency withdrawal. The proper comparison is between an emergency withdrawal and segregation, which is part of the conventional withdrawal process. The Secretary need not seek the approval of another agency to segregate the lands while a conventional withdrawal is considered. Thus, just as he can through the emergency withdrawal process, the Secretary, through segregation, can remove lands from the operation of the public land laws on a temporary emergency basis without the consent of any other agency.

However, although the BLM continues to believe that it can protect natural resource values quickly and effectively via the conventional withdrawal process, in response to the concerns raised by these comments and a desire to make minimal changes to the regulations, we have decided not to remove the regulations in their entirety. Thus, today's rule has no effect on the regulations dealing with the Secretary's authority to make emergency or conventional withdrawals. Both of these regulatory tools will remain at the Secretary's disposal.

General Environmental Concerns

Some comments opposed to the rule expressed environmental concerns about mining and specifically about opening Federal lands to mining. Some of these comments specifically referenced uranium mining near Grand Canyon National Park and a June 25, 2008 communication from the Chairman of the House Natural Resources Committee directing the Secretary to withdraw certain lands surrounding the Grand Canyon from mineral location and entry under FLPMA Section 204(e).

The BLM appreciates the concerns raised in these comments but disagrees that they are relevant to this rulemaking. First, the rule merely removes one regulatory process in order to remove a potential barrier to judicial resolution of FLPMA Section 204(e)'s constitutionality. The rule does not open any lands to mining. Further, the rule is prospective only and therefore does not have any effect on the June 25, 2008 communication relating to lands surrounding the Grand Canyon. Finally, as discussed more fully above, the final rule leaves in place the regulations authorizing the Secretary to, on his own initiative, effect an emergency withdrawal to protect natural resource or other values that might otherwise be lost. Amending the regulation to remove the portion addressing committee-directed withdrawals does not affect the Secretary's ability to protect lands, including park lands, on an emergency basis either through an emergency withdrawal or through the conventional withdrawal process.

National Environmental Policy Act

Some comments stated that the proposed rule violated the National Environmental Policy Act (NEPA). Several comments stated that the Categorical Exclusion invoked in the proposed rule (516 DM, Chapter 2, Appendix 1, CX 1.10) is not applicable and therefore an Environmental Assessment or Environmental Impact Statement is required in order to comply with NEPA. Specifically, comments stated that the elimination of the committee-directed withdrawal provision is not ''of an administrative, financial, legal, technical, or procedural nature'' because it would have ''on-the-ground effects.'' In this regard, several comments referred to the June 25, 2008 communication from the Chairman of the House Natural Resources Committee directing the Secretary to make a withdrawal of certain lands surrounding the Grand Canyon from mineral location and entry and claimed that those lands would be affected by the removal of this regulation. Comments also claimed that the effects are not ''too broad, speculative, or conjectural to lend themselves to meaningful analysis'' because of environmental impacts from mining exploration or development in areas that would be withdrawn or segregated under FLPMA Section 204(e) and the implementing regulations. Finally, one comment stated that numerous activities that would occur in withdrawn or segregated areas, such as mining exploration activities less than 5 acres, would not later be subject to NEPA requirements.

The categorical exclusion is applicable to this rule. First, we note that the categorical exclusion at issue has been amended effective November 14, 2008, to exclude from NEPA review:

Policies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature; *or* whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

73 FR 61292, 61319 (Oct. 15, 2008); 43 CFR 46.210 (emphasis added). As explained in the preamble to the rule amending the categorical exclusion, the exclusion was modified in error in 2004 to include an ''and'' after the first clause. The recent rulemaking corrects that error by inserting the word ''or.'' Thus, if this rule meets either the first or second part of the categorical exclusion, the exclusion will apply.

Second, this rule is of both a legal and procedural nature. As explained above, it does not have any on-the-ground effects. The rule does not open or close any lands to or from any public land laws; rather, this rule simply removes one procedure for the withdrawal of lands from the BLM's regulations. Moreover, this rule is prospective only and will have no effect on the June 25, 2008 communication from the House Committee Chairman. Several comments appeared to believe that the proposed rule will have environmental effects because an as-yet-unidentified tract of land may not be withdrawn in the future. But the removal of the committee-directed provision of the emergency withdrawal regulation is not tied to a particular tract of land and to link this rule with effects that may occur in the future is purely speculative.

One comment also stated that even if the categorical exclusion applies by its terms, extraordinary circumstances exist that preclude its use. More specifically, that comment stated that extraordinary circumstances exist because the lands covered by the June 25, 2008 communication contain properties eligible for listing under the National Historic Preservation Act (NHPA), including Indian Sacred Sites, and are in close proximity to the Grand Canyon. Thus, the comment claimed that two of the BLM's extraordinary circumstances apply: (1) Actions that may have significant impacts on properties listed or eligible for listing under the NHPA and (2) actions that may have significant impacts on natural resources and unique geographic characteristics.

None of the extraordinary circumstances applies to this rule. As noted above, this rule in no way affects the June 25, 2008 communication relating to lands surrounding the Grand Canyon. This rule removes the committee-directed emergency withdrawal procedure from the BLM's regulations. While mining in a particular area may affect properties listed or eligible for listing under NHPA, or might affect the natural and cultural resources or sites present in that area, this rule does not open or close any lands to the operation of the public land laws, including mining laws. Therefore, the comment's statement that the rule will impact any particular area, including the lands covered by the June 25, 2008 communication, is incorrect.

Endangered Species Act

Some comments stated that the proposed rule violated the Endangered Species Act (ESA) because the BLM did not enter into consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding the rule. One of the comments stated that mineral operations ''implicated'' by the promulgation of the rule ''may affect'' threatened or endangered species. The comment again referred to the June 25, 2008 communication as an example.

Consultation under the ESA is not required for two reasons. Under the ESA and its implementing regulations, the consultation requirement only applies to ''actions'' of Federal agencies, which are further defined as all ''activities or programs'' authorized, funded, or carried out by an agency. 15 U.S.C. 1536; 50 CFR 402.02. Here, amendment of the regulations to remove a certain procedure (i.e., committee-directed emergency withdrawals) is not an ''activity or program'' of the BLM; it is simply removing a certain procedure. While the ESA regulations include ''promulgation of regulations'' in the definition of ''action,'' this does not mean that every rule necessitates consultation. Here, the amendment of the emergency withdrawal regulation to remove the portion dealing with committee-directed withdrawals does not authorize, fund, or carry out an activity or program. As such, the ESA does not apply. Second, even if the amendment of the regulation is an ''action'' for purposes of Section 7 of the ESA, it will have no effect on listed species or designated critical habitat because the removal of this procedure from the BLM's regulations will not cause any environmental effects whatsoever. As explained above, this rule does not open any lands to mining. Nor does the rule alter the Secretary's authority to protect lands and resources through an emergency or conventional withdrawal. As such, this rule will not cause any direct effects or any indirect effects that are reasonably certain to occur. See 50 CFR 402.02.

National Historic Preservation Act

Some comments stated that the BLM is required to conduct consultation under the National Historic Preservation Act (NHPA) with affected Native American Tribes because Native American sacred, cultural and historical sites and land would potentially be affected by the rule.

The consultation requirement of the NHPA applies only to ''undertakings'' of a Federal agency, which are defined as a ''project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.'' 36 CFR 800.16(y). The amendment of the emergency withdrawal regulation to remove that portion dealing with committee-directed withdrawals is not a ''project, activity, or program'' as defined by the regulations of the Advisory Council on Historic Preservation. Accordingly, the Act does not apply.

FLPMA

Some comments stated that the proposed rule violates FLPMA 204(e) because FLPMA directs the Secretary to promulgate rules and regulations to implement the Act and the Act contains an emergency withdrawal provision. One of these comments also stated that the proposed rule does not comply with the FLPMA requirement to prevent ''unnecessary or undue degradation'' of the public lands.

The rule does not violate FLPMA. FLPMA does not require that the BLM issue regulations to implement each and every provision of FLPMA; instead, it requires the Secretary to issue regulations that are necessary to implement the Act. 43 U.S.C. 1733(a). As explained herein and in the proposed rule, the BLM does not believe that the emergency withdrawal regulations are necessary to implement the Act. However, although the BLM continues to believe that the conventional withdrawal process can provide effective protection to resources or resource values on an emergency basis, we have decided to leave in place the regulations dealing with the Secretary-initiated emergency withdrawal process. The comment has not explained how the rule would cause ''unnecessary or undue degradation,'' and no such causal link can be made between the rule and any on-the-ground effects.

Keeping Lands Open to Mining

Some commenters supported the proposed rule because they believe it will open lands to mining. For example, one comment supported the proposed

rule as a means of ensuring the reasonable entry of mining on the plateaus on the north and south side of the Grand Canyon. Similarly, some comments were in favor of the proposed rule because they have a vested interest in ensuring that lands remain open to mineral entry, and were of the view that the rule will protect access to mineral deposits on public lands open to mineral entry, and protect the right to use and occupy those lands for prospecting, mining, and processing operations and all uses reasonably incident thereto. These comments also stated that it is important for the United States to utilize and produce domestic sources of the minerals required to maintain our economy, our national security and our standard of living. Some of these comments stated that for national security and national economic security reasons, withdrawal should always be the last approach for protection of public lands.

Although the BLM appreciates the concerns raised by these comments, this rule does not open or close any lands to the operation of the public land laws, including mining laws. Nor does the rule protect access to mineral deposits or the right of claimants to prospect or mine. As explained above, this rule merely amends the emergency withdrawal regulation to remove that portion dealing with the committee-directed emergency withdrawals. Through this rule, the BLM is not taking any position on when a withdrawal—emergency or otherwise—is appropriate.

Opportunity for Public Input

Some comments which supported the proposed rule stated that removal of the emergency withdrawal regulations is long overdue. They stated that the emergency withdrawal process, unlike the conventional withdrawal process, does not provide public notice and opportunities for comment by people who own or have other interests in the land and its natural resources and that select congressional committees should not be allowed to bypass or restrict the valuable input of those affected, and leave them with little recourse.

The BLM agrees that the conventional withdrawal process provides more opportunities for public input than does the emergency withdrawal process and that this may be a reason to use conventional withdrawal procedures instead of the emergency withdrawal process. Although today's rule does not remove the emergency withdrawal regulations in their entirety as proposed, it does not affect the BLM's ability to choose the conventional procedure to protect lands and values quickly so as to allow for greater public input. The Secretary and the BLM are free, as they have been in the past, to choose either procedure.

Executive Order 13132, Federalism

Some comments objected to the finding in the proposed rule that this rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the levels of government. One comment stated that the rule will limit the ability of the national Legislative Branch to directly represent the desires of the states and their citizens. Another commented that states are well situated—perhaps better than distant Federal officials—to recognize that an emergency situation exists regarding resource values on Federal lands within a state.

The BLM disagrees with this comment. The committee-directed emergency withdrawal provision in FLPMA itself (Section 204(e)) is not removed by operation of this rule. Moreover, although removal of the regulation providing for a committee-directed withdrawal may potentially affect relations between branches of the Federal Government, it does not have a substantial direct effect on the relationship between the Federal Government and the states.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Some comments objected to the finding in the proposed rule that tribal governments will not be unduly affected by this rule, and claim that effects on tribal governments would have been revealed if the BLM had consulted with tribes under the National Historic Preservation Act.

The BLM disagrees with these comments. As explained above, the consultation requirement of the NHPA applies only to ''undertakings'' of a Federal agency, which are defined as a ''project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.'' 36 CFR 800.16(y). The removal of the committee-directed emergency withdrawal provision of the regulation is not a ''project, activity, or program'' as defined by the regulations of the Advisory Council on Historic Preservation. Moreover, this rule has no bearing on trust lands, or on lands for which title is held in fee status by Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs. Thus, this rule will not result in significant changes to BLM policy, and tribal Governments will not be unduly affected by this rule.

Executive Order 13352, Facilitation of Cooperative Conservation

One comment objected to the finding in the proposed rule that this rule facilitates cooperative conservation by announcing a policy of using the conventional withdrawal process, which provides for public participation. The comment stated that the proposed rule eliminates a path to public involvement through the Legislative Branch.

Although the BLM disagrees with this comment, it no longer is announcing a policy to use the conventional process as opposed to the emergency withdrawal process. As discussed above, this final rule does not amend the regulations relating to the Secretary's authority to make an emergency withdrawal. The Secretary may choose either the conventional or emergency withdrawal process. Moreover, the committee-directed emergency withdrawal provision in FLPMA itself (43 U.S.C. 1714(e)) is not removed by operation of this rule. Also, this rule does not in any way affect Congress's ability to pass legislation to withdraw lands. Thus, this rule does not impede the facilitation of cooperative conservation. This rule takes appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decisionmaking process; and provides that the programs, projects, and activities of the agency are consistent with protecting public health and safety.

IV. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not a ''significant regulatory action'' within the meaning of Executive Order 12866. Some comments expressed disagreement with this determination. This comment does not affect the validity of this rule, since Executive Order 12866:

> Is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

E.O. 12866, section 10. The determination of the OMB reflects the following findings:

- This rule will not have an annual effect on the economy of $100 million or more, and will not 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.
- This rule will not create any serious inconsistency or otherwise interfere with any action taken or planned by another agency.
- This rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients.
- This rule will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

National Environmental Policy Act

This rule is categorically excluded from environmental review under Section 102(2)(C) of the National Environmental Policy Act (NEPA). In accordance with the Department's NEPA regulations (43 CFR 46.205; 43 CFR 46.210) this categorical exclusion excludes from NEPA review:

> Policies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by case.

This rule is of a legal and procedural nature and is covered by the categorical exclusion. Moreover, no extraordinary circumstances exist that would prevent use of the categorical exclusion. See 43 CFR 46.205; 43 CFR 46.215.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 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 BLM has determined that this rule removing the provision for committee-directed emergency withdrawals will not have a significant economic impact on a substantial number of small entities under the RFA.

Small Business Regulatory Enforcement Fairness Act

This rule is not a ''major rule''' as defined at 5 U.S.C. 804(2) because it will not have an annual effect on the economy greater than $100 million; it will not result in major cost or price increases for consumers, industries, government agencies, or regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on state, local, or tribal governments or the private sector, in the aggregate, of $100 million or more per year; nor does the rule have a significant or unique effect on state, local, or tribal governments. The rule would impose no requirements on these entities. The changes in this rule would not have effects approaching $100 million per year on the private sector. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Executive Order 12630, Government Action and Interference With Constitutionally Protected Property Rights (Takings)

This rule is not a government action capable of interfering with constitutionally protected property rights. Therefore, the BLM has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The BLM has determined that this rule does not have a substantial direct effect on the relationship between the Federal Government and the states. Therefore, in accordance with Executive Order 13132, the BLM has determined that this rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

The BLM has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

The removal of the committee-directed portion of the emergency-withdrawal regulation is not a ''project, activity, or program'' as defined by the regulations of the Advisory Council on Historic Preservation. Moreover, this rule has no bearing on trust lands, or on lands for which title is held in fee status by Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs. Therefore, in accordance with Executive Order 13175, the BLM has determined that this rule will not result in significant changes to BLM policy and that tribal Governments will not be unduly affected by this rule.

Information Quality Act

In developing this rule, the BLM did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554.).

Executive Order 13211, Effects on the Nation's Energy Supply

This rule has no implications under Executive Order 13211.

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM has determined that this rule is administrative in content, involving only changes affecting issuance of emergency withdrawals. Secretarial authority for making conventional and emergency withdrawals remains unchanged by this rule. Thus, this rule does not impede the facilitation of cooperative conservation; takes appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decision-making process; and provides that the programs, projects, and activities are consistent with protecting public health and safety.

Paperwork Reduction Act

The BLM has determined that this rule does not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Authors

The principal authors of this rule are Jeff Holdren and Vanessa Engle of the Division of Lands, Realty, and Cadastral Survey, BLM Washington Office (WO), with assistance from the Division of

Regulatory Affairs (WO) and the Office of the Solicitor, Department of the Interior.

List of Subjects in 43 CFR Part 2300

Administrative practice and procedure, Electric power, Federal Energy Regulatory Commission, Public lands—withdrawal.

C. Stephen Allred,

Assistant Secretary of the Interior, Land and Minerals Management.

■ Under the authorities cited below, part 2300, group 2300, subchapter B, chapter II of title 43 of the Code of Federal Regulations is amended as follows:

PART 2300—LAND WITHDRAWALS

■ 1. The authority citation for part 2300 continues to read as follows:

Authority: 43 U.S.C. 1201; 43 U.S.C. 1740; Executive Order No. 10355 (17 FR 4831, 4833).

Subpart 2310—Withdrawals, General: Procedure

■ 2. Section 2310.5 is revised to read as follows:

§ 2310.5 Special action on emergency withdrawals.

(a) When the Secretary makes an emergency withdrawal under Section 204(e) of the Act (43 U.S.C. 1714(e)), the withdrawal will be made immediately and will be limited in scope and duration to the emergency. An emergency withdrawal will be effective when signed, will not exceed 3 years in duration, and may not be extended by the Secretary. If it is determined that the lands involved in an emergency withdrawal should continue to be withdrawn, a withdrawal application should be submitted to the Bureau of Land Management in keeping with the normal procedures for processing a withdrawal as provided for in this subpart. Such applications will be subject to the provisions of Section 204(c) of the Act (43 U.S.C. 1714(c)), or Section 204(d) of the Act (43 U.S.C. 1714(d)), whichever is applicable, as well as Section 204(b)(1) of the Act (43 U.S.C. 1714(b)(1)).

(b) When an emergency withdrawal is signed, the Secretary must, on the same day, send a notice of the withdrawal to the two Committees of the Congress that are specified for that purpose in Section 204(e) of the Act (43 U.S.C. 1714(e)).

(c) The Secretary must forward a report to each of the aforementioned committees within 90 days after filing with them the notice of Secretarial emergency withdrawal. Reports for all such withdrawals, regardless of the amount of acreage withdrawn, will contain the information specified in Section 204(c)(2) of the Act (43 U.S.C. 1714(c)(2)).

[FR Doc. E8–28742 Filed 12–4–08; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 05–312; FCC 08–256]

Digital Television Distributed Transmission System Technologies

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules for the use of distributed transmission system (''DTS'') technologies in the digital television (''DTV'') service. The rules adopted in this Report and Order will allow DTV station licensees and permittees to use DTS technologies where feasible in place of a single transmitter to provide service as authorized. We find that these rules will improve some DTV stations' ability to serve more of their viewers within their service areas. For example, we expect that DTS will be especially useful in mountainous areas where single transmitters have been unable to reach viewers in valleys or those blocked by elevated terrain. Furthermore, DTS may be a useful tool for stations to prevent some loss of service to existing analog viewers resulting from changes to the station's service area in the transition to digital service. These rules will apply to post-transition operations (*i.e.*, operations after February 17, 2009). DTS proposals related to pre-transition operations will continue to be evaluated under the Commission's interim policy.

DATES: Effective January 5, 2009, except § 73.626(f) which contains information collection requirements that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing when OMB approval for this information collection has been received and this rule will take effect.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact Evan Baranoff, *Evan.Baranoff@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120; or John Gabrysch, *John.Gabrysch@fcc.gov,* or Gordon Godfrey, *Gordon.Godfrey@fcc.gov,* of the Engineering Division, Media Bureau at (202) 418–7000. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams on (202) 418–2918, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* FCC 08–256, adopted on November 3, 2008, and released on November 7, 2008. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Final Paperwork Reduction Act (''PRA'') Analysis

This Report and Order was analyzed with respect to the Paperwork Reduction Act of 1995 (''PRA'') and contains modified information collection requirements, including changes to FCC Forms 301 and 340 to accommodate applications for DTS systems. (The Paperwork Reduction Act of 1995 (''PRA''), Pub. L. 104–13, 109 Stat. 163 (1995) (*codified in* Chapter 35 of Title 44 U.S.C.).) The information collection requirements adopted in this Report and Order will be submitted to OMB for final review under Section 3507(d) of the PRA, and OMB and the public will be afforded an opportunity to file comments on the modified information collection requirements contained in this proceeding. (See 44 U.S.C. 3507(d).) The Commission will publish a separate **Federal Register** notice seeking the PRA comments. In addition, pursuant to the Small Business Paperwork Relief Act of 2002 (''SBPRA''), the Commission sought specific comment in the *DTS NPRM* on how it might ''further reduce the information collection burden for small business concerns with fewer than 25

employees.'' (The Small Business Paperwork Relief Act of 2002 (''SBPRA''), Pub. L. 107–198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).) We received no comment on this issue.

Summary of the Report and Order

I. Introduction

1. In this Report and Order, we adopt rules for the use of distributed transmission system (''DTS'') technologies in the digital television (''DTV'') service. We find that DTS will provide broadcasters with an important tool for providing optimum signal coverage for their viewers. For some broadcasters that are changing channels or transmitting locations for their digital service, DTS may offer the best option for continuing to provide over-the-air service to current analog viewers, as well as for reaching viewers that have historically been unable to receive a good signal due to terrain or other interference. In the *Second DTV Periodic Report and Order,* 69 FR 59500 (October 4, 2004), the Commission approved in principle the use of DTS technologies, but deferred to a separate proceeding the development of rules for DTS operation and the examination of several policy issues related to its use. In the Notice of Proposed Rulemaking in this docket, we examined the issues related to the use of DTS and proposed rules for future DTS operation. (*See Digital Television Distributed Transmission System Technologies,* MB Docket No. 05–312, Clarification Order and Notice of Proposed Rulemaking, 70 FR 72763 (December 7, 2005) (''*DTS Clarification Order and DTS NPRM*''). The rules we adopt will apply to DTS proposals related to operations after the transition to DTV on February 17, 2009. (*See* Digital Television and Public Safety Act of 2005 (''DTV Act''), which is Title III of the Deficit Reduction Act of 2005, Pub. L. 109–171, 120 Stat. 4 (2006) (''DRA'') (codified at 47 U.S.C. 309(j)(14) and 337(e)).) DTS proposals related to pre-transition operations will continue to be evaluated under the interim policy approved in the *Second DTV Periodic Report and Order* and clarified in the *DTS Clarification Order.*

2. We find that these rules will improve some DTV stations' ability to serve more of their viewers within their service areas. We expect that DTS will be especially useful in mountainous areas where single transmitters have been unable to reach viewers in valleys or those blocked by elevated terrain. Furthermore, DTS may be a useful tool for stations to prevent some loss of service to existing analog viewers resulting from changes to the station's service area in the transition to digital service.

II. Executive Summary

3. In summary, we take the following actions to authorize and implement DTS service:

- We define a DTS service area as being comparable to that of a station's single transmitter facility, and, to implement this approach, we will determine a station's potential maximum authorized service area using the ''Table of Distances'' proposed in our *DTS NPRM.* (*See* Section IV.C., *infra.*)
- We adopt a waiver policy to permit a station to use DTS if doing so will enable it to continue to serve its existing analog viewers who would otherwise lose service as a result of its transition to digital service. (*See* Section IV.C., *infra.*)
- We require that DTS transmitters be located within either the DTV station's Table of Distances area or its authorized service area. (*See* Section IV.C., *infra.*)
- We adopt rules to prohibit stations from using DTS to ''cherry-pick'' service. (*See* Section IV.C.3., *infra.*)
- We afford primary regulatory status to the multiple transmitters used in a DTS network within the areas that such DTS transmitters are authorized to serve. (*See* Section IV.B., *infra.*)
- We apply to DTS stations the part 73 licensing and technical rules that apply to DTV single-transmitter stations. (*See* Section IV.D.2., *infra.*)
- We will evaluate DTS proposals using the same interference standard adopted for DTV stations' post-transition operations in the *Third DTV Periodic Report and Order.* (*See* Section IV.D.3., *infra.*) We also adopt the root-sum-square (''RSS'') method of calculating interference from multiple DTS transmitters.
- We permit a licensee of multiple digital Class A TV, digital LPTV, and/or digital TV translator stations to operate through interconnected single-frequency DTS networks, but will continue to separately license each station in this interconnected single-channel network. (*See* Section IV.E., *infra.*)
- We approve on an experimental basis the use of DTS technologies by a single digital Class A TV, digital LPTV or digital TV translator station to provide service within its authorized service area. (*See* Section IV.E., *infra.*)

III. Background

A. DTS Technologies

4. A DTV ''distributed transmission system'' (''DTS'') employs multiple synchronized transmitters spread around a station's service area, rather than the current single-transmitter approach. Each transmitter broadcasts the station's DTV signal on the same channel. Due to the synchronization of the transmitted signals, DTV receivers treat the multiple signals as reflections or ''ghosts'' and use ''adaptive equalizer'' circuitry to cancel or combine them to produce a single signal. (DTS has also been referred to as DTT, for distributed transmission technologies and as DTx, for distributed transmitters.)

5. Full-power analog TV and DTV stations provide service within an area that reaches up to 80 miles from their single transmitting site. Coverage distance depends on a station's authorized channel, power, antenna height and the characteristics of the surrounding terrain. Some stations have authorized facilities that only provide service to a distance of 30 to 40 miles. In situations where coverage is limited by terrain, such full-power stations sometimes use translators that re-broadcast the station's signals on a different channel at relatively low power to provide service in a small area. Translator stations are authorized with secondary regulatory status. In addition, in a few cases, full-power analog TV stations have been able to use TV booster stations, which are like TV translator stations but use the same channel as the primary station. DTV distributed transmitters are similar to analog TV booster stations in some ways, but DTV technologies have the potential to enable much broader use of this type of operation.

6. Potentially, DTS can provide service to areas that a single-transmitter station would fail to reach due to natural or man-made obstructions that would block the signal coming from the single-transmitter site. It can provide more uniform signal levels throughout a station's service area, making indoor reception more reliable. Also, multiple DTS transmitters generally operate at a lower power than a single transmitter to achieve the same coverage and thereby reduce the likelihood of causing interference to neighboring licensees. Use of DTS is also more spectrum efficient than use of translators because DTS uses the stations' already allotted frequency, whereas translators require one or more additional frequencies. In addition, establishing new DTV translators generally requires separate

applications for each translator to be filed during an open filing opportunity with a possible lengthy review process to determine and resolve mutually exclusive applications, while applications for DTS can be submitted by the station seeking to use the additional transmitters and evaluated as part of one application.

7. In the *Second DTV Periodic Report and Order,* the Commission adopted an interim DTS operations policy (''interim policy''). The interim policy permits stations to use DTS within their currently authorized area (including its replication area as well as any maximization area resulting from facilities granted by a construction permit or license). For an interim DTS proposal to be approved, it must be designed to serve essentially all of the station's replication coverage area. In the *DTS Clarification Order,* the Commission clarified how the interim policy applies during the pendency of this proceeding. (Specifically, consistent with the requirement that stations using DTS must serve at least the population that is currently served with a single transmitter, DTS transmitters must be located within the DTV station's predicted noise-limited service contour (PNLC). The *DTS Clarification Order* also said that the Commission would consider on a case-by-case basis requests from stations to extend beyond the PNLC by a minimal distance, provided such extension is necessary to permit coverage of the area within the PNLC. At present, only one station has applied for and been authorized to operate a DTS system under the interim policy. (Reading Broadcasting, Inc. (''RBI''), licensee of WTVE–DT, channel 25, Reading, PA was granted a DTS STA on Nov. 30, 2006.) In addition, the Commission has approved the use of a multiple DTV transmitter system using multiple channels under an experimental authorization. (On May 23, 2007, the Video Division of the Commission's Media Bureau issued a letter granting the Metropolitan Television Alliance (''MTVA'') experimental authority to operate a low-power DTV multiple-transmitter system in New York, NY. The MTA consists of the licensees of ten New York City area television stations (WCBS–TV, WNBC–TV, WNYW–TV, WABC–TV, WWOR–TV, WPIX–TV, WNET–TV, WPXN–TV, WNJU–TV, and WXTV(TV)). These stations operated digital facilities from the North Tower of the World Trade Center, which was destroyed in the September 11th attack. The experimental DTV network is testing the ability of these stations to provide fill-in over-the-air DTV coverage in areas of New York City where adequate coverage is not provided. In an ex parte in September 2008, presented the results of its field test study. In addition, two stations applied for and were authorized to operate a DTS system under an experimental authorization; however, such authority has now expired for these stations. The Pennsylvania State University, NCE licensee of WPSU–DT, channel 15, Clearfield, PA, which was the first to build an experimental DTS system, applied for this system before the interim DTS policy was established, but has since allowed authority for this system to expire. Tribune Broadcast Holdings, Inc., licensee of WTTK–DT, channel 54, Kokomo, IN, applied for an experimental DTS system because they could not meet the interim policy restrictions. The station, however, has now ceased operating its experimental DTS system and has withdrawn its experimental authority in order to focus on the construction of the station's post-transition facility. We also note that TV station WSTE, channel 7, Ponce, PR, which currently operates an integrated system of synchronous boosters to broadcast its analog signal throughout its coverage area, will be allowed to convert its current system to a digital network when it files its application for post-transition operations. (Siete Grande, licensee of WSTE, seeks to fully replicate the coverage of its analog booster system when it transitions to DTV. In the *Seventh Report and Order* in the DTV proceeding, the Commission revised WSTE's parameters in the post-transition DTV Table Appendix B to enable the station to replicate its analog coverage. The Commission also instructed the Media Bureau to process, and grant as appropriate, the applications that will permit WSTE to continue serving its coverage area with its digital signal.

B. The DTV Transition

8. In early 2006, after the release of the Commission's *DTS Clarification Order and DTS NPRM,* Congress enacted significant statutory changes relating to the DTV transition. Most importantly, the DTV Act established February 17, 2009 as the hard deadline for the end of the DTV transition and the end of analog transmissions by full power stations. The DTV Act also requires full-power television broadcast licensees to cease operations outside the core DTV spectrum (i.e., channels 2–51) after February 17, 2009 in order to make that spectrum available for new public safety and commercial wireless services. (*See* 47 U.S.C. 337(e)(1).) Full-power TV broadcast stations must be operating inside the core TV spectrum and only in digital at the end of the transition. (We note that the statutory transition deadline applies only to full-power stations. *See* 47 U.S.C. 309(j)(14) and 337(e). The Commission previously determined that it has discretion under 47 U.S.C. 336(f)(4) to set the date by which analog operations of stations in the low power and translator service must cease. The Commission opted not to establish a fixed termination date for the low power digital television transition until it resolved the issues concerning the transition of full-power television stations.

9. On August 6, 2007, the Commission released the post-transition DTV Table of Allotments (''DTV Table''), providing eligible stations with channels for DTV operations after the DTV transition on February 17, 2009. (The post-transition DTV Table is the result of informed decisions made by eligible licensees and permittees during the Commission's channel election process. The channel election process was established by the Commission in the 2004 *Second DTV Periodic Report and Order.*) On December 22, 2007, the Commission adopted a Report and Order in the Third DTV Periodic Review proceeding. In the *Third DTV Periodic Report and Order,* 72 FR 37310 (July 9, 2007), we established a number of procedures and rule changes designed to provide flexibility to broadcasters to ensure that they meet the statutory transition deadline and complete construction of their final, post-transition (DTV) facilities. Among other things, we set construction deadlines for full-power television stations to construct their full, authorized post-transition (DTV Table Appendix B) facilities and established the procedures and standards applicants must follow in filing applications for facilities specified in the final, post-transition DTV Table. On May 30, 2008, the Commission lifted the freeze on the filing of maximization applications, as well as on the filing of petitions for rulemaking to allow requests for channel substitutions to the DTV Table.

IV. Discussion

10. In this Report and Order, we adopt rules for television broadcasting using a DTS network. (The rules adopted herein are revised from those proposed in the *DTS NPRM* to better effectuate the goals of this proceeding.) Specifically, we will permit DTV station licensees and permittees to use DTS technologies where feasible in place of a single transmitter to provide service as authorized. These rules will apply to stations' post-transition operations. We apply to DTS stations the part 73

licensing and technical rules that apply to DTV single-transmitter stations and will evaluate DTS proposals using the same interference standard adopted for DTV stations' post-transition operations in the *Third DTV Periodic Report and Order.* Stations wishing to apply to use DTS must wait until the Commission obtains approval from the Office of Management and Budget (''OMB'') for the revised forms and modified information collection requirements. The Media Bureau will announce by public notice when the Commission is ready to accept applications for DTS. Until the changes to the necessary forms are effective, we will continue to accept DTS proposals under our interim policy to be evaluated as a request for Special Temporary Authority (''STA''). (In addition, any DTS proposals related to pre-transition operations may be evaluated under the interim policy.)

11. For example, we recognize that stations may wish to use DTS to ensure that their current analog viewers do not lose service after the station transitions to digital-only operation. A station that wishes to use DTS for this purpose need not wait for the final rules to take effect, but may apply under the interim policy and request a waiver of the limitations to an authorized service area, if necessary. Stations that receive an STA to use DTS under the interim policy must still apply to use DTS for their post-transition operations once our new rules and forms become effective.

12. The Commission received 23 comments and 11 reply comments to the *DTS NPRM.* (*See* Appendix A—List of Commenters.) The *DTS NPRM* sought comment on the use of DTS technologies, as well as on the asserted benefits of such technologies, and proposed to permit DTV station licensees and permittees to use DTS technologies where feasible in place of a single transmitter to provide service as authorized.

A. Use and Benefits of DTS Technologies

13. We adopt our proposal in the *DTS NPRM* to authorize DTV stations to use a network of DTS transmitters in lieu of a single-transmitter facility. The record generally supports our proposal to allow DTV stations to use DTS technologies and confirms the spectrum use efficiency and improved consumer service likely to result from the use of DTS. We disagree with the claims of New America Foundation and others (collectively ''NAF, *et al.*'') that areas within a DTV station's authorized service area that are now not reached because of terrain or other reason, constitute unreachable space that should be made available for other uses. (The Commission recently authorized the operation of new low power devices in the TV broadcast spectrum at locations where individual channels/frequencies are not being used for authorized services.) Because we decide herein to limit DTS service to the area that the DTV station is, or would be, authorized to serve with a single transmitter, we disagree that DTS would confer new spectrum rights to broadcasters. In addition, our rules for DTS operations address the concerns raised in the docket about potential abuse and cherry-picking. We note that stations using DTS should be aware that some of their viewers may need to adjust their antennas to receive the DTS signal from a direction that is different from the direction of the signal from the main antenna. (Moreover, in adjusting their antenna to acquire the DTS signal, such adjustment may cause loss of other broadcast signals, necessitating re-scanning of the channels on the viewer's DTV set or converter box.)

14. DTS proponents tout a number of benefits, which mostly include those anticipated by the Commission:

- First, DTS will allow stations to reach viewers that would not otherwise be served by conventional means. This includes reaching rural and remote areas, as well as filling in gaps in coverage within a station's authorized service area caused by terrain blockage.
- Second, DTS techniques will distribute more uniform and higher-level signals throughout a DTV station's service area. This will offer improved service within stations' coverage areas, including near the edges where signals can be low using traditional means. We agree that this should increase viewership through improved reception without causing more interference to neighboring operations, as well as minimize the preclusive impact on existing and future surrounding stations. (We disagree with the NAF, *et al.* who question whether DTS would actually increase viewership.)
- Third, DTS will improve reception quality and reliability through operation of transmitters at lower power and height. It will improve reception of DTV signals on pedestrian and mobile devices, and enhance indoor reception, especially for suburban viewers. DTS may also allow manufacturers to create new types of reception devices.
- Fourth, DTS offers an alternative to stations whose single, taller tower proposals may have been stymied by tower height and placement limits associated with aeronautical safety or local zoning concerns, including aesthetic and safety concerns about taller towers. DTS may also minimize delays and expenses to build out because broadcasters can collocate on existing wireless towers.
- Fifth, a DTS network will enhance spectrum efficiency because such a network uses the same channel for all of its operations.
- Sixth, DTS may facilitate the DTV transition by delivering more reliable digital signals to viewers and by offering a less costly alternative to constructing a large single tower facility. DTS can also benefit stations moving their DTV operations to new channels where existing transmission equipment cannot be re-used. DTS operation offers broadcasters another means to achieve their build-out deadlines, thereby advancing the DTV transition. Broadcasters will be able to reach larger portions of their audiences by delivering signals to segments of the public who, absent DTS solutions, might not be able to receive a station's DTV signal over the air.
- Seventh, for the reasons already noted (e.g., improved service), DTS will enhance DTV broadcasters' ability to compete with cable and satellite service and offer an effective over-the-air alternative for many viewers. We disagree that this competitive benefit necessitates or warrants that we permit DTS stations to expand their over-the-air service throughout their entire Designated Market Areas (''DMAs''), as argued for by Paxson and others.
- Finally, we believe DTS may be a useful tool for stations to address the service loss situation that came to light during the Wilmington DTV early transition, where some analog viewers of station WECT, Wilmington, NC (channel 6), who lived beyond the station's digital service area, lost service when the station transitioned to digital-only operations. DTS may provide stations in this situation with the ability to continue to serve some of their analog viewers who would lose service as a result of the stations' transition. (We recognize that DTS will not solve every instance in which analog viewers lose service after the digital transition. For example, in some situations, use of DTS might interfere with another station's service and could not be permitted. Other solutions are available, including increasing the station's power, using translators, changing channels, and using another station's subchannel to provide service via multicasting.) We also believe that DTS may allow stations to improve service to viewers that are within a station's digital service contour and previously received a strong analog signal, but are now at the edge of the

digital service area and now receive a weaker signal.

B. Regulatory Status

15. We adopt our proposal in the *DTS NPRM* to afford primary regulatory status to the multiple transmitters used in a DTS network within the areas that such DTS transmitters are authorized to serve. The record supports the grant of primary status to DTS transmitters located within a station's authorized service area. We adopt our tentative conclusion and find that primary status within a station's authorized service area is essential for stations to implement a successful DTS network and obtain the benefits offered by DTS techniques. We agree with MWG that, without primary treatment, stations would face protection issues and would be discouraged from using DTS. We conclude that, without primary status, stations would lose primary coverage to significant populations that now enjoy such via a single-transmitter. As described below, we will consider waiver requests, on a case-by-case basis, to permit a station to use DTS to continue serving its existing analog viewers within its analog Grade B contour who would otherwise lose over-the-air service after the station terminates analog broadcasting. Where granted, these areas will also continue to have primary regulatory status, as they currently have for analog service.

C. Service Area and Location of Transmitters

16. As explained in more detail below, we adopt a Comparable Area Approach, meaning that a DTS service area will be comparable to that of the station's single transmitter facility, and define a DTS station's potential (or hypothetical) maximum authorized service area using our proposed ''Table of Distances.'' CFR. The question of how best to define a DTS station's authorized service area garnered the most attention in the record, with commenters debating a variety of alternative approaches. Our discussion in this section focuses, first, on whether a DTS station's authorized service area should be comparable to that of the station's single transmitter facility (''Comparable Area Approach''), or if a DTS station should be authorized to significantly expand its service area beyond that now permitted by a single-transmitter broadcaster under the rules (''Expanded Area Approach''). Next, we determine how best to implement the adopted approach. In implementing that approach, we must also address the concerns that a DTS station may use its DTS network to ''cherry-pick'' (i.e., favor certain populations over others), or otherwise operate in a way that would affect a station's obligation to serve its principal community of license. Finally, we discuss the placement of the multiple DTS transmitters.

1. Comparable Area Approach Adopted

17. We adopt a Comparable Area Approach as proposed in the *DTS NPRM*. For this purpose, we will define a DTS station's maximum authorized service area to be comparable to that which the DTV station could be authorized to serve with a single transmitter. (Subject to their being able to meet other requirements regarding service and interference, DTS broadcasters may serve all areas within a station's authorized service area as defined in the new post-transition DTV Table. *See* 47 CFR 73.622(i). Similarly, a DTS broadcaster may also serve all areas within the station's maximized service area authorized. Stations applying to use DTS must have an authorized service area or establish an authorized service area prior to filing their DTS application.) A DTS broadcaster will be allowed to apply to provide service to a distance comparable to the hypothetically maximized service distance that could be reached by a single-transmitter station. (The hypothetically maximized service distance refers to stations' facilities equal to the maximum power and antenna height allowed by our rules, which limit how large stations' service areas can be. *See* 47 CFR 73.622(f). It is hypothetical because it assumes approval of such maximized facilities. Stations, however, must still apply for facilities to serve such a maximized coverage area and obtain Commission approval. In addition, stations must obtain FAA or state or local government approval as may be necessary for such facilities. A station applying for DTS facilities would not be required to first apply for Commission approval of their hypothetical single-transmitter maximum facilities because, as discussed *infra* at paragraph 25, we have established a Table of Distances for this purpose.) The Commission's rules generally define a DTV station's service area as the station's predicted noise-limited service contour. (*See* 47 CFR 73.622(e): ''The service area of a DTV station is the geographic area within the station's noise-limited F(50,90) contour where its signal strength is predicted to exceed the noise-limited service level.'') DTV service areas are calculated using the parameters specified in the DTV Table or authorized by a DTV construction permit or license. (Stations should also consult OET Bulletin No. 69 for guidance in calculating a station's DTV service area using the Longley-Rice methodology.) Commenters were divided on the DTS service area issue, with some favoring a Comparable Area Approach and others advocating an Expanded Area Approach, such as the DMA Approach, which was tentatively rejected in the *DTS NPRM*. (Several commenters said that DTS stations should be allowed to apply for facilities to serve an area generally comparable to the area they could cover with a single transmitter. In addition, MSTV and Cox agree that stations should not be afforded dramatically expanded primary coverage rights, stating that a DTS service area should be defined to ''preclude expanded primary coverage rights except into traditionally underserved rural areas.'' We further note that the NAF, *et al.*, while generally opposing DTS, particularly oppose any expansion beyond a station's traditional authorized service area in that such use may impact the availability and use of TV white space.) (Other commenters advocate for an approach tentatively rejected in the *DTS NPRM*, but advanced by the Coalition, to permit primary DTS use within a station's entire DMA, subject only to interference and minimum service requirements (''DMA Approach''). Alternatively, these commenters seek to afford secondary status to DTS use outside a station's authorized service area but within a station's DMA (''DMA Secondary Service Approach'').)

18. We select the Comparable Area Approach over an Expanded Area Approach for several reasons. First, this approach offers consistent treatment to both single-transmitter and DTS stations and best balances the primary coverage rights between stations choosing to employ DTS and those choosing not to do so. An Expanded Area Approach is not necessary to implement DTS service or obtain its core benefits. Second, we find that this approach best protects the principles of localism by restricting a station's focus to its traditional coverage area. (MSTV warned that ''arbitrary service expansion'' may ''undermine principles of localism.'') Third, we find that a Comparable Area Approach is more consistent with our TV channel allotment and licensing policies applicable to single-transmitter stations. Fourth, we find that this approach, unlike an Expanded Area Approach, would preserve opportunities for new stations, including low-power stations. (Alliance stated that DTS must not undermine the contributions of boosters, translators and low-power stations.) Finally, while a promising

technology, DTS is still new and we hesitate at this time to dramatically redefine the broadcast television service based on that technology. We thus find that DTS stations should not be afforded dramatically expanded primary coverage rights.

19. We also note that stations using single-transmitter or DTS operation can expand their reach through TV translators or low power television (''LPTV'') operations, albeit on a secondary basis. In this regard, we disagree with the NAF, *et al.* that argue that TV operations should be restricted to provide more vacant channels for the operation of unlicensed devices. The TV services for which this spectrum is allocated on primary and secondary bases are important media for the provision of news, information, and entertainment that warrant priority over those unlicensed broadband devices.

20. The primary Expanded Area Approach advanced by commenters is the DMA Approach, advanced by the Coalition, which would allow DTS broadcasters to expand their service to cover an entire DMA, limited only by the requirement that they do not cause unacceptable interference to another licensee. The Commission, however, tentatively rejected this DMA Approach in the *DTS NPRM* and we remain troubled by the implications of allowing significantly greater coverage for DTS than the coverage that can be achieved by a traditional single-transmitter station. We find that it is not appropriate at this time to expand significantly the coverage rights of some stations by allowing DTS operation on a primary basis beyond a station's authorized maximized area and bounded only by the DMA to which it is assigned by the Nielsen Media Research (Nielsen). (Nielsen assigns DMAs based on measured viewing patterns and these assignments occasionally change.) As explained in the *DTS NPRM*, many DMAs cover extensive areas and the DMA Approach could allow some stations to provide service into communities 100 or more miles away from their community of license. We agree with MSTV and others that DTS must not be used to undermine localism and that a DTS service area should not shift a station's primary focus from its community of license. (MSTV expressed concern about the impact of ''service shifts and expansions within a station's own DMA'' on local viewers. MSTV would, however, allow expanded service only into ''traditionally underserved rural areas in which populations have historically been insufficient to sustain viable, full-service over-the-air station.'') We find that DTS technology's core purpose should be to improve service to a DTV station's local community, both in increasing reception reliability to existing viewers and reaching local viewers now blocked because of terrain and other like impediments. A Comparable Area Approach achieves that purpose, while the DMA Approach may distract stations from this important policy goal.

21. At the crux of the DMA Approach is the proposition that a DMA is a broadcaster's ''natural market.'' Although concerned about the impact on localism, MSTV joins in this general assertion that ''the DMA approach is a more accurate reflection of a station's market.'' MSTV, however, says that the Commission must ''ensure that a station generally cannot expand service to areas within its DMA that are nevertheless far outside the station's existing service area.'' Proponents of the DMA Approach argue that a Comparable Area Approach imposes an artificial limit on the full application and benefits of DTS technologies because DTS broadcasters are no longer constrained by the reach of a single-transmitter. (The Coalition and others argue that our concerns about localism are ''misplaced'' because the Commission's rules now require stations to serve their community of license and stations are now carried via cable and satellite throughout their DMA. (Paxson also notes that the Commission licenses new wireless services via geographically-based areas.) They also argue that an Expanded Area Approach would better enable over-the-air DTV service to compete with cable and satellite service.

22. Broadcasters, however, are licensed to local communities, not DMAs, and for good reason. This ensures that broadcasters are responsive to the unique interests and needs of the individual communities to which they are licensed. (The Commission has a long-standing policy to foster broadcast ''localism,'' which it has defined as the airing of ''programming that is responsive to the needs and interests of their communities of license.'') Section 307(b) of the Communications Act explicitly requires the Commission to ''make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.'' (*See* 47 U.S.C. 307(b): ''In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.'') Pursuant to this mandate, when the Commission allocates channels for a new broadcast service, its first priority is to provide general service to an area, but its next priority is for facilities to provide the first local service to a community. In carrying out the mandate of Section 307(b), the Commission has long recognized that ''every community of appreciable size has a presumptive need for its own transmission service.'' Indeed, the Supreme Court has stated that ''[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece.'' Moreover, we find that it would be inappropriate to redefine the broadcast television service in this proceeding, which pertains only to DTS. Adopting an expanded service area only for DTS broadcasters would disfavor stations that choose to continue using a single-transmitter.

23. It is certainly true that the Commission has several important rules in place designed to protect localism. (The Commission has a number of rules to ensure that a broadcaster is responsive to the unique interests and needs of individual communities. For example, the Commission's main studio rule requires that a station maintain its main studio in or near its community of license to facilitate interaction between the station and the members of the local community it is licensed to serve. In addition, the main studio also must house a public inspection file, the contents of which must include ''a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period.'' The purpose of this requirement is to provide both the public and the Commission with information needed to monitor a licensee's performance in meeting its public interest obligation of providing programming that is responsive to its community.) We agree with commenters, for example, that our principal community coverage requirement plays an important part in protecting localism. (The principal community coverage rule requires a DTV broadcast station to provide a specified signal contour over its community of license to ensure that local residents receive service. *See* 47 CFR 73.625.) Moreover, as noted by the Coalition, a broadcaster's service to its local community will be evaluated

when seeking renewal of its license. (*See* 47 U.S.C. 307(b). When a broadcast station seeks to renew or transfer its license, it must give public notice to its community to ensure that members of the community have an opportunity to file a petition to deny if they object to the station's application for renewal or transfer of license. 47 CFR 73.3580.) These rules, which will continue to apply to DTS stations as they do single-transmitter stations, work within the existing licensing framework to protect localism and highlight the importance of maintaining a station's focus on its community of license.

24. We adopt our tentative conclusion in the *DTS NPRM* that an Expanded Area Approach, particularly throughout a geographically large DMA, would subvert our current licensing rules by allowing a station to obtain the rights to serve a new community where a new station, including a low-power station, might otherwise be licensed. (Disallowing such expansion is consistent with the statutory requirement to award new licenses through competitive bidding (auctions), as appropriate. *See* 47 U.S.C. 309(j).) We reject the argument of the Coalition and others that a DMA Approach would not preclude new stations ''because DTS expansion will occur on a station's already occupied channel.'' (Coalition claimed that ''in almost all circumstances, a maximized, single-transmitter DTV facility will already have prevented new co-channel service because of the destructive level of interference that it would be predicted to cause to any service from a new full-power, LPTV, translator or Class A station co-channel operation.'') New stations, particularly in a geographically large DMA, may be permitted to use the same channel and such expansion may also affect adjacent channel operations. (For example, Denver DMA includes areas of northern Wyoming.) We, thus, reject the DMA Approach and will not allow a DTS station to offer service beyond that station's authorized service area for its single-transmitter facility.

25. Furthermore, we will not give stations a blanket authorization to offer DTS service on a secondary basis throughout a station's DMA for the same reasons that we rejected the primary DMA Approach. (We will, however, in some circumstances, permit incidental secondary service that results from the necessary placement of transmitters near the edge of a station's service area.) Many broadcast commenters advocated, as an alternative to primary service throughout a DMA, that we permit DTS broadcasters to serve an entire DMA on a secondary basis (''Secondary Service DMA Approach''). We seek to afford consistent treatment to both single-transmitter and DTS stations and find that special treatment is not necessary to implement DTS service. Permitting DTS service throughout a station's DMA, even on a secondary basis, threatens localism by distracting a station's focus from its community of license. Moreover, a Secondary Service DMA Approach might still preclude opportunities for new low-power stations. Finally, at this time, we do not seek to dramatically redefine the broadcast television service. We note, however, that DTV broadcasters may achieve the same goals sought by a secondary DTS service through the use of digital on-channel translator/LPTV stations under part 74 of the rules. (CFRWe note that our existing rules do not preclude the use of on-channel digital translators.)

2. Table of Distances Approach Adopted

26. We adopt the proposed ''Table of Distances'' Approach to define the limits of a DTS station's comparable service area. This Table defines each full-power DTV station's hypothetically maximized service area or, in other words, the maximum service area that can be obtained by DTV stations under our rules. (The Table is based on the maximum height and power that a single-transmitter station would be allowed to apply for. *See* 47 CFR 73.622(f).) The Table, which is based on a set of distances from stations' reference points that reflect DTV stations' potential maximized facilities, will be used by DTV stations when applying to maximize facilities using a DTS network. We agree with MWG that this Table approach will define for DTS stations a comparable service area to single-transmitter stations in a simple and straightforward manner. Instead of individually calculating the theoretically maximized DTV service contours of each DTS station, the Table of Distances will simplify determinations of allowable coverage areas under our rules and will ensure consistent treatment of similarly-situated stations. For the majority of DTV stations, the results under the Table approach will be the same as a station-by-station approach; however, the Table approach also accounts for cases of terrain blockage and will allow coverage to continue both for existing viewers and also for the portion of the authorized area that was previously blocked by terrain. (For this reason, we apply 47 CFR 73.622(e)(1) to DTS stations, but not 47 CFR 73.622(e)(2).CFR) We find unpersuasive MSTV's concern that the Table approach may allow DTS broadcasters to extend service into adjacent DMAs, as our rules would now allow such extension by single-transmitter stations. CFR

27. Specifically, we adopt the following Table of Distances. CFRAs explained below, the distances represent circles within which DTS station coverage contours must be contained. In the vast majority of cases, the appropriate circle will equal or exceed a station's currently authorized coverage contour, including the contour within which the station will provide service at the end of the transition. The rule will provide for those exceptional situations in which this is not the case. (CFRThis situation will occur where a station's authorized single-transmitter antenna height above average terrain (''HAAT'') exceeds the standard maximum HAAT (Section 73.622(f) of our rules specifies an HAAT associated with the maximum allowed power, and any increase in HAAT above that height requires a corresponding decrease in the allowed maximum power) and where the average terrain elevation in different directions from the station's transmitter site are significantly different from each other.)

Channel	Zone	F(50,90) field strength	Distance from reference point
2–6	1	28 dBu	108 km. (67 mi.).
2–6	2 and 3	28 dBu	128 km. (80 mi.).
7–13	1	36 dBu	101 km. (63 mi.).
7–13	2 and 3	36 dBu	123 km. (77 mi.).
14–51	1, 2 and 3	41 dBu	103 km. (64 mi.).

28. Waiver policy. We adopt a waiver policy to enable stations to address the type of loss experienced by WECT, Wilmington, NC (channel 6), where many analog viewers of that station lost service when the station transitioned to digital-only operations. Notwithstanding our Table of Distances, on a case-by-case basis, we will permit a station to use DTS if doing so will enable it to continue to serve its existing analog viewers within its analog Grade B contour who would otherwise lose service as a result of its transition. (We will allow stations to apply for a waiver to use DTS to serve their former analog viewers even if there is another affiliate of the same network that will serve them, provided such service would not cause impermissible interference to another station. In acting on waiver requests, we may consider, among other things, the extent to which the area is currently served by other affiliates of the same network.) Moreover, we will consider a station's DTS proposal to serve lost analog viewers of another station affiliated with the same network, provided the station is geographically close to the affected area and use of DTS would not cause impermissible interference to another station. Because the purpose of this waiver policy is to maintain service to existing viewers after the digital transition, we will limit the use of DTS under this waiver policy to stations that apply by August 18, 2009 to provide such service and commit to build the DTS facility as quickly as possible. (We believe that providing the flexibility to apply within six months after the transition date will allow stations to deal with unforeseen circumstances that come to light when they make their transition.) We urge stations to determine now if they anticipate such a loss of service to current analog viewers and to apply as soon as possible to obtain an STA for DTS operation under the interim policy so that they can continue to provide uninterrupted service to the current analog viewers within their analog Grade B contour after they terminate their analog service. We delegate authority to the Media Bureau to consider waiver requests, which must be made in accordance with existing Commission rules. CFR After the new DTS rules and forms take effect, stations must apply to modify their facilities in order to obtain licensed authority to operate using DTS.

29. Reference point. The reference point is one of the parameters used to calculate the area described by the Table of Distances. We will determine each DTS station's reference point using the allotment established in the Commission Order that created or made final modifications to the post-transition DTV Table, 47 CFR 73.622(i), and the corresponding facilities for the station's channel assignment as set forth in that Commission order. CFRCFR In the *DTS NPRM*, the Commission proposed use of a station's reference point in its certification (FCC Form 381) filed in connection with DTV channel election process; however, we find that the new post-transition DTV Table now provides a more relevant reference point. (In November 2004, licensees filed certifications via FCC Form 381 in order to define their proposed post-transition facilities. In these certifications, licensees chose whether to (1) replicate their allotted facilities, (2) maximize to their currently authorized facilities, or (3) reduce to a currently authorized smaller facility. Stations that did not submit certification forms by the deadline were evaluated based on replication facilities. The post-transition DTV Table is based on the results of the Commission's channel election process. The Commission attempted to accommodate broadcasters' channel preferences as well as their replication and maximization service area certifications (made via FCC Form 381).) Generally, a station would use its current reference point based on its Appendix B facility or the Order granting it a new channel, as appropriate. CFRUpon the appropriate public interest showing, a station may request a change to its reference point, just as stations have done historically, provided certain criteria are met. Such changes in reference points are subject to a station showing that the resulting service area circle fully encompasses the station's authorized service area. We decline to adopt the MWG additional proposal of allowing changes to reference points based on whether a DTV City Grade signal could be delivered over the principal community from a hypothetical maximized facility located at the proposed reference point, since this criteria could allow stations to move the center of their coverage area to nearly 90 km from the principal community. (The 48 dBu DTV city grade contour extends approximately 90 km from the transmitter site for channels 14–51, assuming a fully maximized station with 1000kW ERP at 365m HAAT.)

30. Uniform terrain. In parts of the country where the terrain is uniform, the Table of Distances illustrates the area that a station could serve if it operated a single-transmitter facility at the maximum effective radiated power (''ERP'') and antenna height above average terrain (''antenna HAAT'') allowed by our rules. (*See* 47 CFR 73.622(f).) Reliance on this Table will facilitate licensees' use of DTS by eliminating the need for a two-step process: First, calculating the antenna height necessary to match the maximum allowed average antenna height and power for a single transmitter and, then, calculating the distances to the service contour in every direction based on the antenna HAAT in that direction. In most cases, the Table will match the potential maximized facilities of single-transmitter stations because most stations are not in areas where variations in the terrain result in significant variations in the coverage.

31. Irregular terrain. We also will use the Table of Distances in areas in which irregular terrain is an issue. (Coverage contours of stations using non-directional transmitting antennas will be circular except where the surrounding terrain has a different average height in different directions. For example, if the average terrain to the North is 500 feet above mean sea level and the average terrain to the South is 1000 feet above mean sea level, the coverage contour will extend further to the north than it does to the south.) In such locations, single-transmitter stations' maximum service areas are distorted from a circular coverage contour to varying degrees. Where coverage does not reach as far due to terrain in one direction, a station would have a correspondingly larger coverage distance in other directions. In these cases, stations' single-transmitters may be authorized to serve people outside of the circular coverage contour because the average terrain calculation has allowed the station to be authorized for a larger coverage contour in one direction (one that would not have been reached if there was no terrain issue). In these circumstances, we will permit stations to provide DTV service within their authorized coverage area.

32. Location of DTS Transmitters. We require that each DTS transmitter be located within either the DTV station's Table of Distances area or the station's authorized service area (i.e., predicted noise-limited service contour (''PNLC''). CFR We disagree with MWG and the Coalition that there may be situations where placement of a DTS transmitter outside of a station's authorized service area may be necessary to provide meaningful service to the communities that are near the edge of the station's PNLC. We find that transmitters placed inside, but near the edge of, a station's authorized service area can adequately serve the communities in that area.

33. DTS Coverage. We require that each DTS transmitter's coverage must be contained within either the DTV station's Table of Distances area or its authorized service area, except where such extension of coverage beyond the station's authorized service area is of a minimal amount and necessary for the station to provide coverage to its entire authorized service area. (CFR Stations may not extend coverage beyond their authorized service area, unless it is necessary to serve their entire authorized service area. Stations are not required to cover their entire Table of Distances area.) The coverage for each DTS transmitter is determined based on the F(50,90) field strength given in the Table of Distances, calculated in accordance with Section 73.625(b). The combined coverage of a DTS station is the logical union of the coverage of all DTS transmitters.CFR We recognize, and agree with commenters, that in circumstances where transmitters are placed inside but near the edge of a station's authorized service area, it may be technically difficult to ensure that signals from that transmitter will not carry beyond the station's authorized service area. For most stations, our decision to use the Table of Distances based on maximum facilities will allow them flexibility to cover their entire authorized service area with DTS service. For those situations in which a station's authorized service area extends beyond its Table of Distances coverage, we will consider, on a case-by-case basis, requests to locate a DTS transmitter inside, but near the edge of, the station's authorized service area with facilities that may result in signal transmissions beyond that area by a minimal distance. (CFRThis rule represents an exception to the prohibition of secondary DTS service beyond a station's authorized service area. We recognize that such service may also be necessary for stations to serve an area within the current analog Grade B that is not within the station's digital service contour, as permitted by the waiver process discussed *infra* paragraph 28.) Such placement must be shown to be necessary to adequately serve the population inside of a station's authorized service area. In addition, DTS transmitters will be limited to power levels such that any individual DTS transmitter's coverage would only exceed the station's authorized service area by a minimal amount. We note that the Commission has considered such a request under the interim DTS policy. We will not protect DTS service from another DTV station's interference beyond the station's authorized service area and DTS signals beyond the authorized service area must protect other authorized DTV facilities. We delegate authority to the Media Bureau to consider these requests.

34. Digital On-Channel Translator. Alternatively, as previously noted, stations seeking to serve the communities near the edge of their PNLC may apply for a digital on-channel translator/LPTV station. Authority for operation of digital on-channel translator/LPTV station was established in the Digital LPTV Report and Order, in which the Commission permitted digital LPTV and TV translator stations to retransmit programming directly received on the same TV channel with the consent of the licensee of the original input signal. Digital on-channel translator/LPTV stations must be separately licensed (on a secondary basis) under part 74 of the rules. The on-channel translator/LPTV station is technically equivalent to an on-channel booster. (To the extent that a station demonstrates a need to use a non-synchronized, on-channel digital booster to serve terrain-shadowed portions of their service areas (much in the same manner as analog boosters are used), we will permit stations on a case-by-case basis to request STA to use an on-channel digital booster. Consideration of authorizing a digital booster service may be more appropriately addressed in the *Digital LPTV* docket.) However, unlike a booster, the protected signal contour of an on-channel translator/LPTV station is not confined to the protected contour of the associated TV broadcast station. Applications for new on-channel translator/LPTV stations must be filed in the same manner as other applications for new TV translator or LPTV stations. The proposed facilities of these stations are subject to the interference standards, criteria and procedures applicable to other LPTV and translator applications.

35. ''Largest Station'' Alternative. As an alternative to the Table of Distances Approach for determining the hypothetically maximized service area, full-power stations may use the ''largest station'' provision in Section 73.622(f)(5) of the rules. (47 CFR 73.622(f)(5) provides that licensees assigned a DTV channel in the initial DTV Table of Allotments may request an increase in either effective radiated power (''ERP'') in some direction or antenna height above average terrain (''antenna HAAT'') that exceeds the initial technical facilities authorized for the allotment. 47 CFR 73.622(f)(5). Such increases are limited to maximum powers specified in paragraphs (f)(6) through (f)(8) of that section. Where specified antenna HAAT values are exceeded, the maximum ERP generally is reduced in accordance with the appropriate chart or formula in those paragraphs. Paragraph (f)(5) also allows the maximum ERP and HAAT combination to be ''up to that needed to provide the same geographic coverage area as the largest station within their market, whichever would allow the largest service area.'' Such requests must include an engineering showing that the increase would not result in new interference.) Section 73.622(f)(5), which seeks to equalize the coverage areas of all stations within a market and address disparities between VHF and UHF stations, permits stations to exceed the ERP and antenna HAAT limits in order to ''provide the same geographic coverage area as the largest station within their market.'' This rule was clarified in the 2001 First DTV Periodic Report and Order. In clarifying the rule, the Commission stated: ''First, the maximum ERP limits (1000 kW for UHF channels 14–69 in any zone; 30 kW for VHF channels 7–13 in Zone 1; 160 kW for VHF channels 7–13 in Zone 2 or 3; 10 kW for VHF channels 2–6 in Zone 1; and 45 kW for VHF channels 2–6 in Zone 2 or 3) may not be exceeded. The ''largest station'' provision applies only where the rules normally require a reduction in the maximum power because a specified antenna HAAT is exceeded. That is, it does not allow power higher than the maximum ERP to compensate for an antenna HAAT that is lower than the value specified in the rule. Second, the ''largest station'' provision is only triggered where a station in the same market is serving a larger area than could be covered with the standard maximum power and antenna height specified in section 73.622(f) of the rules. Otherwise, applicants must comply with the maximum power and antenna height in that rule Section. Third, for the purpose of this rule, stations in the same DMA are considered to be in the same market. Fourth, the geographical coverage determination is based on the area within the DTV station's noise-limited contour, calculated using predicted F(50,90) field strengths as set forth in Section 73.622(e) of the rules and the procedure specified in Section 73.625(b) of the rules. Under this provision an application may not request a power and antenna height combination that would result in coverage of more square kilometers of area than the largest station in the market. It is not necessary that the application specify coverage that is congruent with or encompassed

by the coverage area of the largest station. Stations are not expected to shift their coverage area in order to use this provision of the maximum power rules. Finally, DTV stations are still subject to the interference protection requirements, even when availing themselves of this provision.'' In comments, the Coalition and KJLA advocate that we permit DTS stations to also use this rule to maximize their service area. (The Coalition and KJLA say that stations should be able to choose the larger of (1) the hypothetically maximized service area using the Table of Distances Approach or (2) ''the service area of the station in the DMA with the greatest population and coverage area'' (their so-called ''Equal Service Area Approach''). We note that this proposal refers to population when only geographic area is considered by Section 73.622(f)(5). In conjunction with this approach, the Coalition again seeks secondary DTS service throughout a DMA. As explained above, we decline to authorize secondary DTS use throughout the DMA to which a station is assigned by Nielsen.) We agree that the service areas available to single-transmitter stations should also be available to DTS stations. To the extent that a single-transmitter station may now seek an increased coverage area under Section 73.622(f)(5), we will permit a DTS station to do the same. Unlike single-transmitter stations, DTS stations likely will not actually need to exceed the ERP and antenna HAAT limits in order to provide the same geographic coverage area as the largest station within their market. Thus, DTS stations seeking to maximize under this rule to cover an area greater than can be covered using the values in the Table of Distances may request an increase in ERP and antenna HAAT values to determine the circle within which all DTS station coverage contours must be contained. In other words, DTS stations may obtain the same coverage under the rule as would a single-transmitter station, provided the DTS service would not result in new interference.

36. In addition, MSTV expresses interest in using ''DTS to expand service into traditionally underserved rural areas in which populations have historically been insufficient to sustain a viable, full-service over-the-air station.'' We believe the rules we adopt here address MSTV's interest. As noted above, under part 74 of our rules, DTV stations may now offer expanded service on a secondary basis through use of either a digital LPTV or digital translator station. We expect that the same technologies used by DTS will offer stations the ability to use a synchronized on-channel digital translator to achieve the goal of reaching traditionally underserved rural areas, while minimizing mutual interference with the parent station.

3. ''Cherry-Picking'' Prohibited

37. We adopt our proposal in the *DTS NPRM* to require that DTS stations provide at least the same level of service they would provide were they using their single-transmitter facilities. Specifically, we will not accept an application proposing use of DTS if the combined coverage from all of the transmitters fails to cover the entire area within the applicant's authorized service area. CFR Further, each DTS transmitter's coverage must be contiguous with at least one other DTS transmitter's coverage. CFR We find that this rule will prevent stations from using DTS technologies to favor some populations within their service area over others, a practice sometimes referred to as ''cherry-picking.'' (As discussed *infra*, stations applying to use DTS must have an authorized service area or establish an authorized service area prior to filing their DTS application.)

38. Most commenters agree that ''cherry-picking'' should be prohibited. CDE, however, disagrees that a cherry-picking rule is necessary, saying that DTS stations have no greater incentive than single-transmitter stations to reduce service via cherry-picking. (CDE argued that ''the concern over cherry-picking by a broadcaster employing DTS is predicated on an incentive to reduce service that is greater than the incentive for a single-stick broadcaster'').) CDE also says ''existing rules for serving certified populations are more than sufficient to prevent reduction in service.'' We disagree and find that the use of a multiple-transmitter system in lieu of a single-transmitter facility by DTS broadcasting presents an opportunity for abuse that must be contained before it starts. While the incentive to fully serve a coverage area, whatever it may be, may be the same for DTS and single-transmitter stations, alike, the opportunity to pick and choose populations within the station's service area is not. Existing viewers, including those in sparsely populated areas, rightly will expect to receive television service regardless of the technology employed by the station. Therefore, because of the different means that DTS and single-transmitter stations will use to deliver service, we find it necessary to impose restrictions to eliminate the opportunity for ''cherry-picking.'' We recognize, however, that some difference in coverage between conventional and DTS operations may be unavoidable, but we intend to keep this concern and public service obligations in mind when we review applications to use DTS technologies.

39. Specifically, we adopt the proposed contour overlap method to prohibit ''cherry-picking.'' CFR This is the same approach used under the interim rules. The contour overlap method evaluates whether a DTS station would serve ''essentially all of its replication coverage area;'' or, in other words, whether all viewers within a station's replicated service area are predicted to be served by a station's current transmitter. (Under the interim rules, we require that the combined DTS noise-limited service be provided over all of a station's replication service area and requiring overlapping contours to be sure that every location in a station's replication service area is within the PNLC of at least one proposed DTS transmitter).) Contour overlap ensures that the station's service area is contiguous and does not consist of unconnected areas of service separated by populated areas that are not served. (This rule and the general prohibition on cherry-picking also applies to stations using DTS to maximize beyond their current service contour.) This rule furthers one of the major goals of adopting DTS, which is to provide improved service, particularly in geographic areas that have been difficult to reach with the signal from a single transmitter. Accordingly, we will deny any application to construct DTS facilities that would result in a loss of service to the population currently served within the licensee's service contour. We agree with MWG that this will be an effective way of assuring that the population within a station's service area receives service. We will require that these viewers be predicted to receive the minimally necessary signal strength (based on the FCC curves F(50,90) propagation model) from at least one DTS transmitter. CFR We will keep the same considerations in mind in evaluating any requests for waiver to provide service to current analog service areas within the station's analog Grade B contour.

D. Licensing and Technical Rules

40. We adopt our proposals in the *DTS NPRM* to apply to DTS stations the part 73 licensing and technical rules that apply to DTV single-transmitter stations. The record supports this conclusion and we address the specific provisions of the new rules in the section below. As we discuss below,

stations that wish to apply to use DTS under the new rules may do so after the rules take effect and the new forms and processing program are available. Until the new rules and forms are effective, stations may apply to use DTS under the existing interim policy as a request for STA. (47 CFR 73.1635.) A station that wishes to use DTS to ensure uninterrupted service for its current analog viewers may apply under the interim policy and request a waiver, if necessary. The record is insufficient to support use of DTS for new stations that do not yet have an authorized service area. Accordingly, stations applying to use DTS must have an authorized service area or establish an authorized service area prior to filing their DTS application. If there is demonstrated interest in or need for DTS as an option for new stations, we can initiate a rulemaking, or interested parties may file a petition for rulemaking.

1. Technical Rules: Power, Antenna Height, and Emission Mask

41. We adopt our proposal in the *DTS NPRM* to apply to DTS stations the Part 73 DTV effective radiated power (''ERP''), antenna height above average terrain (''antenna HAAT'') and emission mask rules applicable to single-transmitter stations. (*See* 47 CFR 73.622(f).) The record supports this conclusion. We will require that each transmitter in a DTS system conform to the maximum power and emission mask requirements applicable to single-transmitter stations. (We are convinced by MWG who argues that the relative powers of distributed transmitters in a network must be carefully chosen to optimize the service the network provides and should not be unnecessarily constrained.) We find that this approach will offer DTS stations flexibility in designing their system to maximize DTV service, while limiting their potential for causing interference, in light of the service area limitations adopted above and the post-transition interference protection requirements that were adopted in the *Third DTV Periodic Report and Order*. CFR

42. We apply to all primary DTS transmitters the full-power DTV emission mask rules. (*See* 47 CFR 73.622(h)(1).) We decline to adopt relaxed out-of-band emission designator mask requirements for very low power DTS transmitters, as requested by Harris. We recognize that secondary stations, such as digital LPTV and translators, may now use relaxed emission masks and that applying those standards to low-power primary DTS transmitters may offer some cost savings. (*See* 47 CFR 74.794(a)(2).) But we agree with MWG that when transmitters are located in dense RF environments, such as when multiple stations build a common DTS network with collocated transmitters, there might be a significant increase in the noise floor that could affect all of the stations. We find that the increased risk of interference is not worth the relatively small savings that could be realized by using a relaxed emission mask.

2. Licensing Issues

43. We adopt our proposal in the *DTS NPRM* to apply to DTS stations the part 73 DTV licensing rules applicable to single-transmitter DTV stations, as supported by the record. CFR We also conclude that DTS transmitters will not be separately licensed but will be part of a linked group that will be covered by one construction permit and license. We find that this is a simple and efficient way to license DTS transmitters. DTS stations will use the same application filing and processing procedures applicable to single-transmitter DTV stations. CFR Accordingly, DTS stations will also be subject to the rules recently established for DTV stations in the *Third DTV Periodic Report and Order*.

44. Specifically, stations will request authority to construct DTS facilities by filing a single application that includes either (1) a main transmitter and one or more additional transmitters that will collectively use the DTS technology, or (2) two or more smaller DTS transmitters. A station may add to its DTS network of transmitters using a minor change application for a construction permit to change a licensed DTV facility, or for a modified construction permit to change a DTV facility authorized by a construction permit. Such applications will be processed in accordance with the DTV processing rules and guidelines. We will revise FCC Forms 301, 340 and 302–DTV to accommodate requests for DTS systems. Until the new rules and forms are effective, we will continue to accept DTS proposals under our interim policy to be evaluated as requests for STA. We recognize that stations may wish to use DTS to ensure that their current analog viewers do not lose service after the station transitions to digital-only operation. A station that wishes to use DTS for this purpose need not wait for the final rules to take effect but may apply under the interim policy and request a waiver under existing Commission rules, if necessary. CFR Stations that receive an STA to use DTS under the interim policy must file for a modification after the rules take effect and the forms are available in order to continue using DTS for their post-transition operations.

45. Principal community coverage requirement. As noted above, part 73 will apply to DTS stations as they would to single-transmitter stations and this includes our principal community coverage requirement. (*See* 47 CFR 73.625.) This rule, which commenters agree must also apply to full-power DTS stations, requires a DTV broadcast station to provide a specified signal contour over its community of license to ensure that local residents receive service (sometimes referred to as a predicted signal strength that is ''noise-limited plus 7 dB''). CFR We will strictly enforce this requirement when evaluating DTS proposals and require that the coverage from one or more DTS transmitter(s) must provide principal community coverage as required in Section 73.625(a). CFR The record supports this conclusion. However, we remain concerned that, in cases where DTS stations propose to use multiple transmitters to comply with Section 73.625(a), the interaction between the signals from the different transmitters may make reception difficult or impossible in some part of the overlapping coverage areas. Therefore, while we will afford DTS stations the flexibility to satisfy our principal community coverage requirement with multiple transmitters, we will disallow proposals that fail to address this concern.

3. Interference Rules and Calculations

46. Consistent with our decision to apply part 73 to DTS stations, we will evaluate DTS proposals using the same interference standard adopted for DTV stations' post-transition operations in the *Third DTV Periodic Report and Order*. (*See* 47 CFR 73.616.) As already noted, commenters generally support application of the part 73 rules to DTS broadcasters. (Commenters raised other issues in the docket that we decline to address at this time. We will not address the issue of whether to adopt variable desired-to-undesired (D/U) interference ratios in situations where adjacent-channel transmitters are proposed to be located inside a desired station's noise-limited service contour. We find that the comments submitted in this record do not provide an adequate basis on which to make a decision to retain the current D/U ratios or to change them. For the same reason, we also decline address comments seeking the conversion of our database's coordinate data from the North American Datum of 1927 (NAD27) to the more recent North American Datum of 1983 (NAD83).

However, we may address this issue in a future proceeding so we can consider the issue in the context of all media operations.)

47. Interference from DTS Stations. A DTS station must not cause more than 0.5 percent new interference to another station in accordance with Section 73.616 of the rules. (47 CFR 73.616 states ''An application will not be accepted if it is predicted to cause interference to more than an additional 0.5 percent of the population served by another post-transition DTV station.'') We will calculate interference from DTS stations based on the combined signals of all the DTS transmitters in a network. In the *DTS NPRM*, the Commission asked whether to calculate interference based on each DTS transmitter individually or, based more conservatively, on the combined signals of all the DTS transmitters. Commenters generally support measuring the combined interference effect of multiple DTS transmitters. For purposes of compliance with this rule, we adopt the root-sum-square (''RSS'') method of calculating interference from multiple DTS transmitters, rather than adding up the aggregate interference from each individual DTS transmitter, commonly referred to as a ''direct summation'' approach. This means that the combined field strength level at a given location is equal to the square root of the sum of the squared field strengths from each transmitter in the DTS network at that location. CFR We note that the RSS method differs from the direct summation method used under the interim rules. CDE and MWG advocated use of the RSS method. MSTV and NAB suggested a direct summation approach, but did not address the RSS method. (MSTV and NAB suggest aggregating the interference from individual co-channel DTS transmitters in making interference calculations.) We agree with CDE and MWG that the RSS method in virtually all situations will best approximate actual interference from multiple DTS transmitters and is less likely to overestimate interference. (We agree with MWG, which states that ''there is virtually no possibility that the receiver will coherently sum interfering signals from two undesired transmitters; summing the undesired signals would be overly pessimistic.'') We will use the RSS method to calculate both adjacent channel and co-channel interference.

48. DTS protection from interference. As mentioned above, we are applying the same interference protection standard for DTS stations as we do for traditional single-transmitter DTV stations. Accordingly, a DTS station must be protected from interference in accordance with the criteria specified in Section 73.616 (i.e., the 0.5 percent new interference standard). CFR To determine compliance with the interference protection requirements of Section 73.616, the population served by a DTS station shall be the population within the station's combined coverage contour, excluding the population in areas that are outside (1) The DTV station's authorized service area, (2) the Table of Distances area, and (3) the DTS coverage authorized under the waiver policy in paragraph 28 to prevent the loss of analog service. For DTS stations, a population within the combined coverage contour will be considered to have service if it is predicted, using the OET–69 methodology, to receive sufficient signal strength from at least one DTS transmitter individually. In other words, the field strengths of DTS transmitters in a network will not be combined for the purposes of determining service to a population within the station's combined coverage contour. Section 73.616(e) also states that, ''For this purpose, the population served by the station receiving additional interference does not include portions of the population within the noise-limited service contour of that station that are predicted to receive interference from the post-transition DTV allotment facilities of the applicant or portions of that population receiving masking interference from any other station.'' For purposes of applying this provision to DTS stations, we will not consider self interference to be masking interference. In the *DTS NPRM*, we noted MWG's suggestion that, for purposes of analyzing interference from its neighbors, internal interference between DTS transmitters in a single system should be ignored, and sought comment on this issue. We received no additional comment on this issue. We agree with MWG and expect that a DTS system designed with good engineering practice should have minimal self interference. We may, however, revisit this issue if we are presented with evidence of significant self interference.

49. Changes to OET Bulletin No. 69. Commenters also state that we must modify the methodology in our OET Bulletin No. 69 (OET–69) to properly calculate interference from multiple DTS transmitters. Currently, our application processing software based on OET–69 methodology only considers interference from a single transmitter. We agree and will adapt our application processing software and OET–69 methodology to determine the combined impact from multiple transmitters. Specifically, we will modify OET–69 and our software implementing the methodologies described therein to consider interference to a station's service from the multiple DTV transmitters operated by a station using a DTS network. This change will not affect the current OET–69 method under which the interference impact to a station from other stations that operate from a single antenna are considered individually; rather the interference impact of multiple transmitters will be limited to only the DTS transmitters operated by a single station. This change will be issued in a forthcoming update of OET–69.

4. Synchronization Standard

50. As proposed in the *DTS NPRM*, we will not require DTS transmitters to comply with a particular synchronization standard, such as that approved by the Advanced Television Systems Committee (''ATSC''), as long as the synchronization technology used is effective in minimizing interference within the system and otherwise will provide service to the population within a station's service area consistent with the Commission's rules. The record supports this conclusion. (We note that CBA says that Class A and LPTV stations using DTS should not have to comply with the ATSC technical standard and that the Commission should allow experimentation with an alternative technical standard, such as COFDM.) We agree with MSTV that the synchronization standard should be flexible to encourage the development and enhancement of synchronization technology. Stations, of course, must continue to comply with the ATSC standards for digital television, as required by our rules. (*See* 47 CFR 73.682(d).)

51. We also agree with MSTV that the essential patents to employ the synchronization technology used in DTS should be licensed on a reasonable and nondiscriminatory (''RAND'') basis. Under RAND policies, patent holders commit themselves to offer their patents for licensing on RAND terms. In the *DTS NPRM*, the Commission noted that MWG has patent interests in the technology contained in the ATSC synchronization standard for DTS. By not requiring a particular synchronization standard, we seek to avoid requiring DTS broadcasters to use a patented technology. In cases where stations choose to use a patented technology, we expect that such use will be offered on RAND terms. We note that the ATSC patent policy requires a patent holder to file a statement with ATSC to disclose whether the patent

holder will commit itself to offer its patents for licensing on RAND terms. MWG has filed a patent statement in accordance with this policy to license its patents on RAND terms. Consistent with our previous patent policy for DTV, we reiterate our expectation that the licensing of the patents for DTS technology will be on RAND terms and if a future problem is brought to our attention, we will consider it and take appropriate action.

E. Class A and Low Power DTS

52. First, we approve on an experimental basis the use of DTS technologies by a single digital Class A TV, digital LPTV or digital TV translator station to provide service within its authorized service area. Second, as proposed in the *DTS NPRM*, we permit a licensee of multiple digital Class A TV, digital LPTV, and/or digital TV translator stations to operate through interconnected single-frequency DTS networks, but will continue to separately license each station in this interconnected single-channel network. In this section, we first discuss the use of DTS by a single digital Class A TV, digital LPTV and digital TV translator station to provide DTS service in the same manner as a full-power DTS station, i.e., to provide service within the station's authorized service area. (The service area of a Class A TV station is defined by 47 CFR 73.6010(c) and (d). The service area of a digital LPTV or translator station is defined by 47 CFR 74.792.) Then, we discuss the use of DTS by multiple Class A or low power stations to operate through interconnected single-frequency DTS networks.

53. Single-station DTS. We will allow low power stations to request an experimental license to use DTS to build out their digital facilities, as we offered to full power stations in 2004. However, at this time, we believe that it is premature and unnecessary to create DTS service rules for individual Class A and low power stations to use DTS in place of a single transmitter to provide service within the protected contour of the authorized station. In the *DTS NPRM*, the Commission generally sought comment on whether to allow Class A and low power stations to use DTS to provide service within their authorized service area. While noting that such stations may benefit from use of DTS technologies to overcome terrain limitations and avoid interference, the *DTS NPRM* also noted that the service area of a Class A or LPTV station is typically much smaller than that of a DTV broadcast station and, thus, Class A and low power stations may have less need for distributed stations. The comments generally support allowing these stations to use DTS to serve authorized service areas. For example, Holston Valley and Smith note that low power UHF stations can achieve large service contours, for which DTS would help overcome the same reception problems faced by full-power stations. (We note that the protected signal contour of a digital UHF low power station operating with the maximum permitted ERP of 15,000 watts at an antenna height of 152.4 meters (500 feet) is predicted to extend 49.9 kilometers (29.1 miles).) The CBA states that there will be Class A and LPTV licensees interested in experimenting with DTS technologies.

54. The record is not instructive on the specific means to implement a Class A or secondary low power DTS service. We believe that low power stations should be able to use DTS for individual station operation. However, we do not have an adequate record at this time to resolve the technical issues for low power stations as they differ from full power stations. Nor do we have sufficient indication of widespread interest in DTS among individual low power stations to warrant initiating a further notice at this time. We recognize that low power stations generally serve a much smaller geographic area than most full power stations. Consequently, the likelihood of needing DTS to provide service is low. Moreover, Class A and low-power stations do not face the same DTV transition deadline as full-power stations, thereby reducing the urgency for post-transition low power DTS rules. Low power stations are in the early stages of transitioning to digital service and do not yet have a deadline for terminating analog service. To provide maximum flexibility, we will allow low power stations to request an experimental license to use DTS to build out their digital facilities, as we offered to full power stations in 2004. If there is demonstrated interest in or need for DTS as an alternative for individual low power stations on a permanent basis, we can initiate a rulemaking at that time. For now, Class A and low power stations that wish to experiment with DTS technologies may request STA on a case-by-case basis.

55. Interconnected Networks of Class A Stations. We permit a digital Class A TV licensee to use DTS technologies to operate a group of commonly-owned stations with contiguous predicted DTV noise-limited contours through interconnected single frequency networks that carry common locally-produced programming within the market area served by the station group. (The market area for locally produced programming of a digital Class A station is the area within the station's predicted DTV noise-limited contour, as defined in Section 73.622(e), based on the station's authorized facilities. With respect to a group of commonly-owned stations, digital Class A stations whose predicted noise-limited contours are physically contiguous to each other comprise the market area for locally produced programming. CFRCFR We will not issue a single DTS license for such interconnected stations.) Because the rules now permit a digital Class A TV licensee to offer common locally-produced programming within the contiguous predicted DTV noise-limited contours of any of the digital Class A stations in a commonly-owned group, we find that we should permit the more spectrally-efficient single-frequency network of commonly-owned stations with contiguous predicted DTV noise-limited contours. (*See* 47 CFR 73.6000(2).) Accordingly, we will not reject a digital application of a Class A station to change its channel on the basis of predicted interference to another commonly-owned station in the same market area. Applications for such digital Class A TV stations must be filed using the process proposed in the digital LPTV proceeding. We will not otherwise permit single-frequency networks of commonly-owned digital Class A stations (i.e., stations with non-contiguous contours) and we will separately license each station in the single-frequency network (i.e., we will not issue a single DTS license for such interconnected stations).

56. In the *DTS NPRM*, the Commission proposed to authorize Class A TV licensees to use DTS technologies to operate a single-frequency network of a group of commonly owned digital Class A stations. Commenters were split on this proposal. One group of commenters support such single-channel networks of commonly-owned Class A stations because it would be spectrally efficient. The other group of commenters oppose such networks, claiming that it would in effect change the regulatory status of Class A TV stations. Specifically, MSTV and NAB assert that allowing Class A TV licensees to use DTS to operate such single-channel networks throughout a station's market area would convert such networks into a single Class A ''super'' station that would change the regulatory relationship between full-power and Class A stations. (Paxson adds that Class A licensees should not be given such an opportunity to expand throughout a market area unless full-

power broadcasters are also allowed the opportunity to serve an entire DMA.)

57. We conclude that our current rules permit Class A stations to use a single-frequency DTS network to interconnect. Therefore, to the extent that Class A stations may now offer service throughout the contiguous predicted DTV noise-limited contours of a commonly owned group of digital Class A stations, we will allow it. When there are commonly owned stations in the same market, the individual stations operate on different TV channels in order to avoid interference to reception. Use of a common channel in a Class A station group using DTS technologies would promote spectrum efficiency and may also provide an alternative for licensees whose stations may someday face channel displacement and possible cessation of operation. We also note that our rules do not now preclude licensees from operating such commonly owned stations on the same channel, albeit with the potential for interference. (A change in channel not related to channel displacement is a major change for which an application can only be filed in an established filing window.) Use of DTS technology could significantly lessen the interference risk among such stations depending on local conditions. Moreover, each of the commonly owned Class A stations in the same market is separately licensed and, with certain exceptions, must satisfy the regulatory requirements for a Class A station. That is, the operation of each of the Class A stations in such networks would, in most respects, be the same as their operation as stand-alone digital stations with regard to protected service area, permitted ERP, and minimum hours of operation. These stations would be authorized with the same regulatory status accorded stand-alone digital Class A stations under the existing Class A interference standards. (*See* 47 CFR Part 73, subpart J.)

58. We find that the above provisions for use of DTS technologies do not alter the statutory status of Class A stations. The Commission established the Class A television service pursuant to the Community Broadcasters Protection Act of 1999 (''CBPA'') in order to preserve low-power community television service. (*See* 47 U.S.C. 336(f)(1). Congress directed the Commission to establish a Class A TV service to provide a measure of primary status to certain LPTV stations so that those stations could continue to operate during and after the DTV transition. The CBPA directed that Class A licensees must be subject to the same license terms and renewal standards as full power television licensees, and that Class A licensees should be accorded primary status as television broadcasters as long as they continue to meet the requirements set forth in the statute. Class A TV stations are similar in many respects to LPTV stations; their operations are generally governed by the same technical standards. Unlike LPTV stations, Class A stations must comply with part 73 regulations applicable to full-service TV broadcast stations, except for those that cannot apply for technical or other reasons. Class A stations also are afforded certain interference protection rights not available to LPTV stations. The Class A service rules (Part 73, Subpart J) also contain provisions for the operation of digital Class A TV stations.) Class A stations provide locally originated programming, often to rural and urban communities that have either no or little access to such programming. Such stations are owned by a wide variety of licensees, including minorities, women, educational organizations and small businesses, and often provide niche programming to residents of specific ethnic, racial, and interest communities. The Class A service promotes diversity and localism in television broadcasting. The CBPA provided Class A eligibility for licensees of commonly owned LPTV stations broadcasting common local programming produced in the combined market area of these stations.

59. Interconnected Networks of Low Power Stations. We permit digital LPTV and TV translator stations to interconnect through the use of a single-frequency DTS network. We find that they can do so within the framework of their service rules. (*See* 47 CFR Part 74, Subpart G.) Unlike Class A networks, low power networks do not raise any policy considerations because they involve only secondary service. Moreover, these low power stations have no minimum coverage obligations.

V. Conclusion

60. By this Report and Order, we adopt rules for DTV broadcasters' use of DTS technologies. The rules we adopt herein will apply to DTV operations after the February 17, 2009 transition date. These rules will improve DTV stations' ability to serve all viewers in their service areas. In particular, DTS will benefit viewers who would not otherwise be reached by conventional means. We recognize that some stations may need to use DTS to provide digital service to current analog viewers who are within the station's Grade B contour after they terminate analog broadcasting. We will accept requests for waivers from the rules we are adopting, as well as deviations from the Interim Policy, to permit and expedite service for viewers in these areas who would otherwise lose service from the station, and, in particular, if the viewers would be without service from any affiliate of the same network.

VI. Procedural Matters

A. Final Regulatory Flexibility Analysis

61. As required by the Regulatory Flexibility Act of 1980 (''RFA''), the Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA'') relating to this Report and Order. (*See* 5 U.S.C. 603. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''), Public Law 104–121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (''CWAAA'').) As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the Notice of Proposed Rulemaking (''*DTS NPRM*'') to this proceeding. The Commission sought written public comment on the proposals in the *DTS NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

1. Need for, and Objectives of, the Report and Order

62. This Report and Order adopts rules for the use of distributed transmission system (''DTS'') technologies. The rules adopted in this Report and Order will allow DTV station licensees and permittees to use DTS technologies where feasible in place of a single transmitter to provide service as authorized. In summary, we take the following actions to authorize and implement DTS service:

- We define a DTS service area as being comparable to that of a station's single transmitter facility, and, to implement this approach, we will determine a station's potential maximum authorized service area using the ''Table of Distances'' proposed in our *DTS NPRM*.
- We adopt a waiver policy to permit a station to use DTS if doing so will enable it to continue to serve its existing analog viewers who would otherwise lose service as a result of its transition to digital service.
- We require that DTS transmitters be located within either the DTV station's Table of Distances area or its authorized service area.

• We adopt rules to prohibit stations from using DTS to ''cherry-pick'' service.

• We afford primary regulatory status to the multiple transmitters used in a DTS network within the areas that such DTS transmitters are authorized to serve.

• We apply to DTS stations the Part 73 licensing and technical rules that apply to DTV single-transmitter stations.

• We will evaluate DTS proposals using the same interference standard adopted for DTV stations' post-transition operations in the *Third DTV Periodic Report and Order.* We also adopt the root-sum-square (''RSS'') method of calculating interference from multiple DTS transmitters.

• We permit a licensee of multiple digital Class A TV, digital LPTV, and/or digital TV translator stations to operate through interconnected single-frequency DTS networks but will continue to separately license each station in this interconnected single-channel network.

• We approve on an experimental basis the use of DTS technologies by a single digital Class A TV, digital LPTV or digital TV translator station to provide service within its authorized service area.

We find that these rules will improve some DTV stations' ability to serve more of their viewers within their service areas. For example, we expect that DTS will be especially useful in mountainous areas where single transmitters have been unable to reach viewers in valleys or those blocked by elevated terrain. Furthermore, DTS may be a useful tool for stations to prevent some loss of service to existing analog viewers resulting from changes to the station's service area in the transition to digital service. These rules will apply to post-transition operations (i.e., operations after February 17, 2009). DTS proposals related to pre-transition operations will continue to be evaluated under the Commission's interim policy.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

63. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

3. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

a. Entities Directly Affected by Rules

64. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small government jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

65. The rules adopted by this Report and Order will permit DTV broadcast stations to use DTS technologies where feasible in place of a single transmitter to provide service as authorized. We adopt our tentative conclusion in the *DTS NPRM* that only television broadcast station licensees and permittees will be directly affected by the rules adopted herein. Therefore, in this FRFA, we consider the impact of the rules on small television broadcast stations. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

66. *Television Broadcasting.* The rules and policies adopted herein apply to television broadcast licensees and potential licensees of television service. The SBA defines a television broadcast station as a small business if such station has no more than $14.0 million in annual receipts. Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' The Commission has estimated the number of licensed commercial television stations to be 1,376. According to Commission staff review of the BIA Financial Network, MAPro Television Database (''BIA'') on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or about 72 percent) have revenues of $14.0 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed NCE television stations to be 380. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

67. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

68. *Class A TV, LPTV, and TV translator stations.* The rules and policies adopted herein also apply to licensees of Class A TV stations, low power television (LPTV) stations, and TV translator stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $14.0 million in annual receipts. Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, and 4,518 licensed TV translators. Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than $14.0 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

b. Entities Not Directly Affected by Rules

69. We adopt our tentative conclusion that the rules adopted herein will not directly affect any other types of entities

other than television broadcast station licensees and permittees. In the *DTS NPRM,* we invited comment on this tentative conclusion but received no comments on this issue. In particular, out of an abundance of caution, we invited comment from any small cable operators or small multichannel video programming distributors (MVPDs) who believed they might be directly affected by the proposed rules contained in the *DTS NPRM.* Because the rules adopted herein pertain only to the technology employed in television broadcasting, we find that these rules will not directly affect small cable operators or small MVPDs. We, thus, adopt our conclusion that these entities fall outside the scope of this FRFA. Accordingly, we do not discuss these entities, which were listed in the IRFA.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

70. The rules adopted by this Report and Order will permit television broadcast licensees to use DTS technologies in lieu of a single-transmitter to operate their television broadcast stations. Use of DTS is at the option of the broadcast licensee. The rules do not impose any mandatory reporting, recordkeeping and other compliance requirements, unless the licensee chooses to use DTS. The rule changes that will directly affect reporting, recordkeeping and other compliance requirements are described below.

71. The rules adopted by this Report and Order require that DTS transmitters be part of a linked group that will be covered by one construction permit and license. DTS transmitters will not be separately licensed. Unless otherwise indicated, the rules adopted by this Report and Order will apply the current requirements and processes for DTV stations, or, where appropriate, analog TV stations. The Commission intends to use application filing and processing procedures similar to the current procedures for DTV licensing. FCC Forms 301 and 340 will be modified to accommodate the use of DTS. Specifically, licensees will request authority to construct DTS facilities by filing a single application that includes either (1) a main transmitter and one or more additional transmitters that will collectively use the DTS technology, or (2) two or more smaller DTS transmitters. In addition, a licensee may add to its DTS network of transmitters using a minor change application for a construction permit to change a licensed DTV facility, or for a modified construction permit to change a DTV facility authorized by a construction permit. Such applications will be processed in accordance with the Commission's current processing rules and guidelines, which includes requiring that the coverage from one or more DTS transmitter(s) must provide principal community coverage as required in Section 73.625(a) of the rules.

5. Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

72. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

73. The rules adopted by this Report and Order will permit broadcast stations to use DTS technologies where feasible in place of a single transmitter to provide service as authorized. The use of DTS technologies is not mandatory and only television broadcast licensees who choose to employ a DTS network will be impacted by the rules. Specifically, we conclude that small broadcasters will benefit from the opportunities offered by DTS technologies. Although no commenters specifically address the IRFA, the record does show many benefits of DTS to small broadcasters. Small broadcasters will share in the benefits to all broadcasters discussed in Section III.A., supra, which include uniform signal levels throughout a licensee's service area, the ability to operate at reduced power to achieve the same coverage, a reduced likelihood of causing interference to neighboring licensees, an ability to overcome terrain limitations, and more reliable indoor reception. Of particular importance to small broadcasters, the use of DTS technologies will allow stations to reach rural and remote areas that cannot now be served by conventional means. Finally, the Commission is not imposing any adverse economic impact on small entities by the rules adopted in this Report and Order because the rules will impact small broadcasters only if they choose to avail themselves of the opportunities afforded by them; therefore, no discussion of alternatives is necessary.

6. Report to Congress

The Commission will send a copy of this Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of this Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

B. Final Paperwork Reduction Act Analysis

74. This Report and Order was analyzed with respect to the Paperwork Reduction Act of 1995 (''PRA'') and contains modified information collection requirements, including changes to FCC Forms 301 and 340 to accommodate applications for DTS systems. (The Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13, 109 Stat. 163 (1995) (*codified in* Chapter 35 of Title 44 U.S.C.).) The information collection requirements adopted in this Report and Order will be submitted to OMB for final review under Section 3507(d) of the PRA, and OMB and the public will be afforded an opportunity to file comments on the modified information collection requirements contained in this proceeding. (44 U.S.C. 3507(d).) In addition, pursuant to the Small Business Paperwork Relief Act of 2002 (''SBPRA''), the Commission sought specific comment in the *DTS NPRM* on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' (The Small Business Paperwork Relief Act of 2002 (''SBPRA''), Public Law 107–198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).) We received no comment on this issue.

C. Congressional Review Act

75. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act. (*See* 5 U.S.C. 801(a)(1)(A). The Congressional Review Act is contained in Title II, section 251, of the CWAAA; *see* Public Law 104–121, Title II, section 251, 110 Stat. 868.)

D. Additional Information

76. For more information on this Report and Order, please contact Evan Baranoff, Policy Division, Media Bureau at (202) 418–7142, Gordon Godfrey,

Engineering Division, Media Bureau at (202) 418–2193, or John Gabrysch, Engineering Division, Media Bureau at (202) 418–7152.

VII. Ordering Clauses

77. Accordingly, *it is ordered* that, pursuant to Sections 1, 4(i) and (j), 7, 301, 302, 303, 307, 308, 309, 316, 319, 324, 336, and 337 of the Communications Act of 1934, 47 U.S.C 151, 154(i) and (j), 157, 301, 302, 303, 307, 308, 309, 316, 319, 324, 336, and 337, this Report and Order is adopted, and the Commission's rules are amended as set forth in Appendix B, and shall be effective January 5, 2009, except § 73.626(f) which contains information collection requirements that have not been approved by OMB. The changes to FCC Forms 301 and 340 are subject to the PRA and are not effective until approved by the OMB. The Commission will publish a notice in the **Federal Register** announcing when OMB approval for these forms and information collections have been received and these rules will take effect.

78. *It Is Further Ordered* that, pursuant to Section 5(c) of the Communications Act of 1934, 47 U.S.C. 155(c), the Chief, Media Bureau, is granted delegated authority to review and process requests and applications to use DTS technologies.

79. *It Is Further Ordered* that, pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), the Commission shall send a copy of this Report and Order in a report to Congress and the General Accounting Office.

80. *It Is Further Ordered* that the Reference Information Center, Consumer Information Bureau, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 73

Digital television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows.

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334 and 336.

■ 2. Add a new § 73.626 to read as follows:

§ 73.626 DTV distributed transmission systems.

(a) A DTV station may be authorized to operate multiple synchronized transmitters on its assigned channel to provide service consistent with the requirements of this section. Such operation is called a distributed transmission system (DTS). Except as expressly provided in this section, DTV stations operating a DTS facility must comply with all rules applicable to DTV single-transmitter stations.

(b) For purposes of compliance with this section, a station's ''authorized service area'' is defined as the area within its predicted noise-limited service contour determined using the facilities authorized for the station in a license or construction permit for non-DTS, single-transmitter-location operation.

(c) *Table of Distances.* The following Table of Distances describes (by channel and zone) a station's maximum service area that can be obtained in applying for a DTS authorization.

Channel	Zone	F(50,90) field strength (dBU)	Distance from reference point
2–6	1	28	108 km. (67 mi.).
2–6	2 and 3	28	128 km. (80 mi.).
7–13	1	36	101 km. (63 mi.).
7–13	2 and 3	36	123 km. (77 mi.).
14–51	1, 2 and 3	41	103 km. (64 mi.).

(1) DTV station zones are defined in § 73.609.

(2) *DTS reference point.* A station's DTS reference point is established in the FCC Order that created or made final modifications to the Post-Transition DTV Table of Allotments, § 73.622(i), and the corresponding facilities for the station's channel assignment as set forth in that FCC Order.

(d) *Determining DTS coverage.* The coverage for each DTS transmitter is determined based on the F(50,90) field strength given in the Table of Distances (in paragraph (c) of this section), calculated in accordance with § 73.625(b). The combined coverage of a DTS station is the logical union of the coverage of all DTS transmitters.

(e) *DTS protection from interference.* A DTS station must be protected from interference in accordance with the criteria specified in § 73.616. To determine compliance with the interference protection requirements of § 73.616, the population served by a DTS station shall be the population within the station's combined coverage contour, excluding the population in areas that are outside both the DTV station's authorized service area and the Table of Distances area (in paragraph (c) of this section). Only population that is predicted to receive service by the method described in § 73.622(e)(2) from at least one individual DTS transmitter will be considered.

(f) *Applications for DTS.* An application proposing use of a DTS will not be accepted for filing unless it meets all of the following conditions:

(1) The combined coverage from all of the DTS transmitters covers all of the applicant's authorized service area;

(2) Each DTS transmitter's coverage is contained within either the DTV station's Table of Distances area (pursuant to paragraph (c) of this section) or its authorized service area, except where such extension of coverage beyond the station's authorized service area is of a minimal amount and necessary to meet the requirements of paragraph (f)(1) of this section;

(3) Each DTS transmitter's coverage is contiguous with at least one other DTS transmitter's coverage;

(4) The coverage from one or more DTS transmitter(s) is shown to provide principal community coverage as required in § 73.625(a);

(5) The ''combined field strength'' of all the DTS transmitters in a network does not cause interference to another station in excess of the criteria specified in § 73.616, where the combined field strength level is determined by a ''root-sum-square'' calculation, in which the combined field strength level at a given location is equal to the square root of the sum of the squared field strengths

from each transmitter in the DTS network at that location.

(6) Each DTS transmitter must be located within either the DTV station's Table of Distances area or its authorized service area.

■ 3. Add a new § 73.6023 to read as follows:

§ 73.6023 Distributed transmission systems.

Station licensees may operate a commonly owned group of digital Class A stations with contiguous predicted DTV noise-limited contours (pursuant to § 73.622(e)) on a common television channel in a distributed transmission system.

Note: The following Appendices will not be included in the Code of Federal Regulations.

Appendix A: List of Commenters

Comments

1. Alliance for Local Broadcasters (''Alliance'') (filed 02/06/06).
2. Association of Public Television Stations (''APTS'') (filed 02/06/06).
3. Coalition for DTS (''Coalition'') (Joint Comments filed 02/06/06). (The Coalition members include: Tribune Broadcasting Company, Media General, Inc., Clear Channel Television, Meredith Broadcast Group, California Oregon Broadcasting, Inc., Holston Valley Broadcasting Corporation, Reading Broadcasting, Inc., Oklahoma Land Company LLC, and Axcera, LLP.)
4. Cohen, Dippell and Everist, P.C. (''CDE'') (filed 02/06/06).
5. Community Broadcasters Association (''CBA'') (filed 02/06/06).
6. Harris Corporation (''Harris'') (filed 02/06/06).
7. Holston Valley Broadcasting Corporation (''Holston Valley'') (filed 02/06/06).
8. KJLA, LLC (KJLA), KMVD Licensee Co., LLC (KMVD), and Rancho Palos Verdes Broadcasters, Inc. (RPVB) (''KJLA, LLC et al'') (Joint Comments filed 02/06/06).
9. LIN Television Corporation (''LIN'') (filed 02/06/06).
10. Louis Martinez Family Group (''LMFG'') (filed 02/06/06).
11. Merrill Weiss Group LLC (''MWG'') (late filed 02/07/06).
12. Association for Maximum Service Television, Inc. (''MSTV'') (filed 02/06/06).
13. National Association of Broadcasters (''NAB'') (filed 02/06/06).
14. New America Foundation, *et al.* (includes Media Access Project, ''MAP'') (''NAF, *et al.*'') (Joint Comments filed 02/06/06). (The complete list of commenters jointly filing with the New America Foundation (NAF) in this pleading include: Acorn Active Media Foundation (Acorn), Action Coalition for Media Education, Alliance for Community Media, Benton Foundation, Center for Digital Democracy (CDD), Center for Neighborhood Technology, Champaign-Urbana Community Wireless Network (CUWiN), Citizens for Independent Public Broadcasting, Common Cause, Consumer Federation of America (CFA), FreeNetworks.org, Free Press, Future of Music Coalition, Hawaii Consumers, MediaChannel.org, Media Access Project (MAP), Media Alliance, Prometheus Radio Project, Reclaim the Media, and Tribal Digital Village.)
15. Owens, Whitney (filed 02/06/06).
16. Paxson Communications Corporation (''Paxson'') (filed 02/06/06). (Paxson changed its name last year to ION Media Networks (''ION'').)
17. Reading Broadcasting, Inc. (''RBI'') (filed 02/06/06).
18. Rohde & Schwarz, Inc. and Samsung (Joint Comments) (filed 02/06/06).
19. Siete Grande Television, Inc. (''Siete Grande'') (filed 02/06/06).
20. Smith, Thomas C. (''Smith'') (filed 02/06/06).
21. SunBelt Television, Inc. (''SunBelt'') (filed 02/06/06).
22. The Pennsylvania State University (''PSU'') (filed 02/06/06).
23. TVPlus LLC (filed 02/06/06).

Reply Comments

1. CDE (filed 03/07/06).
2. Coalition (late filed 03/10/06).
3. Cox Broadcasting, Inc. (filed 03/07/06).
4. KJLA, LLC et al (filed 03/07/06).
5. MWG (late filed 03/08/06).
6. MSTV (filed 03/07/06).
7. NAB (filed 03/07/06).
8. Paxson (filed 03/07/06).
9. Reading (filed 03/07/06).
10. TVPlus LLC (filed 03/07/06).
11. Word of God Fellowship, Inc. (filed 03/07/06).
12. Wireless Internet Provider's Association (filed 02/27/06).

[Appendix B: Rule Changes—Reserved.]

[**Note:** The rules codified in this Report and Order (FCC 08–256), which were contained in Appendix B of the Report and Order, are set forth in this document, following the signature block.]

BILLING CODE 6712–01–P

Appendix C: Changes to FCC Forms 301 and 340

The Federal Communications Commission revises FCC Form 301 and FCC Form 340 to accommodate the use of DTS. The Main forms are revised to add "DTS" as a service type. In addition, the revised forms will include the following questions:

SECTION III.E. – DTS Engineering

GENERAL QUESTIONS. Complete the following questions that relate to the proposed DTS facility as a whole.

1. Channel Number: _____

2. Zone: ☐ **I** ☐ **II** ☐ **III**

3. Reference Point Coordinates for Table of Distances, in accordance with Section 73.626(c) of the rules:

   _____° _____' _____" ☐ N ☐ S Latitude

   _____° _____' _____" ☐ E ☐ W Longitude

4. File Number for Current Authorized Service Area: _____

5. The proposed DTS facility will operate on the DTV channel for this station as established in the Post-Transition DTV Table of Allotments, 47 CFR Section 73.622(i). ☐ **Yes** ☐ **No**

6. The proposed DTV station satisfies the interference protection provisions of 47 CFR Sections 73.616 and 73.626. ☐ **Yes** ☐ **No** (If "No," attach as an Exhibit justification.)

7. The proposed DTV station satisfies the coverage requirement in 47 CFR Section 73.625 and, therefore, will encompass the allotted principal community. ☐ **Yes** ☐ **No** (If "No," attach as an Exhibit justification.)

8. The proposed DTS facility satisfies the requirements in 47 CFR Section 73.626 in the following respects:

   a. The combined coverage from all of the DTS transmitters in the proposed DTS facility covers all of the station's authorized service area, as required in 47 CFR Section 73.626(f)(1). ☐ **Yes** ☐ **No** (If "No," attach as an Exhibit justification.)

   b. Each DTS transmitter's coverage is contained within either the DTV station's Table of Distances area (47 CFR Section 73.626 (c)) or its authorized service area, except where such coverage is of a minimal amount and necessary to meet the requirements of 47 CFR Section 73.626(f)(1). ☐ **Yes (coverage entirely contained station's authorized service area)** ☐ **Yes (but coverage exceeds station's authorized service area by "minimal amount")** ☐ **No** (Attach as an Exhibit a justification if "No" or if "Yes but coverage exceeds station's authorized service area by minimal amount".)

   c. Each DTS transmitter's coverage is contiguous with at least one other DTS transmitter's coverage, as required in 47 CFR Section 73.626(e)(3). ☐ **Yes** ☐ **No** (If "No," attach as an Exhibit justification.)

d. The coverage from one or more DTS transmitter(s) in the DTS facility provide(s) principal community coverage, as required in 47 CFR Section 73.626(e)(4). ☐ **Yes (one transmitter** provides principal community coverage**)** ☐ **Yes (multiple transmitters provide principal community coverage)** ☐ **No** (If "No," or if "Yes, multiple transmitters provide principal community coverage," attach as an Exhibit justification.)

e. The combined field strength of all of the DTS transmitters in the proposed DTS facility do not cause interference to another station in excess of the criteria specified in 47 CFR Section 73.616, as required in 47 CFR Section 73.626(e)(5). ☐ **Yes** ☐ **No** (If "No," attach as an Exhibit justification.) (Note: The combined field strength level shall be determined by a "root-sum-square" calculation, where the combined field strength level at a given location is equal to the square root of the sum of the squared field strengths from each transmitter in the DTS network at that location.)

f. Each DTS transmitter in the proposed DTS facility is located within either the DTV station's Table of Distances area or its authorized service area. ☐ **Yes** ☐ **No** (If "No," attach as an Exhibit justification.)

9. Environmental Protection Act.

a. The proposed DTS facility will not have a significant environmental impact, including exposure of workers or the general public to levels of RF radiation exceeding the limits specified in 47 CFR Sections 1.1307 and 1.1310. ☐ **Yes** ☐ **No**

b. Submit in an Exhibit the following for each transmitter site in the proposed DTS facility:

(If "Yes," provide a brief explanation for each site of why an Environmental Assessment is not required. Also describe in the Exhibit the steps that will be taken to limit RF radiation exposure to the public and to persons authorized access to each transmitter site. Note: By

checking "Yes" to this question, the applicant also certifies that it, in coordination with other users of each transmitter site, will reduce power or cease operation as necessary to protect persons having access to each site, transmitter or antenna from radio frequency electromagnetic exposure in excess of FCC guidelines.)

(If "No," provide an Environmental Assessment as required by 47 CFR Section 1.1311.)

10. The proposed DTS facility satisfies the requirements of 47 CFR Section 73.1030 regarding notification to radio astronomy installations, radio receiving installations and FCC monitoring stations. ☐ **Yes** ☐ **No**

11. The antenna structures to be used by the proposed DTS facility have been registered with the Commission and will not require re-registration to support the proposed antennas, OR the FAA has previously determined that the proposed antenna structures will not adversely effect safety in air navigation and these structures qualify for later registration under the Commission's phased registration plan, OR the proposed installation on these antenna structures do not require notification to the FAA pursuant to 47 CFR Section 17.7.

TECHNICAL SPECIFICATIONS. Ensure that the specifications below are accurate. Contradicting data found elsewhere in this application will be disregarded. All items must be completed. The response "on file" is not acceptable.

TECH BOX (site-specific questions). Complete the following questions for each transmitter site in the proposed DTS facility.

1. DTS Site Number (x of total number of sites): __ of __

2. Antenna Location Coordinates: (NAD 27):

_____° _____' _____" ☐ N ☐ S Latitude

_____° _____' _____" ☐ E ☐ W Longitude

3. Antenna Structure Registration Number: _____

☐ Not Applicable ☐ FAA Notification Filed with FAA

4. Antenna Location Site Elevation Above Mean Sea Level: _____ meters

5. Overall Tower Height Above Ground Level: _____ meters

6. Height of Radiation Center Above Ground Level: _____ meters

7. Height of Radiation Center Above Average Terrain: _____ meters

8. Maximum Effective Radiated Power (average power): _____ kW

9. Antenna Specifications:

a. Manufacturer: _____ Model: _____

b. Electrical Beam Tilt: _____ degrees ☐ Not Applicable

c. Mechanical Beam Tilt: _____ degrees toward azimuth _____ degrees True ☐ Not Applicable

d. Polarization: ☐ Horizontal ☐ Circular ☐ Elliptical

e. Directional Antenna Relative Field Values: ☐ Not applicable (Nondirectional)

Rotation: _____° ☐No rotation

[Degree Value Grid]

If a directional antenna is proposed for this site, the requirements of 47 CFR Section 73.625(c) must be satisfied. Exhibit required.

[Exhibit No. ___]

f. Elevation Pattern: Does the proposed antenna propose elevation radiation patterns that vary with azimuth for reasons other than the use of mechanical beam tilt? ☐ **Yes** ☐ **No**

g. **Required Exhibit:** Attach as an Exhibit all data specified in 47 CFR Section 73.625(c).

[Exhibit No. ___]

The vertical (elevation) plane radiation pattern data shall be submitted in Office Open XML ("Excel Spreadsheet") format with the first column containing depression angle values and second (and subsequent, when applicable) column(s) containing relative field values. When applicable, the first row shall list the azimuth angle being tabulated. The range of depression angles shall be 10 degrees above horizontal (-10 degrees depression) to 90 degrees below horizontal (90 degrees depression) and shall include data points spaced not more than 0.5-degree between -5 and 10 degrees depression angle, and not more than 5 degrees elsewhere. All pattern minima and maxima shall be included. Additional elevation plane data may be included following the column corresponding to 350 degrees TN so that the direction(s) of maximum and minimum radiation are provided. A relative field value of 1 shall correspond to the azimuth and depression angles corresponding to the direction of maximum ERP.

[Appendix D: Final Regulatory Flexibility Act Analysis—Reserved.]

[**Note:** The Final Regulatory Flexibility Act Analysis, which was contained in Appendix D of the Report and Order (FCC 08–256), is set forth in section VI of the **SUPPLEMENTARY INFORMATION** of this document.]

[FR Doc. E8–28855 Filed 12–4–08; 8:45 am]

BILLING CODE 6712–01–C

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 229 and 232

[Docket No. FRA–2006–26175, Notice No. 5]

RIN 2130–AB84

Electronically Controlled Pneumatic Brake Systems

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; delay of effective date.

SUMMARY: On October 16, 2008, the final rule in this proceeding providing regulatory relief for implementation and use of electronically controlled pneumatic brake systems was published with an effective date of December 15, 2008. *See* 73 FR 61512. *See* 73 FR 61512. To comply with the Congressional Review Act, the effective date of the final rule is being delayed to January 12, 2009.

DATES: The effective date of the final rule published on October 16, 2008, is delayed to January 12, 2009.

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: The final rule in this proceeding, published on October 16, 2008, indicated that it would be effective on December 15, 2008. *See* 73 FR 61512. Pursuant to the Congressional Review Act, codified at 5 U.S.C. 802, each major rule shall take effect 60 days after the final rule is either published in the **Federal Register** or is received by Congress, whichever is later. The final rule in this proceeding was received by Congress on November 13, 2008. Accordingly, the final rule's effective date will be January 12, 2009.

Issued in Washington, DC, on December 2, 2008.

Clifford C. Eby,

Acting Federal Railroad Administrator.

[FR Doc. E8–28893 Filed 12–2–08; 4:15 pm]

BILLING CODE 4910–06–P

Proposed Rules

Federal Register
Vol. 73, No. 235
Friday, December 5, 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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 315 and 316

RIN 3206–AL73

Noncompetitive Appointment of Certain Military Spouses

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing proposed regulations that allow agencies to noncompetitively appoint certain military spouses to positions in the competitive service. These regulations implement Executive Order 13473, 73 FR 56703 (Sept. 28, 2008), which authorizes noncompetitive appointments in the Civil Service for spouses of certain members of the armed forces. These regulations facilitate the entry of military spouses into the Federal civil service as part of an effort to recruit and retain skilled and experienced members of the armed forces and to recognize and honor the service of members injured, disabled, or killed in connection with their service.

DATES: Comments will be considered if received by January 5, 2009.

ADDRESSES: Send, fax, or deliver written comments to Angela Bailey, Deputy Associate Director, Center for Talent and Capacity Policy, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6500, Washington, DC 20415, e-mail to *employ@opm.gov*, or FAX to 202–606–2329.

Comments may also be sent through the Federal eRulemaking Portal at: *http://www.regulations.gov.* All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Jacquelyn Carrington at (202) 606–0960, FAX at (202) 606–2329, TDD at (202) 418–3134, or e-mail *jacquelyn.carrington@opm.gov.*

SUPPLEMENTARY INFORMATION: On September 25, 2008, the President signed Executive Order 13473 (73 FR 56703) allowing agencies to make noncompetitive appointments of spouses of certain members of the armed forces. To implement this Executive order, the Office of Personnel Management is proposing to add a new section 315.612 to subpart F of part 315, title 5, Code of Federal Regulations, and revise part 316, Temporary and Term Appointment, subpart C, section 316.302, and subpart D, section 316.402, to permit noncompetitive permanent, term, or temporary appointment of military spouses, respectively. This authority allows agencies to recruit and noncompetitively appoint spouses of certain members of the armed forces to positions in the competitive service. These regulations do not provide a hiring preference for military spouses, nor do they establish selection priority for these individuals. Consistent with other noncompetitive appointment authorities, these individuals must apply to a Federal vacancy announcement to be considered. This proposal creates a pool of applicants from which agencies may make noncompetitive selections if they choose to do so.

Agency Authority

Paragraph (a) of the proposed new § 315.612 explains the intent of the Executive order, which authorizes agencies to noncompetitively appoint certain military spouses to competitive service positions under certain circumstances. Specifically, agencies are authorized to appoint noncompetitively the spouse of a service member serving on active duty in the armed forces who has received permanent change of station orders, the spouse of a 100 percent disabled service member whose disability resulted from active duty in the armed forces, or the un-remarried widow or widower of a service member who was killed while on active duty in the armed forces.

Definitions

Paragraph (b) of proposed § 315.612 contains six definitions necessary for the administration of the section.

Eligibility

Paragraph (c) of proposed § 315.612 provides the criteria that a military spouse must meet to be eligible for noncompetitive appointment under this section. This paragraph also contains the eligibility criteria that a member of the armed forces on active duty must meet in order for his or her spouse to be eligible for noncompetitive appointment under this section.

This paragraph specifies that to be eligible for appointment under this section, the spouse of a member of the armed forces who is serving on active duty must be married to the member of the armed forces on, or before, the date of the service member's orders relocating him or her to another permanent duty station. It also specifies that the spouse must accompany the service member to the new permanent duty station.

This paragraph makes clear that the spouse of a deceased service member must be the un-remarried widow or widower of a member of the armed forces killed while on active duty in order to be eligible for noncompetitive appointment under this section.

Lastly, this paragraph provides that under this section agencies may appoint eligible spouses only to positions within the geographic area containing the permanent duty station to which the service member has been transferred or reassigned. The head of an agency, however, may waive this limitation if there are no Federal agencies within the geographic area in which the new duty station is located. Eligible spouses of 100 percent disabled service members, or service members who were killed while on active duty, are not subject to the geographic area limitation.

Conditions

Paragraph (d) of proposed § 315.612 provides the conditions under which an agency may appoint a military spouse noncompetitively under this section. This paragraph specifies that a spouse remains eligible for a noncompetitive appointment for a maximum of 2 years from the date of the (a) service member's orders authorizing a permanent change of station; (b) the documentation showing the service member is 100 percent disabled; or (c) the documentation showing the service member was killed while on active duty.

This paragraph also specifies that an eligible spouse may receive only one noncompetitive appointment to a permanent Federal job per each set of orders authorizing the service member's

permanent change of station. OPM is not proposing a limitation on the number of temporary or term appointments an eligible spouse may have per permanent change of duty location authorization.

This paragraph provides that individuals who accompany their military spouses to the new duty station within 1 year of the effective date of these regulations are eligible for noncompetitive appointment under this section.

Lastly, this paragraph provides that any provision that would disqualify an applicant for Federal appointment also disqualifies a spouse for appointment under these provisions.

Proof of Eligibility

Paragraph (e) of proposed § 315.612 explains the documentation that an agency hiring representative must have received from a spouse before making a noncompetitive appointment under this section. Spouses of active duty military members must submit to the hiring agency the following information: A copy of the military member's active duty orders authorizing a permanent change of duty station, and proof that the spouse was married to the military member at the time of the orders' issuance.

The spouse of an individual with a 100 percent disability rating must submit to the hiring agency documentation that states the individual is 100 percent disabled as a result of a service-connected disability that occurred while the individual was on active military duty, and proof that the spouse is married to the military member.

The spouse of an individual killed while on active duty must submit to the hiring agency documentation that shows the military member was serving on active military duty at the time of his or her death, proof that the spouse was married to the military member at the time of his or her death, and a statement certifying that he or she is the un-remarried widow or widower of the service member.

Acquisition of Competitive Status

Paragraph (f) of proposed § 315.612 provides the military spouse appointed under this section acquires competitive status upon completion of a probationary period.

Tenure on Appointment

Paragraph (g) of proposed § 315.612 specifies that an eligible military spouse hired under this authority has a career-conditional appointment until the employee fulfills the requirements for career tenure.

Temporary and Term Employment

The proposed regulations also revise §§ 316.302 and 316.402 to authorize agencies to make noncompetitive term or temporary appointments, respectively, of spouses eligible under the proposed provisions of § 315.612.

30-Day Comment Period

OPM is imposing a 30-day comment period on this proposed rule.

Regulatory Flexibility Act

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

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Parts 315 and 316

Government employees.

U.S. Office of Personnel Management.

Michael W. Hager,

Acting Director.

Accordingly, OPM proposes to amend title 5, Code of Federal Regulations, part 315, subpart F, and part 316, as follows:

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

1. The authority citation for part 315 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p. 111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O. 13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart F—Career or Career-Conditional Appointment Under Special Authorities

2. Add § 315.612 to subpart F to read as follows:

§ 315.612 Noncompetitive appointment of certain military spouses.

(a) *Agency authority.* In accordance with the provisions of this section, an agency may appoint noncompetitively a spouse of a member of the armed forces serving on active duty who has orders specifying a permanent change of station, a spouse of a 100 percent disabled service member injured while on active duty, or the un-remarried widow or widower of a service member who was killed while performing active duty.

(b) *Definitions.*

In this section,

(1) *Active duty* means full-time duty in the armed forces including full-time National Guard duty, except that for Reserve Component members the term ''active duty'' does not include training duties or attendance at service schools.

(2) *Armed forces* has the meaning given that term in 10 U.S.C. 101.

(3) *Duty station* means the permanent location to which a member of the armed forces is assigned for duty as specified on the individual's permanent change of station (PCS) orders.

(4) *Member of the armed forces* or *service member* means an individual who:

(i) Is serving on active duty in the armed forces under orders specifying the individual is called or ordered to active duty for more than 180 consecutive days, has been issued orders for a permanent change of station, and is authorized for dependent travel (i.e., the travel of the service member's family members) as part of the orders specifying the individual's permanent change of station;

(ii) Retired from active duty in the armed forces with a disability rating of 100 percent as documented by a branch of the armed forces, or, retired or was released or discharged from active duty in the armed forces and has a disability rating of 100 percent as documented by the Department of Veterans Affairs.

(iii) Was killed while serving on active duty in the armed forces.

(5) *Permanent change of station* means the assignment, reassignment, or transfer of a member of the armed forces from his or her present duty station or location without return to the previous duty station or location.

(6) *Spouse* means the husband or wife of a member of the armed forces.

(c) *Eligibility.*

(1) A spouse of a member of the armed forces as defined in paragraph (b)(4)(i) of this section must have:

(i) Married the member of the armed forces on, or prior to, the date of the service member's orders authorizing a permanent change of station; and

(ii) Relocated with the member of the armed forces to the new duty station specified in the documentation ordering a permanent change of station.

(2) A spouse of a member of the armed forces as defined in paragraph (b)(4)(iii) of this section must be the un-remarried widow or widower of the member of the armed forces killed on active duty in the armed forces.

(3) A spouse's eligibility for noncompetitive appointment under this section is limited to the geographic area, as specified on the member of the armed forces' permanent change of station orders. It includes the service member's duty station and the surrounding area from which people reasonably can be expected to travel daily to and from work. The head of an agency may waive this limitation (i.e., accept applications from spouses) if no Federal agency exists in the spouse's geographic area.

(d) *Conditions.*

(1) In accordance with the provisions of this section, spouses are eligible for noncompetitive appointment for a maximum of 2 years from the date of:

(i) The service member's permanent change of station orders;

(ii) Documentation verifying the member of the armed forces is 100 percent disabled; or

(iii) Documentation verifying the member of the armed forces was killed while on active duty.

(2) A spouse may receive only one noncompetitive appointment under this section to a permanent position per the service member's orders authorizing a permanent change of station.

(3) In accordance with the provisions of this section, spouses who relocated with a member of the armed forces to the location provided in the service member's permanent change of station orders within 1 year prior to the effective date of these regulations are eligible for noncompetitive appointment under this section.

(4) Any law, Executive order, or regulation that disqualifies an applicant for appointment also disqualifies a spouse for appointment under this section.

(e) *Proof of Eligibility.*

(1) Prior to appointment, the spouse of a member of the armed forces as defined in paragraph (b)(4)(i) of this section must submit to the employing agency:

(i) A copy of the service member's active duty orders which authorize a permanent change of station. This authorization must include:

(A) A statement authorizing the service member's spouse to accompany the member to the new permanent duty station;

(B) The specific location to which the member of the armed forces is to be assigned, reassigned, or transferred pursuant to permanent change of station orders; and

(C) The effective date of the permanent change of station; and

(ii) Documentation verifying marriage to the member of the armed forces (e.g., a marriage license or other legal documentation verifying marriage).

(2) Prior to appointment, the spouse of a member of the armed forces as defined in paragraph (b)(4)(ii) of this section must submit to the employing agency copies of:

(i) Documentation showing the member of the armed forces was released or discharged from active duty due to a service-connected disability;

(ii) Documentation showing the member of the armed forces retired, or was released or discharged from active duty, with a disability rating of 100 percent; and

(iii) Documentation verifying marriage to the member of the armed forces (e.g., a marriage license or other legal documentation verifying marriage).

(3) Prior to appointment, the spouse of a member of the armed forces as defined in paragraph (b)(4)(iii) of this section must submit to the employing agency copies of:

(i) Documentation showing the individual was released or discharged from active duty due to his or her death while on active duty;

(ii) Documentation verifying the member of the armed forces was killed while serving on active duty; and

(iii) Documentation verifying marriage to the member of the armed forces (e.g., a marriage license or other legal documentation verifying marriage); and

(iv) A statement certifying that he or she is the un-remarried widow or widower of the service member.

(f) *Acquisition of competitive status.* A person appointed under paragraph (a) of this section acquires competitive status automatically upon completion of probation.

(g) *Tenure on appointment.* An appointment under paragraph (a) of this section is career-conditional unless the appointee has already satisfied the requirements for career tenure or is exempt from the service requirement pursuant to § 315.201.

PART 316—TEMPORARY AND TERM EMPLOYMENT

3. The authority citation for part 316 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

4. Section 316.302(b)(3) is revised to read as follows:

§ 316.302 Selection of term employees.

* * * * *

(b) * * *

(3) Career-conditional appointment under § 315.601, 315.604, 315.605, 315.606, 315.607, 315.608, 315.609, 315.612, or 315.711 of this chapter;

* * * * *

5. Section 316.402(b)(3) is revised to read as follows:

§ 316.402 Procedures for making temporary appointments.

* * * * *

(b) * * *

(3) Career-conditional appointment under § 315.601, 315.604, 315.605, 315.606, 315.607, 315.608, 315.609, 315.612, 315.703, or 315.711 of this chapter;

* * * * *

[FR Doc. E8–28747 Filed 12–4–08; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2007–0153]

RIN 0579–AC88

Importation of Eggplant From Israel

Correction

In proposed rule document E8–26814 beginning on page 66807 in the issue of Wednesday, November 12, 2008 make the following correction:

§319.56–48 [Corrected]

On page 66811, in the third column, in §319.56–48(e), in the last line, ''7 CFR 319.56*48.'' should read ''7 CFR 319.56–48.''

[FR Doc. E8–26814 Filed 12–4–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. AMS–FV–08–0089; FV09–930–1 PR]

Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2008–2009 Crop Year for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule invites comments on the establishment of final free and restricted percentages for the 2008–2009 crop year tart cherries covered under the Federal marketing order regulating tart cherries grown in seven States (order). The percentages are 73 percent free and 27 percent restricted and will establish the proportion of cherries from the 2008 crop which may be handled in commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions. The percentages were recommended by the Cherry Industry Administrative Board (Board), the body that locally administers the marketing order. The order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: Comments must be received by *January 5, 2009.*

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Unit 155, 4700 River Road, Riverdale, MD 20737; telephone: (301) 734–5243, Fax: (301) 734–5275; or e-mail; *Patricia.Petrella@usda.gov or Kenneth.Johnson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (Department) is issuing this proposed rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This proposed rule would establish final free and restricted percentages for tart cherries for the 2008–2009 crop year, beginning July 1, 2008, through June 30, 2009. This proposed rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposed rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season. The regulations apply to all handlers of tart cherries that are in the regulated districts within the production area. Tart cherries in the free percentage category may be shipped immediately to any market, while restricted percentage tart cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with § 930.59 of the order and § 930.159 of the regulations, or used for exempt purposes (to obtain diversion credit) under § 930.62 of the order and § 930.162 of the regulations. The regulated districts for the 2008–2009 season are: District one—Northern Michigan; District two—Central Michigan; District three—Southern Michigan; District four—New York; District seven—Utah; and District eight—Washington. Districts five, six and nine (Oregon, Pennsylvania, and Wisconsin, respectively) will not be regulated for the 2008–2009 season.

The order prescribes under § 930.52 that those districts to be regulated shall be those districts in which the average annual production of cherries over the prior three years has exceeded six million pounds. A district not meeting the six million-pound requirement shall not be regulated in such crop year. Because this requirement was not met in the Districts of Oregon, Pennsylvania, and Wisconsin, handlers in those districts would not be subject to volume regulation during the 2008–2009 crop year.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. The supply of tart cherries, by contrast, varies greatly from crop year to crop year. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from crop year to crop year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely balanced. The primary purpose of setting free and restricted percentages is to balance supply with demand and reduce large surpluses that may occur.

Section 930.50(a) of the order prescribes procedures for computing an optimum supply for each crop year. The Board must meet on or about July 1 of each crop year, to review sales data, inventory data, current crop forecasts and market conditions. The optimum supply volume is calculated as 100 percent of the average sales of the prior three years to which is added a desirable carryout inventory not to exceed 20 million pounds or such other amount as may be established with the approval of the Secretary. The optimum supply represents the desirable volume

of tart cherries that should be available for sale in the coming crop year.

The order also provides that on or about July 1 of each crop year, the Board is required to establish preliminary free and restricted percentages. These percentages are computed by deducting the actual carryin inventory from the optimum supply figure (adjusted to raw product equivalent—the actual weight of cherries handled to process into cherry products) and subtracting that figure from the current year's USDA crop forecast or from an average of such other crop estimates the Board votes to use. If the resulting number is positive, this represents the estimated over-production, which would be the restricted tonnage. The restricted tonnage is then divided by the sum of the USDA crop forecast(s) for the regulated districts to obtain percentages for the regulated districts. The Board is required to establish a preliminary restricted percentage equal to the quotient, rounded to the nearest whole number, with the complement being the preliminary free tonnage percentage. If the tonnage requirements for the year are more than the USDA crop forecast, the Board is required to establish a preliminary free tonnage percentage of 100 percent and a preliminary restricted percentage of zero. The Board is required to announce the preliminary percentages in accordance with paragraph (h) of § 930.50.

The Board met on June 19, 2008, and computed, for the 2008–2009 crop year, an optimum supply of 183 million pounds. The Board recommended that the desirable carryout figure be zero pounds. Desirable carryout is the amount of fruit required to be carried into the succeeding crop year and is set by the Board after considering market circumstances and needs. This figure can range from zero to a maximum of 20 million pounds.

The Board calculated preliminary free and restricted percentages as follows: The USDA estimate of the crop for the entire production area was 177 million pounds; a 31 million pound carryin (based on Board estimates) was subtracted from the optimum supply of 183 million pounds which resulted in the 2008–2009 poundage requirements (adjusted optimum supply) of 152 million pounds. The carryin figure reflects the amount of cherries that handlers actually have in inventory at the beginning of the 2007–2008 crop year. Subtracting the adjusted optimum supply of 152 million pounds from the USDA crop estimate (177 million pounds) leaves a surplus of 25 million pounds of tart cherries. Subtracting an additional 8 million pounds for USDA committed sales results in a final surplus of 17 million pounds of tart cherries. The surplus was divided by the production in the regulated districts (161 million pounds) and resulted in a restricted percentage of 10 percent for the 2008–2009 crop year. The free percentage was 90 percent (100 percent minus 10 percent). The Board established these percentages and announced them to the industry as required by the order.

The preliminary percentages were based on the USDA production estimate and the following supply and demand information available at the June meeting for the 2008–2009 year:

	Millions of pounds
Optimum Supply Formula:	
(1) Average sales of the prior three years	183
(2) Plus desirable carryout	0
(3) Optimum supply calculated by the Board at the June meeting	183
Preliminary Percentages:	
(4) USDA crop estimate	177
(5) Carryin held by handlers as of July 1, 2008	31
(6) Adjusted optimum supply for current crop year (Item 3 minus Item 5)	152
(7) Surplus (Item 4 minus Item 6)	25
(8) Subtract pounds designated for USDA	8
(9) Surplus (Item 7 minus Item 8)	17
(10) USDA crop estimate for regulated districts	161

	Percentages	
	Free	Restricted
(11) Preliminary percentages (item 9 divided by item 10 × 100 equals restricted percentage; 100 minus restricted percentage equals free percentage)	90	10

Between July 1 and September 15 of each crop year, the Board may modify the preliminary free and restricted percentages by announcing interim free and restricted percentages to adjust to the actual pack occurring in the industry.

The Secretary establishes final free and restricted percentages through the informal rulemaking process. These percentages would make available the tart cherries necessary to achieve the optimum supply figure calculated by the Board. The difference between any final free percentage designated by the Secretary and 100 percent is the final restricted percentage. The Board met on September 12, 2008, to recommend final free and restricted percentages.

The actual production reported by the Board was 210 million pounds, which is a 33 million pound increase from the USDA crop estimate of 177 million pounds.

A 35 million pound carryin (based on handler reports estimates) was subtracted from the optimum supply of 183 million pounds which resulted in the 2008–2009 poundage requirements (adjusted optimum supply) of 148 million pounds. Subtracting the adjusted optimum supply of 148 million pounds from the USDA crop estimate (210 million pounds) and subtracting 8 million pounds for USDA committed sales results in a surplus of 54 million pounds of tart cherries. The surplus was divided by the production in the regulated districts (203 million pounds) and resulted in a restricted percentage of 27 percent for the 2008–2009 crop year. The free percentage was 73 percent (100 percent minus 27 percent).

The final percentages are based on the Board's reported production figures and the following supply and demand information available in September for the 2008–2009 crop year:

	Millions of pounds
Optimum Supply Formula:	
(1) Average sales of the prior three years	183
(2) Plus desirable carryout	0
(3) Optimum supply calculated by the Board	183
Final Percentages:	
(4) Board reported production	210
(5) Plus carryin held by handlers as of July 1, 2008	35
(6) Subtract USDA committed sales	8
(7) Tonnage available for current crop year	237
(8) Surplus (item 7 minus item 3)	54
(9) Production in regulated districts	203

	Percentages	
	Free	Restricted
(10) Final Percentages (item 8 divided by item 9 × 100 equals restricted percentage; 100 minus restricted percentage equals free percentage)	73	27

The USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (Guidelines) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This goal would be met by the establishment of a preliminary percentage which releases 100 percent of the optimum supply and the additional release of tart cherries provided under § 930.50(g). This release of tonnage, equal to 10 percent of the average sales of the prior three years' sales, is made available to handlers each season. The Board recommended that such release should be made available to handlers the first week of December and the first week of May. Handlers can decide how much of the 10 percent release they would like to receive on the December and May release dates. Once released, such cherries are released for free use by such handler. Approximately 18 million pounds would be made available to handlers this season in accordance with the Guidelines. This release would be made available to every handler and released to such handler in proportion to the handler's percentage of the total regulated crop handled. If a handler does not take his/her proportionate amount, such amount remains in the inventory reserve.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. A majority of the producers and handlers are considered small entities under SBA's standards.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 1997/98 through 2007/08, approximately 96 percent of the U.S. tart cherry crop, or 247.3 million pounds, was processed annually. Of the 247.3 million pounds of tart cherries processed, 61 percent was frozen, 27 percent was canned, and 12 percent was utilized for juice and other products.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. Bearing acreage has declined from a high of 50,050 acres in 1987/88 to 34,700 acres in 2007/08. This represents a 31 percent decrease in total bearing acres. Michigan leads the nation in tart cherry acreage with 70 percent of the total and produces about 75 percent of the U.S. tart cherry crop each year.

The 2008/09 crop is moderate in size at 210 million pounds. The largest crop occurred in 1995 with production in the regulated districts reaching a record 395.6 million pounds. The price per pound received by tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuations in the tart cherry industry are national in scope and impact. Growers testified during the order promulgation process that the prices they received often did not come close to covering the costs of production.

The industry demonstrated a need for an order during the promulgation process of the marketing order because large variations in annual tart cherry supplies tend to lead to fluctuations in prices and disorderly marketing. As a result of these fluctuations in supply and price, growers realize less income. The industry chose a volume control marketing order to even out these wide variations in supply and improve returns to growers. During the promulgation process, proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because many such growers and handlers had been going out of business due to low tart cherry prices. They also testified that, since an order would help increase grower returns, this should increase the buffer between business success and failure because small growers and handlers tend to be less capitalized than larger growers and handlers.

Aggregate demand for tart cherries and tart cherry products tends to be relatively stable from year-to-year. Similarly, prices at the retail level show

minimal variation. Consumer prices in grocery stores, and particularly in food service markets, largely do not reflect fluctuations in cherry supplies. Retail demand is assumed to be highly inelastic which indicates that price reductions do not result in large increases in the quantity demanded. Most tart cherries are sold to food service outlets and to consumers as pie filling; frozen cherries are sold as an ingredient to manufacturers of pies and cherry desserts. Juice and dried cherries are expanding market outlets for tart cherries.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. In general, the farm-level demand for a commodity consists of the demand at retail or food service outlets minus per-unit processing and distribution costs incurred in transforming the raw farm commodity into a product available to consumers. These costs comprise what is known as the ''marketing margin.''

The supply of tart cherries, by contrast, varies greatly. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from year-to-year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely in equilibrium. As a result, grower prices fluctuate widely, reflecting the large swings in annual supplies.

In an effort to stabilize prices, the tart cherry industry uses the volume control mechanisms under the authority of the Federal marketing order. This authority allows the industry to set free and restricted percentages. These restricted percentages are only applied to states or districts with a 3-year average of production greater than six million pounds, and to states or districts in which the production is 50 percent or more of the previous 5-year processed production average.

The primary purpose of setting restricted percentages is an attempt to bring supply and demand into balance. If the primary market is over-supplied with cherries, grower prices decline substantially.

The tart cherry sector uses an industry-wide storage program as a supplemental coordinating mechanism under the Federal marketing order. The primary purpose of the storage program is to warehouse supplies in large crop years in order to supplement supplies in short crop years. The storage approach is feasible because the increase in price—when moving from a large crop to a short crop year—more than offsets the costs for storage, interest, and handling of the stored cherries.

The price that growers receive for their crop is largely determined by the total production volume and carryin inventories. The Federal marketing order permits the industry to exercise supply control provisions, which allow for the establishment of free and restricted percentages for the primary market, and a storage program. The establishment of restricted percentages impacts the production to be marketed in the primary market, while the storage program has an impact on the volume of unsold inventories.

The volume control mechanism used by the cherry industry results in decreased shipments to primary markets. Without volume control the primary markets (domestic) would likely be over-supplied, resulting in lower grower prices.

To assess the impact that volume control has on the prices growers receive for their product, an econometric model has been developed. The econometric model provides a way to see what impacts volume control may have on grower prices. The three districts in Michigan, along with the districts in Utah, New York, and Washington are the restricted areas for this crop year and their combined total production is 203 million pounds. A 27 percent restriction means 148 million pounds is available to be shipped to primary markets from these four states. Production levels of 0.6 million pounds for Wisconsin, 2.8 million pounds for Oregon, and 3.7 million pounds for Pennsylvania (the unregulated areas in 2008/09), result in an additional 7.1 million pounds available for primary market shipments.

In addition, USDA requires a 10 percent release from reserves as a market growth factor. This results in an additional 18 million pounds being available for the primary market. The 148 million pounds from Michigan, Utah, Washington, and New York, the 7.1 million pounds from the other producing states, the 18 million pound release, and the 35 million pound carryin inventory gives a total of 208 million pounds being available for the primary markets.

The econometric model is used to estimate the impact of establishing a reserve pool for this year's crop. With the volume controls, grower prices are estimated to be approximately $0.11 per pound higher than without volume controls.

The use of volume controls is estimated to have a positive impact on growers' total revenues. With regulation, growers' total revenue from processed cherries is estimated to be $4.3 million higher than without restrictions. The without restrictions scenario assumes that all tart cherries produced would be delivered to processors for payments.

It is concluded that the 27 percent volume control would not unduly burden producers, particularly smaller growers. The 27 percent restriction would be applied to the growers in Michigan, New York, Utah, and Washington. The growers in the other three states covered under the marketing order will benefit from this restriction.

The use of volume controls is believed to have little or no effect on consumer prices and will not result in fewer retail sales or sales to food service outlets.

Without the use of volume controls, the industry could be expected to start to build large amounts of unwanted inventories. These inventories have a depressing effect on grower prices. The econometric model shows for every 1 million-pound increase in carryin inventories, a decrease in grower prices of $0.0036 per pound occurs. The use of volume controls allows the industry to supply the primary markets while avoiding the disastrous results of over-supplying these markets. In addition, through volume control, the industry has an additional supply of cherries that can be used to develop secondary markets such as exports and the development of new products. The use of reserve cherries in the production shortened 2002/03 crop year proved to be very useful and beneficial to growers and packers.

In discussing the possibility of marketing percentages for the 2008–2009 crop year, the Board considered the following factors contained in the marketing policy: (1) The estimated total production of tart cherries; (2) the estimated size of the crop to be handled; (3) the expected general quality of such cherry production; (4) the expected carryover as of July 1 of canned and frozen cherries and other cherry products; (5) the expected demand conditions for cherries in different market segments; (6) supplies of competing commodities; (7) an analysis of economic factors having a bearing on the marketing of cherries; (8) the estimated tonnage held by handlers in primary or secondary inventory reserves; and (9) any estimated release of primary or secondary inventory reserve cherries during the crop year.

The Board's review of the factors resulted in the computation and announcement in September 2008 of the free and restricted percentages proposed

to be established by this rule (73 percent free and 27 percent restricted).

One alternative to this action would be not to have volume regulation this season. Board members stated that no volume regulation would be detrimental to the tart cherry industry due to the size of the 2008–2009 crop. Returns to growers would not cover their costs of production for this season which might cause some to go out of business.

As mentioned earlier, USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity available under this rule is 110 percent of the quantity shipped in the prior three years.

The free and restricted percentages established by this rule release the optimum supply and apply uniformly to all regulated handlers in the industry, regardless of size. There are no known additional costs incurred by small handlers that are not incurred by large handlers. The stabilizing effects of the percentages impact all handlers positively by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all producers by allowing them to better anticipate the revenues their tart cherries will generate.

While the benefits resulting from this rulemaking are difficult to quantify, the stabilizing effects of the volume regulations impact both small and large handlers positively by helping them maintain markets even though tart cherry supplies fluctuate widely from season to season.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this regulation.

In addition, the Board's meeting was widely publicized throughout the tart cherry industry and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 12, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements under the tart cherry marketing order have been previously approved by OMB and assigned OMB Number 0581–0177.

Reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This rule does not change those requirements.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services and for other purposes.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because this rule would need to be in place as soon as possible since handlers are already shipping tart cherries from the 2008–2009 crop. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is proposed to be amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 930.256 is added to read as follows:

Note: This section will not appear in the annual Code of Federal Regulations.

§ 930.256 Final free and restricted percentages for the 2008–2009 crop year.

The final percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2008, which shall be free and restricted, respectively, are designated as follows: Free percentage, 73 percent and restricted percentage, 27 percent.

Dated: November 26, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–28769 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1220

[Docket No. AMS–LS–08–0074]

Soybean Promotion, Research, and Information Program: Amend Procedures To Request a Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would amend the regulations that provide for procedures to request a referendum under the Soybean Promotion, Research, and Consumer Information Program, commonly known as the soybean checkoff program. The number of soybean producers referred to the in the regulations would change from 663,880 to 589,182, based on information provided by the Department of Agriculture (USDA), Farm Service Agency (FSA). This change is necessary to establish the number of soybean producers who are eligible to participate in the 2009 Request for Referendum. Additionally, this rule would amend the regulations pursuant to administrative changes to Web site addresses and office locations made for the USDA's Agricultural Marketing Service (AMS).

DATES: Comments must be received by December 22, 2008.

ADDRESSES: Comments may be posted online at *http://www.regulations.gov,* or sent to Kenneth R. Payne, Chief, Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251; or via Fax to (202) 720–1125. Comments will be made available for public inspection at the above address during regular business hours or via the Internet at *http://www.regulations.gov.* Comments received will be posed

without change, including any personal information provided. All comments should reference the docket number, Docket No. AMS–LS–08–0074; the date of submission; and the page number of this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Kenneth R. Payne, Chief, Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251; Telephone 202/720–1115; Fax 202/720–1125; or e-mail to *Kenneth.Payne@usda.gov*.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposal is not intended to have a retroactive effect. The proposed rule would not preempt any other Federal or State laws, regulations, or policies.

The Soybean Promotion, Research, and Consumer Information Act (Act) provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 1971 of the Act, a person subject to the Soybean Promotion and Research Order (Order) may file a petition with USDA stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with the law and requesting a modification of the Order or an exemption from the Order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that district courts of the United States in any district in which such person is an inhabitant, or has their principal place of business, has jurisdiction to review USDA's ruling on the petition, if a complaint for this purpose is filed within 20 days after the date of the entry of the ruling.

Further, section 1974 of the Act provides, with certain exceptions, that nothing in the Act may be construed to preempt or supersede any other program relating to soybean promotion, research, consumer information, or industry information organized under the laws of the United States or any State. One exception in the Act concerns assessments collected by Qualified State Soybean Boards (QSSBs). The exception provides that to ensure adequate funding of the operations of QSSBs under the Act, no State law or regulation may limit or have the effect of limiting the full amount of assessments that a QSSB in that State may collect, and which is authorized to be credited under the Act. Another exception concerns certain referenda conducted during specified periods by a State relating to the continuation of a QSSB or State soybean assessment.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), USDA is required to examine the impact of the proposed rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened.

For the purpose of the Request for Referendum, the Secretary would use the most recent number of soybean producers identified by USDA's FSA. The latest number of soybean producers identified by FSA is 589,182 and was obtained using information from 2006 and 2007 acreage reports. The data were sorted in such a manner as to include all producers that were engaged in the production of soybeans in at least one of the 2 years and exclude counting a producer more than once if that producer engaged in production during both years. Therefore, the number of soybean producers who would be eligible to participate in the Request for Referendum would be 589,182. The majority of producers subject to the Order are small businesses under the criteria established by the Small Business Administration (SBA) [13 CFR 121.201]. SBA defines small agricultural producers as those having annual receipts of less than $750,000.

Further, the information collection requirements are minimal. Requesting form LS–51–1 to participate in a Request for Referendum may be done by mail, in-person, by facsimile, or via the Internet and would not impose a significant economic burden on participants. Finally, this action would amend the regulations pursuant to administrative changes to web site addresses and office locations for the AMS. Accordingly, the Administrator of AMS has determined that this proposed rule will not have a significant economic impact on a substantial number of small business entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the reporting and recordkeeping requirements included in 7 CFR part 1220 were previously approved by OMB and were assigned control number 0581–0093.

Background

The Act (7 U.S.C. 6301–6311) provides for the establishment of a coordinated program of promotion and research designed to strengthen the soybean industry's position in the marketplace, and to maintain and expand domestic and foreign markets and uses for soybeans and soybean products. The program is financed by an assessment of 0.5 of 1 percent of the net market price of soybeans sold by producers. The final rule establishing a Soybean Promotion, Research, and Consumer Information program was published in the July 9, 1991, issue of the **Federal Register** (56 FR 31043) and assessments began on September 1, 1991.

The Act required that an initial referendum be conducted no earlier than 18 months and not later than 36 months after the issuance of the Order to determine whether the Order should be continued. The initial referendum was conducted on February 9, 1994. On April 1, 1994, the Secretary announced that of the 85,606 valid ballots cast, 46,060 (53.8 percent) were in favor of continuing the Order and the remaining 39,546 votes (46.2 percent) were against continuing the Order. The Act required approval by a simple majority for the Order to continue.

The Act also required that within 18 months after the Secretary announced the results of the initial referendum, the Secretary would conduct a poll among producers to determine if producers favored a referendum on the continuance of the payment of refunds under the Order.

A July 25, 1995, nationwide poll of soybean producers did not generate sufficient support for a refund referendum to be held. A refund referendum would have been held if at least 20 percent (not in excess of one-fifth of which may be producers in any one State) of the 381,000 producers (76,200) nationwide requested it. Only 48,782 soybean producers participated in the poll. Consequently, refunds were discontinued on October 1, 1995.

The Act also specifies that the Secretary shall, 5 years after the conduct of the initial referendum and every 5 years thereafter, provide soybean producers an opportunity to request a referendum on the Order. Additionally, the Act specifies that these subsequent polls require that at least 10 percent (not in excess of one-fifth in any one State) of all producers must request a

referendum in order to trigger the conduct of a referendum. If a referendum is requested, it will be held within 1 year of that determination.

On October 1, 1999, through November 16, 1999, a nationwide Request for Referendum was conducted to determine if there was sufficient interest among soybean producers to vote on whether to continue the soybean checkoff program. Ten percent of the 600,813 soybean producers nationwide (not in excess of one-fifth of which may be producers in any one State) needed to participate in the Request for Referendum to trigger a referendum. Only 17,970 eligible soybean producers completed valid requests.

Five years later, another Request for Referendum was conducted May 1, 2004, through May 28, 2004. As in the prior Request for Referendum, the purpose was to determine if there was sufficient interest among soybean producers to vote on whether to continue the soybean checkoff Program. To be eligible to participate in the Request for Referendum, producers or the producer entity that they are authorized to represent had to certify and provide supporting documentation showing that they or the producer entity they represent paid an assessment sometime during the representative period between January 1, 2002, and December 31, 2003. Of the total 663,880 soybean producers eligible to participate, 3,206 valid Requests for Referendum were completed. This number did not meet the requisite number of 66,388; therefore, a referendum was not conducted.

In accordance with the Act, another Request for Referendum will be conducted in 2009. In this proposed rule, data provided by USDA's FSA would be used to amend the number of soybean producers in preparation for this upcoming Request for Referendum. Presently, § 1220.616 of the Order states that the number of soybean producers in the United States is 663,880. The latest number of soybean producers identified by FSA is 589,182 soybean producers for crop years 2006 and 2007, using information based on acreage reports compiled on a daily basis. The data were sorted in such a manner as to include all producers that were engaged in the production of soybeans in at least one of the 2 years and exclude counting a producer more than once if that producer engaged in production during both years. Using the last two crop years for which complete data is available ensures that all eligible producers are counted, as some producers use soybeans in rotation with other crops and do not plant soybeans every year or the market for some producers in a particular crop year may not have been conducive to growing soybeans. This methodology is consistent with that used during the last amendment to § 1220.616 in 2004.

In addition to the changes proposed relating to the number of eligible soybean producers, AMS also intends to amend §§ 1220.622 and 1220.628 to update Web site addresses and office locations as a result of internal changes within the agency.

A 15-day comment period is provided for interested persons to comment on the proposed changes to section 1220.616. This comment period is deemed appropriate because the Act provides that the Secretary, every 5 years after the initial continuation referendum, will give soybean producers the opportunity to request additional referenda on the Order. A 15-day comment period will allow sufficient time to publish a final rule to amend § 1220.616 before the upcoming Request for Referendum. As such, the number of soybean producers eligible to participate in a Request for Referendum will be established, and a Request for Referendum can be conducted as early in 2009 as practicable.

List of Subjects in 7 CFR Part 1220

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreements, Reporting and recordkeeping requirements, Soybeans and soybean products.

For the reasons set forth in the preamble, it is proposed that 7 CFR part 1220 be amended as follows:

PART 1220—SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION

1. The authority citation for part 1220 continues to read as follows:

Authority: 7 U.S.C. 6301–6311 and 7 U.S.C. 7401.

Subpart F—Procedures To Request a Referendum

2. In § 1220.616, paragraph (d) is revised to read as follows:

§ 1220.616 General.

* * * * *

(d) For purposes of paragraphs (b) and (c) of this section, the number of soybean producers in the United States is determined to be 589,182.

§ 1220.622 [Amended]

3. In § 1220.622, paragraph (b) the Web site ''*www.ams.usda.gov/lsg/mpb/rp-soy.htm*'' is removed and a new Web site ''*www.ams.usda.gov/lsmarketingprograms*'' is added in its place.

4. In § 1220.628, paragraph (a) is revised to read as follows:

§ 1220.628 Results of the request for referendum.

(a) The Administrator, FSA, shall submit to the Administrator, AMS, the reports from all State FSA offices. The Administrator, AMS shall tabulate the results of the Request for Referendum. USDA will issue an official press release announcing the results of the Request for Referendum and publish the same results in the **Federal Register**. In addition, USDA will post the official results at the following Web site: *http://www.ams.usda.gov/lsmarketingprograms.* Subsequently, State reports and related papers shall be available for public inspection upon request during normal business hours in the Marketing Programs Branch office, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC.

* * * * *

Dated: November 26, 2008.

James E. Link,

Administrator.

[FR Doc. E8–28674 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1275; Directorate Identifier 2007–NM–167–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. This proposed AD would require repetitive detailed and high frequency eddy current inspections to detect cracks of the backup intercostals and the upper sill of the forward airstair doorway, and applicable corrective actions. This proposed AD would also provide for an optional terminating

action, which would eliminate the need for repetitive inspections. This proposed AD results from a report indicating that cracks were found in the backup intercostals and upper sill web of the forward airstair doorway. We are proposing this AD to detect and correct fatigue cracking of the backup intercostals and upper sill web of the forward airstair doorway, which could result in a rapid loss of cabin pressure.

DATES: We must receive comments on this proposed AD by January 20, 2009.

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; telephone 206–544–9990; fax 206–766–5682; e-mail *DDCS@boeing.com*; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

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: Howard Hall, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6430; 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–2008–1275; Directorate Identifier 2007–NM–167–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 have received a report indicating that cracks were found in the backup intercostals and upper sill web of the forward airstair doorway on a Boeing Model 737–200 series airplane. The cracks were found in the upper sill web at the stop fitting at station (STA) 312 and in the two backup intercostals of the stop support structure at STA 322.7 and STA 333.3. Investigation revealed the cracks are due to fatigue caused by cyclic loads acting on the upper sill web, which is stabilized by the backup intercostals. Fatigue cracking of the backup intercostals and upper sill web of the forward airstair doorway, if not detected and corrected, could result in a rapid loss of cabin pressure.

The configuration of the subject area on certain Boeing Model 737–100, –200C, –300, –400, and –500 series airplanes is almost identical to that on the affected Boeing Model 737–200 series airplanes. Therefore, those Boeing Model 737–100, –200C, –300, –400, and –500 series airplanes are subject to the unsafe condition revealed on the Boeing Model 737–200 series airplanes.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 737–53A1269, dated May 17, 2007. The service bulletin describes procedures for repetitive detailed and high frequency eddy current inspections to detect fatigue cracking of the backup intercostals and the upper sill web of the forward airstair doorway, and applicable corrective actions. The service bulletin also describes procedures for an optional terminating action, which would eliminate the need for the repetitive inspections.

The corrective and optional terminating actions include doing a repair/preventive modification to install new backup intercostals with radius fillers, installing the preventive modification filler and doubler plate, and repairing any cracked upper sill web.

The service information also specifies the following compliance times:

- For the initial inspections: The threshold is prior to 45,000 or 49,500 total flight cycles depending on the flight cycles on the airplane. The grace period is 1,000 or 4,500 flight cycles depending on the flight cycles on the airplane.
- For the applicable repetitive inspections: The compliance time is at intervals of 4,500 flight cycles.
- For the applicable corrective actions: The compliance time is before further flight.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. For this reason, we are proposing this AD, which would require accomplishing certain actions specified in the service information described previously. The proposed AD also provides for an optional terminating action, as specified in the service bulletin, for the repetitive inspection requirements.

Costs of Compliance

There are about 1,712 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 509 airplanes of U.S. registry. The proposed inspections would take about 2 work hours per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the proposed AD for U.S. operators would be $81,440, or $160 per airplane, per inspection cycle.

The optional terminating action, if done, would take about 9 work hours, at an average labor rate of $80 per work hour. Required parts would cost between $533 and $566 per airplane, depending on the airplane configuration. Based on these figures, the estimated cost of the optional terminating action would range between $1,253 and $1,286 per airplane, depending on the airplane configuration.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2008–1275; Directorate Identifier 2007–NM–167–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by January 20, 2009.

Affected ADs

(b) None

Applicability

(c) This AD applies to Boeing Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 737–53A1269, dated May 17, 2007.

Unsafe Condition

(d) This AD results from a report indicating that cracks were found in the backup intercostals and upper sill web of the forward airstair doorway. We are issuing this AD to detect and correct fatigue cracking of the backup intercostals and upper sill web of the forward airstair doorway, which could result in a rapid loss of cabin pressure.

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.

Inspections

(f) At the applicable compliance times and repeat intervals listed in the tables of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1269, dated May 17, 2007 (hereafter ''the service bulletin''), except as provided by paragraphs (f)(1), (f)(2), and (f)(3) of this AD: Do repetitive detailed and high frequency eddy current inspections to detect cracks of the backup intercostals and the upper sill of the forward airstair doorway, and applicable corrective actions by accomplishing all the applicable actions specified in the Accomplishment Instructions of the service bulletin. Do the applicable corrective actions before further flight.

(1) Where the service bulletin specifies a compliance time from the release date of the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where the columns identified as ''Airplane Flight Cycles'' in the tables of the service bulletin specify less than 45,000 total flight cycles for certain actions, this AD affects airplanes having less than or equal to 45,000 total flight cycles.

(3) Where the columns identified as ''Repeat Interval'' in the tables of the service bulletin specify an interval of 4,500 flight cycles for all conditions, this AD requires repetitive inspections only if no crack is found during any inspection required by paragraph (f) of this AD.

Optional Terminating Action

(g) Accomplishing the backup intercostal repair/preventative modification and/or the upper door sill web repair, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1269, dated May 17, 2007, ends all the corresponding repetitive inspection requirements of paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Howard Hall, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (917) 917–6430; 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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, FAA, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington on November 26, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–28819 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–158747–06]

RIN 1545–BG45

Withholding Under Internal Revenue Code Section 3402(t)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to

withholding under section 3402(t) of the Internal Revenue Code (Code). The proposed regulations reflect changes in the law made by the Tax Increase Prevention and Reconciliation Act of 2005 that require Federal, State, and local government entities to withhold income tax when making payments to persons providing property or services. These proposed regulations provide guidance to assist the government entities in complying with section 3402(t). The regulations also provide certain guidance to persons receiving payments for property or services from government entities. This document also contains proposed amendments to regulations under sections 3406, 6011, 6051, 6071, and 6302 of the Code.

DATES: Written or electronic comments and requests for a public hearing must be received by *March 5, 2009*.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–158747–06), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–158747–06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov/* (IRS REG–158747–06).

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, Jean Casey, (202) 622–6040; concerning submissions of comments or to request a public hearing, Richard Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 31 under section 3402(t) of the Code. This document also contains proposed amendments to 26 CFR part 31 under sections 3406, 6011, 6051, 6071, and 6302 of the Code.

Section 3402(t) of the Code was added by section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109–222 (TIPRA), 120 Stat. 345, which was enacted into law on May 17, 2006. Section 3402(t)(1) provides that the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services (including any payment made in connection with a government voucher or certificate program which functions as a payment for property or services) shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment. Under the statute, section 3402(t) applies to payments made after December 31, 2010.

Exceptions to section 3402(t) withholding are contained in section 3402(t)(2). Section 3402(t)(2) provides that section 3402(t) withholding shall not apply to any payment—

(A) Except as provided in section 3402(t)(2)(B), which is subject to withholding under any other provision of chapter 24 (Collection of Income Tax at Source on Wages, sections 3401 through 3406) or chapter 3 (Withholding of Tax on Nonresident Aliens and Foreign Corporations, sections 1441 through 1464) of the Code;

(B) Which is subject to withholding under section 3406 (backup withholding) and from which amounts are being withheld under such section;

(C) Of interest;

(D) For real property;

(E) To any government entity subject to the requirements of section 3402(t)(1), any tax-exempt entity, or any foreign government;

(F) Made pursuant to a classified or confidential contract described in section 6050M(e)(3);

(G) Made by a political subdivision of a State (or any instrumentality thereof) which makes less than $100,000,000 of such payments annually;

(H) Which is in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test; and

(I) To any government employee not otherwise excludable with respect to his or her services as an employee.

Section 3402(t)(3) provides for the coordination of section 3402(t) with other Code sections. Section 3402(t)(3) provides that, for purposes of sections 3403 and 3404 and for purposes of so much of subtitle F (except section 7205) as relates to chapter 24, payments to any person for property or services which are subject to withholding shall be treated as if such payments were wages paid by an employer to an employee.

The legislative history in connection with section 3402(t) indicates that ''[t]he withholding requirement applies regardless of whether the government entity making such payment is the recipient of the property or services.'' H.R. Conf. Rep. No.109–455, 109th Cong., 2d Sess. at 300 (2006). Further, the conference report also provides, with respect to the exception provided by section 3402(t)(2)(H), that ''payments under government programs to provide health care or other services that are not based on the needs or income of the recipients are subject to withholding, including programs where eligibility is based on the age of the beneficiary.'' H.R. Conf. Rep. No. 109–455 at page 301. In addition, with respect to section 3402(t)(2)(A), the conference report states that section 3402(t) withholding ''does not apply to payments of wages or to any other payment with respect to which mandatory (e.g., U.S.-source income of foreign taxpayers) or voluntary (e.g., unemployment benefits) withholding applies under present law.'' H.R. Conf. Rep. No. 109–455 at page 301. The origins of the provision indicate that it was conceived to address tax noncompliance. See also, ''Options to Improve Tax Compliance and Reform Tax Expenditures'' (JCS–2–05), Joint Committee on Taxation, Jan. 27, 2005.

Notice 2008–38, 2008–13 IRB 683, published by the IRS on March 31, 2008, invited public comments regarding guidance under section 3402(t). In particular, Notice 2008–38 requested comments on the application of section 3402(t) to credit cards and payment cards, payments to payees not subject to United States taxation, passthrough entities in which a government entity is a partner or owner, government contractors and subcontractors, and *de minimis* payments. The Notice also requested comments on when and how amounts withheld under section 3402(t) should be transmitted to the IRS. See § 601.601(d)(2)(ii)(b).

Many comments were received in response to Notice 2008–38, and the comments were taken into consideration in developing the proposed regulations.

Explanation of Provisions

The proposed regulations provide rules about which government entities are subject to the requirement of section 3402(t) withholding, which payments are subject to section 3402(t) withholding (and which are excepted from such withholding), when withholding is required on such payments, and how government entities pay and report the tax to the IRS. The proposed regulations also include transition rules providing relief from liability for the tax imposed by section 3402(t) with respect to payments under existing contracts. The proposed regulations also provide temporary relief from penalties and interest if a government entity makes a good faith effort but fails to withhold on payments as required under section 3402(t).

The regulations provide guidance primarily on what government entities

need to do to comply so that they can make timely preparations. The Treasury Department and IRS anticipate issuing further guidance to address questions raised by taxpayers who expect to receive payments subject to section 3402(t) withholding from government entities including, but not limited to, how to claim credits and how to claim the benefit of statutory exemptions from withholding under section 3402(t). Although some commenters requested that the Treasury Department and IRS issue guidance exempting payments from withholding where the 3-percent rate for withholding prescribed under section 3402(t) is expected to exceed either the profit margin in the taxpayer's industry or the income tax the taxpayer will owe for reasons particular to the taxpayer's business, the Treasury Department and IRS have determined that exemptions of this type would be contrary to the requirements of the statute. Commenters also requested that they be permitted to credit amounts withheld under section 3402(t) against Federal taxes other than income taxes, such as employment taxes. Consistent with the statute's purpose of addressing income tax noncompliance, the Treasury Department and IRS propose to allow credits to be claimed only against income tax.

Government Entities Subject to Section 3402(t)

Section 3402(t)(1) applies to ''the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing.'' Section 3402(t) does not restrict the term *the Government of the United States* in any manner. Therefore, the entire Federal government, including the executive branch, the legislative branch, and the judicial branch, is subject to the requirements of section 3402(t). Thus, Congress, the Administrative Office of the United States Courts, the Executive Office of the President, Federal agencies, and all other components of the Federal government are included in the definition of Government of the United States and are required to withhold under section 3402(t).

The term *State* includes the District of Columbia. See section 7701(a)(10) of the Code. For purposes of section 3402(t), the term *State* does not include Indian tribal governments. Section 7871(a) prescribes when an Indian tribal government is to be treated as a State under the Code, and section 7871(a) does not provide that Indian tribal governments will be treated as States for purposes of section 3402(t). Consequently, the term *political subdivision* also does not include a subdivision of an Indian tribal government. See section 7871(a) and (d). Accordingly, because Indian tribal governments and their subdivisions are not among the listed government entities subject to section 3402(t), payments by Indian tribal governments and their subdivisions are not subject to the withholding requirements of section 3402(t).

The definition of *political subdivision* in the proposed regulations follows the definition in the section 103 regulations. Section 1.103–1(b) of the Income Tax Regulations provides, in part, that the term *political subdivision* denotes any division of any State or local government unit that is a municipal corporation or that has been delegated the right to exercise part of the sovereign power of the unit.

Although the Code makes references to government instrumentalities in multiple sections, the Code and regulations do not currently provide a definition of instrumentality. In Rev. Rul. 57–128, 1957–1 CB 311, the IRS adopted a six-factor test for use in determining what is an instrumentality of a State or a political subdivision thereof for purposes of an exception from the requirement to pay tax under the Federal Insurance Contributions Act (FICA). The factors are: (1) Whether the organization is used for a government purpose and performs a government function; (2) whether performance of its function is on behalf of one or more States or political subdivisions; (3) whether there are any private interests involved, or whether the States or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses. A number of revenue rulings published by the IRS illustrate the application of this test. See, for example, Rev. Rul. 65–26, 1965–1 CB 444; Rev. Rul. 65–196, 1965–2 CB 388; and Rev. Rul. 69–453, 1969–2 CB 182. See § 601.601(d)(2)(ii)(*b*). The Treasury Department and IRS invite comments on use of the same or a similar test for purposes of section 3402(t).

Persons Subject to Withholding Under Section 3402(t)

Section 3402(t) applies to government payments to ''persons'' providing any property or services. Section 7701(a)(1) of the Code provides that, when used in the Code, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the term *person* shall be construed to mean and include an individual, a trust, estate, partnership, association, company, or corporation. Because no alternative definition of *person* is provided in section 3402(t), the definition in section 7701(a)(1) and the regulations under section 7701(a)(1) applies. Therefore, section 3402(t) withholding can apply to payments for property or services to individuals, trusts, estates, partnerships, associations, companies, or corporations.

Payments Subject to Section 3402(t) Withholding

The proposed regulations provide that a payment subject to withholding arises when the government entity or its payment administrator pays a person for providing property or services. Under the proposed rules, the withholding requirements of section 3402(t) will not apply to any payment that is less than the payment threshold amount, which is $10,000. The Treasury Department and IRS are proposing this payment threshold of $10,000 because the burden of withholding on smaller transactions is likely to be substantial and outweigh the benefits of increased withholding. This threshold corresponds to a minimum withholding of $300.

Under the proposed rules, multiple payments made by a government entity to any person generally would not be aggregated in determining whether the payment threshold amount has been met. However, the proposed regulations provide an anti-abuse rule to ensure that the payment threshold is not manipulated to avoid the required withholding. If a government entity divides a payment into two or more separate payments primarily to avoid the payment threshold for one or more payments, the separate payments would be treated as one payment made on the date that the first payment was made for purposes of this rule. For example, if a government entity is scheduled to make a contractual payment to a person for landscaping services of $15,000 on July 2, 2011, but divides the payment into payments of $7,000 and $8,000 made on July 1, 2011, and July 2, 2011, respectively, the government entity would be treated as having made a single payment of $15,000 on July 1, 2011. This anti-abuse rule would not apply if the primary reason for division into separate payments is unrelated to section 3402(t).

If a government entity makes a single payment of $10,000 or more to any

person for more than one property or service provided by that person, the government entity would be required to withhold on the payment. For example, if a person bills a government entity $5,000 each day for seven days for services provided each day, but the government entity makes one payment of $35,000 in satisfaction of these bills, the payment threshold is applied to the $35,000 payment.

Many commenters requested guidance on how the requirements of section 3402(t) apply to prime contractors and subcontractors. Under the proposed rules, if a government entity or its payment administrator makes a payment to a person that is subject to withholding under section 3402(t), no subsequent transfer of cash or property by that person to another person is treated as a payment for section 3402(t) purposes. Thus, if the government entity enters into a contract with a prime contractor for property and services, and that prime contractor separately contracts with subcontractors for delivery of certain property and services, then withholding under section 3402(t) applies only to payments by the government entity or its payment administrator to the prime contractor, and does not apply to successive payments by the prime contractor to its subcontractors.

The proposed regulations apply to payments made by the government entity or its payment administrator. For purposes of the proposed regulations, a *payment administrator* is any person that acts with respect to a payment solely as an agent for a government entity by making the payment on behalf of the government entity to a person providing property or services to, or on behalf of, the government entity. Transfers of funds from a government entity to a payment administrator to be used by the payment administrator, on the government entity's behalf, to pay persons for providing property or services are not payments subject to withholding under section 3402(t). However, if the government entity pays the payment administrator a fee for its services, the government entity would treat the fee as a payment subject to withholding. The government entity is liable for the withholding required and responsible for all related reporting regardless of whether the government entity or its payment administrator makes the payment and regardless of when the payment for property or services is made under this section.

Credit Card Payments

Many commenters questioned how the requirements of section 3402(t) apply to payments made by government credit card or payment card. Under the proposed regulations, when a government entity or its payment administrator uses a credit card or payment card to pay a person for providing property or services, payment occurs at the point of sale when the government credit card or payment card is tendered and not when the government entity pays the credit card company. The government entity is liable for the withholding and reporting associated with the payment, and this liability is not transferred to any other party involved in the credit card or payment card transaction, including, but not limited to, the acquiring bank, the issuing bank, or the credit card association. (The acquiring bank may be separately required to report amounts it pays under new section 6050W, which was enacted as part of the Housing Assistance Tax Act of 2008, Div. C of Pub. L. 110–289.)

Section 3402(t)(2)(A)—Payments Subject to Withholding Under Chapter 3 or Chapter 24 and Section 3402(t)(2)(B)—Payments From Which Backup Withholding Is Withheld

Section 3402(t)(2)(A) provides an exception from the requirement of section 3402(t) for amounts that are subject to withholding under some other provision of chapter 3 or chapter 24 (other than section 3406). Thus, payments that are subject to withholding under the wage withholding regime or the regime for withholding of tax on nonresident aliens and foreign corporations are exempt from withholding under section 3402(t). Furthermore, consistent with the legislative history, amounts for which the payee may elect withholding are exempt from withholding under section 3402(t), regardless of whether the payee in fact makes such an election. These payments include: (1) Unemployment compensation as defined in section 85(b) (section 3402(p)(2)); (2) social security benefits as defined in section 86(d) (section 3402(p)(1)(C)(i)); (3) any payment referred to in the second sentence of section 451(d) that is treated as insurance proceeds, relating to certain disaster payments received under the Agricultural Act of 1949, as amended, or Title II of the Disaster Assistance Act of 1988 (section 3402(p)(1)(C)(ii)); (4) any amount that is includible in gross income under section 77(a), relating to amounts received as loans from the Commodity Credit Corporation that the taxpayer has elected to treat as income (section 3402(p)(1)(C)(iii)); and (5) any payment of an annuity to an individual.

A special rule applies for payments subject to backup withholding. Section 3402(t)(2)(B) provides that a payment that is subject to 28 percent withholding under section 3406 (backup withholding) is not excepted from the requirement of 3 percent withholding under section 3402(t) unless backup withholding is actually being deducted from the payment. Thus, if backup withholding is required with respect to a payment made by a government entity and the government entity performs backup withholding on the payment, section 3402(t) does not apply. If the government entity fails to backup withholding on such a payment, the government entity would remain liable for backup withholding regardless of whether it imposed withholding under section 3402(t) with respect to the payment. Proposed amendments to the regulations under section 3406 clarify that if backup withholding is required, withholding under section 3402(t) is not required.

Under the proposed regulations, payments made to nonresident aliens or foreign individuals that are exempt from United States taxation pursuant to a treaty would be exempt from withholding under section 3402(t) because such payments are subject to withholding absent application of the treaty. Specifically, absent a treaty, United States source fixed or determinable, annual or periodical (FDAP) income paid to a nonresident alien individual or foreign corporation is subject to withholding under chapter 3, except for income that is effectively connected with a U.S. trade or business (other than compensation for personal services) pursuant to sections 1441 and 1442. Relevant examples of FDAP include salaries, compensation and emoluments.

Imposing a new withholding requirement on nonresident aliens and foreign corporations that owe no United States tax would serve no purpose. Foreign persons that are exempt from withholding under sections 1441 and 1442 by reason of an income tax treaty are not the source of the tax noncompliance problem that section 3402(t) was enacted to address. Further, our existing documentation procedures are intended to ensure that those claiming treaty benefits are in fact entitled to treaty benefits. See, for example, Form W–8BEN, ''Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding,'' and Form 8233, ''Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual.'' Accordingly, the

proposed regulations under section 3402(t) provide that the ''subject to withholding under chapter 3'' exception in section 3402(t)(2)(A) applies to payments with respect to which a foreign person claims a zero rate of tax under an income tax treaty. Thus, if a foreign person furnishes documentation establishing entitlement to an exemption from withholding under chapter 3 by reason of an income tax treaty, government entities would not be required to withhold under section 3402(t) from payments to such person.

Section 3402(t)(2)(C)—Interest

Section 3402(t)(2)(C) provides that payments of interest are exempt from withholding. The proposed regulations do not provide a definition of interest. The Treasury Department and IRS request comments concerning whether a definition of interest is needed and if so, what that definition should be.

Section 3402(t)(2)(D)—Payments for Real Property

Section 3402(t)(2)(D) provides that payments for real property are not subject to section 3402(t). Because the exception is not limited to payments for fee ownership, the proposed regulations provide that payments for real property include payments for leasing real property and leasehold improvements.

Commenters asked whether real property included payments made under contracts for the construction of buildings or other public works. Neither the statute itself nor the legislative history defines ''real property'' for purposes of section 3402(t).

The proposed regulations adopt the position that payments for the construction of buildings or public works are not payments for real property excepted by section 3402(t)(2)(D). Payments for the construction of a building are payments for services to build the building and personal property to be used in the construction of the building rather than payments for real property. This position is consistent with statutes governing construction contracts of the Federal government. See, for example, 40 U.S.C. 3131–3134 (the ''Miller Act'').

Section 3402(t)(2)(E)—Payments to Government Entities Subject to Section 3402(t), Tax-Exempt Organizations, and Foreign Governments

Section 3402(t)(2)(E) provides exceptions from section 3402(t) withholding for payments to any government entity subject to the requirements of section 3402(t)(1), payments to any tax-exempt entity, and payments to any foreign government. The determination of whether an entity is a government entity such that payments it receives are exempt parallels the determination whether the entity is a government entity required to withhold on payments it makes. Thus, if a government entity is required to withhold under section 3402(t)(1), payments to that government entity are not subject to withholding under section 3402(t). The proposed regulations also clarify that, even if no withholding is required on payments from a government entity because the government entity qualifies for the exception of section 3402(t)(2)(G) for political subdivisions and instrumentalities making total payments of less than $100 million (discussed later in this preamble), payments to that government entity are not subject to withholding.

The proposed regulations define the term *tax-exempt entity* for purposes of section 3402(t)(2)(E) as any organization exempt from federal income tax under section 501(a) as an organization described in section 501(c), 501(d), or section 401(a).

Section 3402(t)(2)(F)—Payments Made Pursuant to a Classified or Confidential Contract

Section 3402(t)(2)(F) provides an exception from section 3402(t) withholding for payments made pursuant to a classified or confidential contract described in section 6050M(e)(3). Section 6050M(e)(3) describes a contract between a Federal executive agency and another person if—

(A) The fact of the existence of such contract or the subject matter of such contract has been designated and clearly marked or clearly represented, pursuant to the provisions of Federal law or an Executive order, as requiring a specific degree of protection against unauthorized disclosure for reasons of national security, or

(B) The head of such Federal executive agency (or his designee), pursuant to regulations issued by such agency, determines, in writing, that filing the required return under section 6050M (related to information returns required to be filed by any Federal executive agency with respect to persons receiving contracts) would interfere with the effective conduct of a confidential law enforcement or foreign counterintelligence activity.

Section 3402(t)(2)(G)—The Exception for Political Subdivisions and Instrumentalities Making Total Payments Under $100,000,000

Section 3402(t)(2)(G) provides that payments made by certain smaller government entities are not subject to withholding under section 3402(t). Specifically, a political subdivision of a State (or any instrumentality thereof) that makes less than $100,000,000 of payments for property or services annually (other than for payroll or of another type exempt from withholding under these proposed regulations) is not required to withhold under section 3402(t) on any of its payments. The proposed regulations provide a simple rule for determining before each year starts whether the exception provided by section 3402(t)(2)(G) applies to a given political subdivision or instrumentality. The determination would be based on the payments made during the accounting year of the political subdivision or instrumentality ending with or within the second preceding calendar year. For example, to determine whether the political subdivision or instrumentality is subject to withholding with respect to payments made in 2011, the proposed regulations would look to whether payments made by the political subdivision or instrumentality for its accounting year ending with or within the calendar year 2009 equaled or exceeded $100,000,000. For this purpose, the accounting year is considered to be the year used by the political subdivision or instrumentality to keep its accounting books and determine budgets. In most cases, political subdivisions and instrumentalities would be able to make a reasonably accurate estimate whether the exception applies before the end of the accounting year ending in 2009 based on budgetary projections. However, in cases where the payments are expected to be near the $100,000,000 threshold, the time between the end of the accounting year in 2009, when a definitive determination could be made, and December 31, 2010, should give the political subdivision or instrumentality sufficient time to prepare for withholding under section 3402(t) for payments made in 2011.

In determining whether the political subdivision or instrumentality has made $100,000,000 of total payments, the proposed regulations would require that all payments for property and services made during the accounting year be considered with the exception of those payments qualifying for any of the exceptions provided by § 31.3402(t)–4(a) through (l) of the proposed regulations.

For this purpose, payments that are less than the $10,000 payment threshold count toward the $100,000,000 test.

This exception provided by section 3402(t)(2)(G) does not apply to the United States Government, States, or instrumentalities of the United States Government or States.

The Treasury Department and IRS request comments on the application of section 3402(t)(2)(G), particularly with regard to whether the rules for determining whether the exception applies would provide adequate time to modify systems for compliance with section 3402(t), whether a special rule should be considered allowing the averaging of multiple accounting years for political subdivisions and instrumentalities that have unusually high expenditures in a given accounting year, and whether the determination of total payments under the proposed regulations is practicable.

Section 3402(t)(2)(H)—Payments in Connection with a Public Welfare or Public Assistance Plan

Section 3402(t)(2)(H) provides an exception from section 3402(t) withholding for any payment in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test. The proposed regulations adopt a broad definition of *in connection with* to include payments made to third parties under a public assistance or public welfare program for the benefit of the recipient of benefits under the program. The proposed regulations also are consistent with the legislative history in providing that a program for which eligibility is determined under a needs or income test does not include a program under which eligibility is based on age only (for example, Medicare). The proposed regulations provide that, for purposes of this exception, a program providing disaster relief to victims of a natural or other disaster is considered to be a program for which eligibility is determined under a needs test.

Section 3402(t)(2)(I)—Payments to a Government Employee With Respect to Services as an Employee

Section 3402(t)(2)(I) provides an exception from section 3402(t) withholding for payments to any government employee not otherwise excludable with respect to the employee's services as an employee. The proposed regulations broadly interpret this exception to exclude from section 3402(t) withholding any form of compensation that is paid to the employee or on the employee's behalf. For example, the proposed regulations exclude employer contributions to employee benefit and deferred compensation plans as well as employee contributions to such plans. This exception applies to any payments by an employer for fringe benefits or deferred compensation to, or for the benefit of, an employee.

The proposed regulations provide that the section 3402(t)(2)(I) exclusion from section 3402(t) withholding also applies to: (a) Travel reimbursements paid by a government entity to a government employee under accountable plans within the meaning of section 62(c) for the individual employee's travel, lodging, and meal expenses; and (b) the government employee's payments to third parties that provide travel, lodging, and meals that are reimbursable under such travel reimbursement plans. Most payments for individual travel, lodging, and meal expenses would fall beneath the $10,000 payment threshold. Nevertheless, this exception may be significant in determining whether the government entity making the payments qualifies for the exception under section 3402(t)(2)(G) for political subdivisions of a State (or their instrumentalities) making payments under $100,000,000, as payments under section 3402(t)(2)(I) are excluded when calculating the total amount of payments.

Section 31.3401(a)–4(a) of the Employment Tax Regulations provides that if a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) and § 1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. Thus, these payments would qualify for the exception under section 3402(t)(2)(I).

By comparison, if the travel reimbursement or payment by the employer is not paid under an accountable plan, the reimbursement would be treated as paid under a nonaccountable plan. Payments to the employee under a nonaccountable plan are includible in gross income and wages and subject to income tax withholding under section 3402(a). Thus, such payments would be excepted from withholding under section 3402(t) by section 3402(t)(2)(A).

Exception for Certain Payments Received by Nonresident Alien Individuals and Foreign Corporations

In general, in the case of a nonresident alien individual or a foreign corporation (foreign person), sections 872(a) and 882(b) provide that gross income for United States income tax purposes consists of (1) gross income derived from sources within the United States; and (2) gross income derived from sources outside the United States (foreign source income), but only if it is effectively connected with a trade or business within the United States. The source of income is determined under sections 861 through 865. The source of income derived from the performance of services is the place where the services are performed as provided in sections 861(a)(3) and 862(a)(3), whereas the source of income from the purchase and sale of inventory property (other than unprocessed timber) is the location where the sale takes place as described in § 1.861–7(c) of the Income Tax Regulations (see also sections 861(a)(6) and 862(a)(6)). Therefore, if a foreign person provides services or sells inventory property in a foreign country, it will have no United States income tax liability with respect to the income earned from providing the services or selling the property—even to a United States government entity—provided that the income is not effectively connected with the conduct of a trade or business within the United States.

Accordingly, the proposed regulations exclude such payments made to foreign persons from 3-percent withholding under section 3402(t). For administrative reasons, subjecting these foreign source payments to withholding under 3402(t) would be unduly burdensome to the foreign persons receiving such payments and the IRS. The foreign persons, most of whom are not presently United States income tax filers, would have to get taxpayer identification numbers (TINs) and file refund claims. Likewise, the IRS would have to issue TINs, process the claims, and refund all of the funds collected. Withholding on foreign source payments to foreign persons has no potential to reduce tax noncompliance because the potential income resulting from the payments is not subject to United States income taxation. Procedures to be followed by government entities and foreign persons for purposes of claiming this exception from section 3402(t) withholding will be issued at a later date.

Exception for Payments to Indian Tribal Governments

Indian tribal governments are not subject to United States income tax. Subjecting payments made by government entities to Indian tribal governments to withholding under section 3402(t) would be unduly burdensome for the same reasons

discussed above with respect to certain payments made to foreign persons. Therefore, the proposed regulations except these payments from 3-percent withholding under section 3402(t).

Deposits and Reporting of Amounts Withheld Under Section 3402(t)

In determining rules for reporting amounts withheld under section 3402(t), the Treasury Department and IRS have considered the administrative burden on government entities imposed by reporting, the need for payees to receive timely and accurate information about the amounts withheld, and the need for IRS systems to process the information reported. Many comments reflected a preference for using an existing system and adapting current forms and procedures to accommodate section 3402(t) withholding, rather than creating a new system and forms for such withholding. The commenters indicated that using an existing system would ease compliance by government entities and would ease the processing of the payment and reporting of such tax.

The Treasury Department and IRS believe the existing procedure for reporting nonwage withholding on Form 945, ''Annual Return of Withheld Federal Income Tax,'' and reporting payments subject to withholding on Form 1099–MISC, ''Miscellaneous Income,'' with slight modifications to existing forms, would provide the most satisfactory method of payment and reporting. Because most government entities have a system for issuing Form 1099–MISC, using this system with modifications for reporting section 3402(t) withholding should ease compliance. Additionally, using Form 1099–MISC would give payees the information they need to timely file their income tax returns claiming credit for the withholding. Because this system would be similar to the system used currently for reporting and paying nonwage income tax withholding, the IRS would be able to process the withholding timely and on a cost-effective basis.

Accordingly, the proposed amendments to the regulations under section 6011 provide that payors required to withhold amounts under section 3402(t) must file Form 945 reporting the amounts withheld. Proposed amendments to the regulations under section 6302 further provide that the amounts withheld under section 3402(t) must be deposited and reported in the same manner as other nonwage withheld amounts, such as withholding on gambling winnings and pensions. Pursuant to existing regulations, such amounts are treated as if they were employment taxes for purposes of the deposit rules, but are subject to special rules for determining the payor's deposit schedule, as provided in § 31.6302–4.

Additionally, proposed amendments to regulations under section 6051 provide that payors required to withhold amounts under section 3402(t) must file information returns and furnish payee statements on Form 1099–MISC reporting such payments and tax withheld. Because this reporting would be done pursuant to regulations under section 6051, the exceptions provided in the regulations under section 6041 relating to Form 1099 would not apply (for example, the exception for payments to corporations).

Payments for Jury Duty, Utilities, and Fuel Surcharges

Commenters asked whether jury duty pay is subject to withholding under section 3402(t). Jury duty pay generally will not meet the $10,000 payment threshold provided in the proposed regulations. No special rule for jury duty pay is provided.

Commenters also requested guidance about utility payments. Rates for utility services are generally prescribed through a State regulatory process. Commenters expressed concern about the consequences of paying something less than the regulatorily prescribed rate to the utility. In fact, utility companies—like all persons receiving payments subject to withholding under section 3402(t)—would be paid the full amount charged, albeit in the form of a combination of a cash payment and a deposit of tax made to the IRS. Therefore, unless otherwise excepted, utility payments are subject to withholding under section 3402(t) on the same basis as payments for other property and services.

Commenters also requested that fuel surcharges be exempted from withholding, arguing that a fuel surcharge provided under a contract is merely a cost recovery mechanism used to garner the lowest possible rates for the government by controlling volatile cost components in bid calculations. Although the use of separately stated charges for certain costs may well serve this purpose in contracting, section 3402(t) provides no exception for fuel surcharges or any other separately stated cost item. Section 3402(t) requires withholding on payments made regardless of how the payee may apply them against costs. Therefore, the proposed regulations do not provide an exception for payments allocated to fuel surcharges or any other separately stated costs.

Application of Section 3402(t) to Passthrough Entities

Commenters requested guidance with respect to the application of section 3402(t) where either the payor or the payee is a partnership or S corporation (''passthrough entities''). With respect to payments from a passthrough entity, the proposed regulations provide that such payments are not generally subject to withholding under section 3402(t) unless 80 percent or more of the passthrough entity is owned by government entities that are required to withhold under section 3402(t)(1). With respect to payments to a passthrough entity, the proposed regulations provide that such payments are generally subject to withholding under section 3402(t) unless 80 percent or more of the passthrough entity is owned by persons described in section 3402(t)(2)(E) (government entities required to withhold under section 3402(t)(1), tax-exempt entities, and foreign governments). An 80-percent threshold is consistent with similar thresholds in various areas of the tax law. See, for example, section 775(b)(3) and §§ 1.414(c)–2(b)(2) and 301.7701(i)–1(d)(3)(i)(A). The proposed regulations also provide that, as a general rule, whether a passthrough entity is subject to section 3402(t) is determined on the first day of the entity's taxable year. The Treasury Department and IRS believe that this general rule simplifies compliance and administration by requiring one annual determination of whether a passthrough entity's payments are subject to withholding under section 3402(t). However, the proposed regulations provide that any manipulation of the ownership percentage with an intent to avoid application of section 3402(t) would be recharacterized as appropriate to reflect the actual ownership percentage.

Effective Date and Transition Relief for Existing Contracts

The proposed regulations provide that the regulations will generally be effective for payments made after the later of December 31, 2010, or the date that is 6 months after the publication of final regulations. Commenters questioned whether section 3402(t) would apply to payments made under contracts in existence prior to the effective date of section 3402(t). They noted that many government entities are party to multi-year contracts. These contracts did not contemplate the withholding of income tax from payments under the contracts. Future

contracts can address the withholding requirement and its effect on the contractor's cash flow. Accordingly, the proposed regulations provide that payments made under written binding contracts in effect on the later of December 31, 2010, or the date that is 6 months after the publication of final regulations are not subject to withholding under section 3402(t), unless such contract is materially modified. Payments pursuant to contracts entered into after the later of December 31, 2010, or the date that is 6 months after the publication of final regulations will be subject to section 3402(t).

Under the proposed regulations, if there is a material modification to an existing contract after the later of the effective date of the legislation or six months after the issuance of final regulations under section 3402(t), the contract would cease to be an existing contract for purposes of this transition relief and payments under the contract would become subject to the withholding requirements of section 3402(t). The Treasury Department and IRS are considering whether contracts that contain the option of renewal should be considered new contracts as of the date of renewal. The final regulations may provide that a contract that is renewable as of a certain date is treated as a new contract on the first date the contract is renewed. The Treasury Department and IRS request comments on how option terms in contracts, including, but not limited to, options to renew, should affect the transition relief for payments under written binding contracts.

Credit Against Income Tax

The Treasury Department and IRS received numerous comments from taxpayers expecting to receive payments subject to section 3402(t) withholding. Most of these comments asked how taxpayers would take the credit for the section 3402(t) withholding. Section 31 provides the general crediting rule for withholding of income tax. Specifically, section 31(a)(1) provides that ''[t]he amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle.'' Chapter 24 includes section 3402(t), and section 31(a)(1) is in subtitle A, income taxes. Thus, by its terms, section 31(a)(1) applies to persons who have had income tax withheld from a payment pursuant to section 3402(t) and allows a credit against income tax only.

Section 31(a)(2) provides the general rule on the timing of the allowance of the credit: ''The amount so withheld during any calendar year shall be allowed as a credit for the taxable year beginning in such calendar year. If more than one taxable year begins in a calendar year, such amount shall be allowed as a credit for the last taxable year so beginning.'' Thus, absent a special rule, the rule of section 31(a)(2) generally applies for purposes of withholdings required under chapter 24, which includes section 3402(t).

Section 31(c) provides a special rule solely for backup withholding. Under section 31(c), any credit allowed by section 31(a) for backup withholding under section 3406 must be allowed for the taxable year of the recipient of the income in which the income is received. Congress did not provide a similar exception for the timing of the credit for section 3402(t) withholding. Section 31(c) is limited by its terms to section 3406 withholding only. Thus, the general rule of section 31(a)(2) applies to section 3402(t) withholding rather than the special rule of section 31(c).

The effect of section 31(a)(2) is that fiscal year taxpayers may be entitled to take credit for withholding under section 3402(t) only in a taxable year subsequent to the taxable year in which the amount was withheld. For example, if amounts were withheld under section 3402(t) from a June 30 fiscal year taxpayer during the period from January 1, 2011, to June 30, 2011, the taxpayer will be entitled to take credit for the withheld tax on its income tax return for the fiscal year ending June 30, 2012, rather than its income tax return for the fiscal year ending June 30, 2011.

The Treasury Department and IRS recognize that, in the case of fiscal year taxpayers, the application of the rule in section 31(a)(2) requiring that the credit be taken in the second of two possible taxable years may be burdensome for taxpayers. The Treasury Department and IRS request comments on what impact the timing rule in section 31(a)(2) described above for income tax credits will have on taxpayers that have tax withheld under section 3402(t).

Crediting Against Estimated Income Tax Liability

Taxpayers may take into account the income tax withheld under section 3402(t) and allowed as a credit under section 31 in determining estimated tax liability pursuant to sections 6654 and 6655. With respect to individual taxpayers, section 6654(g)(1) provides that, for purposes of determining the application of the penalty for an individual's failure to pay estimated tax, the amount of the credit allowed under section 31 for the taxable year shall be deemed a payment of estimated tax. As with other income tax withheld, an individual recipient may account for income tax withheld in computing estimated income tax liability on Form 1040–ES, ''Estimated Tax for Individuals.'' Because most individuals are calendar year taxpayers, the section 3402(t) withholding would generally be treated as a payment of estimated tax for the same calendar year, and the individual's liability for other payments of estimated tax for that year would be reduced. However, if the individual is a fiscal year taxpayer, the individual may not take into account the withholding for estimated tax purposes until the fiscal year that begins in the calendar year in which the tax is withheld.

Similar rules apply to corporate taxpayers. In determining the amount of estimated tax required to be paid to avoid the section 6655 penalty applicable to corporations for failure to pay estimated tax, section 6655(g)(1)(B) provides in effect that credits against tax under section 31 are taken into account. Thus, corporate taxpayers can also take into account the amount of credit allowed under section 31(a) in determining income tax liability and in computing estimated income tax liability. As with individual taxpayers, corporate taxpayers on a fiscal year could have the problem of delay in taking account of the credit if withholding occurs in the part of the calendar year before the beginning of the fiscal year that begins in that calendar year.

Credit Against Employment Taxes or Other Taxes

Many commenters requested that taxpayers be allowed to take credit for section 3402(t) withholding with respect to employment taxes or other taxes. The statute directs that crediting follow the rules under section 31(a), which provide for crediting against income tax. Where the statute permits income tax payments to be treated as employment tax payments, or vice versa, it makes specific provision for that treatment. See, for example, section 3507(d) (providing for the treatment of advance payments of the earned income credit as payments of the income tax withholding and FICA liability of the employer); section 3510(b) (providing that domestic employment taxes are treated as taxes due for estimated tax purposes under section 6654); and section 31(b) (providing for the crediting against income tax of the special refund of social security tax under section 6413(c) applicable when an employee receives wages from two or more employers in excess of the social security tax contribution and benefit base). The

Code does not provide for withholding under section 3402(t) to be treated as payments of the taxpayer's employment tax liability.

Rate of Income Tax Withholding

Some taxpayers requested that the Treasury Department and IRS provide for lower withholding rates for taxpayers with lower profit margins or lower marginal income tax rates. The statute provides for a uniform 3-percent rate of withholding. Thus, the proposed regulations apply withholding at the 3-percent rate to all payments for services and property from which withholding under section 3402(t) is required to be made.

Liability for Section 3402(t) Withholding in the Event of Failure To Withhold

If a government entity fails to withhold the tax imposed by section 3402(t), section 3403 applies. Under section 3402(t)(3) and section 3403, the government entity is generally liable for the payment of the tax to the IRS unless it can prove that the payee has paid its income tax liability.

Section 3403 provides that the employer shall be liable for the payment of tax required to be deducted and withheld under chapter 24, and shall not be liable to any person for the amount of any such payment.

Section 31.3403–1 of the Employment Tax Regulations provides that every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if the employer fails to deduct any part of the tax, the employer is nevertheless liable for the correct amount of the tax. Section 3402(t)(3) provides that for purposes of section 3403, payments to any person for property or services that are subject to withholding under section 3402(t) are treated as if such payments were wages paid by an employer to an employee.

Thus, sections 3402(t)(3) and 3403 establish the liability of the government entity for the amount of the tax imposed by section 3402(t) if it fails to withhold.

However, section 3402(d) provides an exception to the entity's liability for income tax withholding in certain cases. Under this exception, if the entity required to withhold fails to do so, and thereafter the tax is paid, the tax will not be collected from the entity that failed to withhold. Thus, for purposes of section 3402(t), the government entity generally will be liable if it fails to withhold unless it is able to demonstrate, consistent with IRS procedures, that the taxpayer reported the amounts that were subject to withholding on its income tax return and paid the income tax due.

Transition Rule for Penalties and Interest on Underpayments

The proposed regulations provide a special transition rule for a government entity's liability for interest and penalties with respect to the failure to pay the tax on payments for property and services made before January 1, 2012. Under the transition rule, a government entity would not be liable for penalties and interest with respect to liability for withholding imposed by section 3402(t), on payments for property or services made before January 1, 2012, if the entity made a good faith effort to comply with the requirements of section 3402(t). However, this transition rule would not provide relief from liability for the amount of tax required to be withheld under section 3402(t).

Proposed Effective Date

These regulations are proposed to apply to payments made after the later of December 31, 2010, or six months after the date of publication of final regulations. In addition, the regulations will not apply to payments under contracts existing on the later of December 31, 2010, or six months after the date of publication of final regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is A.G. Kelley, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

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

Par. 2. The following §§ 31.3402(t)–0, 31.3402(t)–1, 31.3402(t)–2, 31.3402(t)–3, 31.3402(t)–4, and 31.3402(t)–5 are added, § 31.3402(t)–6 is added and reserved, and § 31.3402(t)–7 is added to read as follows:

§ 31.3402(t)–0 Outline of the Government withholding regulations.

This section lists paragraphs contained in §§ 31.3402(t)–1 through 31.3402(t)–5, and § 31.3402(t)–7.

§ 31.3402(t)–1 Withholding requirements on certain payments made by government entities.

(a) In general.
(b) Special rules.
(c) Deposit and reporting requirements.
(d) Effective/applicability date.

§ 31.3402(t)–2 Government entities required to withhold under section 3402(t).

(a) In general.
(b) Government of the United States.
(c) State.
(d) Political Subdivision.
(e) [Reserved].
(f) Possessions of the United States.

(g) Passthrough entities.
(h) Small entity exception.
(i) Effective/applicability date.

§ 31.3402(t)–3 Payments subject to withholding.

(a) In general.
(b) Payment threshold of $10,000.
(c) No withholding on successive payments.
(d) Payments made through a payment administrator or to a contractor.
(e) Payments by credit card or payment card.
(f) Examples.
(g) Effective/applicability date.

§ 31.3402(t)–4 Certain payments excepted from withholding.

(a) Payments subject to withholding under chapter 3 or chapter 24 (other than section 3406).
(b) Payments subject to withholding under section 3406 with backup withholding deducted.
(c) [Reserved].
(d) Payments for real property.
(e) Payments to government entities, tax-exempt organizations, and foreign governments.
(f) Payments made pursuant to a classified or confidential contract.
(g) Exception for political subdivisions or instrumentalities thereof making less than $100,000,000 of payments for property or services annually.
(h) Payments made in connection with a public assistance or public welfare program.
(i) Payments made to any government employee with respect to his or her services.
(j) Payments received by nonresident alien individuals and foreign corporations.
(k) Payments to Indian tribal governments.
(l) Payments in emergency or disaster situations.
(m) Effective/applicability date.

§ 31.3402(t)–5 Application to passthrough entities.

(a) In general.
(b) Definitions.
(c) Payments from a passthrough entity.
(d) Payments to a passthrough entity.
(e) Effective/applicability date.

§ 31.3402(t)–6 Crediting of tax withheld under section 3402(t) [Reserved].

§ 31.3402(t)–7 Effective date and transition rules.

(a) General rule.
(b) Exception for payments made under existing written binding contracts.
(c) Good faith exception for interest and penalties on payments before January 1, 2012.

§ 31.3402(t)–1 Withholding requirement on certain payments made by government entities.

(a) *In general.* Except as provided in §§ 31.3402(t)–3(b) and 31.3402(t)–4, the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) making any payment to any person providing any property or services shall deduct and withhold from such payment a tax in an amount equal to 3 percent of such payment.

(b) *Special rules.* See § 31.3402(t)–2 for government entities required to withhold under this section, § 31.3402(t)–3 for what constitutes a payment to a person for property or services and when such payment is deemed to occur for purposes of this section, and § 31.3402(t)–4 for payments that are excepted from withholding under this section.

(c) *Deposit and reporting requirements.* See § 31.6302–4 for deposit requirements with respect to withholding under section 3402(t). See §§ 31.6011(a)–4(b) and 31.6051–5 for the reporting requirements with respect to withholding under section 3402(t).

(d) *Effective/applicability date.* (1) Except as provided in paragraph (d)(2) of this section, this section is effective for payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

(2) Payments made under a written binding contract that was in effect on the later of December 31, 2010, or the date that is 6 months after the publication in the **Federal Register** of final regulations under section 3402(t), are not subject to the withholding requirements of this section. The preceding sentence does not apply to payments made under any contract that is materially modified after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

§ 31.3402(t)–2 Government entities required to withhold under section 3402(t).

(a) *In general.* The requirement to withhold under section 3402(t) and § 31.3402(t)–1(a) applies to the Government of the United States (see paragraph (b) of this section) and every State (see paragraph (c) of this section), as well as instrumentalities of the foregoing. The requirement also applies to political subdivisions of every State (see paragraph (d) of this section), and their instrumentalities, unless the small entity exception of § 31.3402(t)–4(g) applies.

(b) *Government of the United States.* The Government of the United States includes the legislative branch, the judicial branch, and the executive branch, and all components of the United States Government. Thus, departments and agencies are included within the definition of United States Government.

(c) *State.* The term *State* includes the District of Columbia. However, an Indian tribal government is not considered a State for purposes of section 3402(t) and § 31.3402(t)–1(a). See section 7871(a).

(d) *Political subdivision.* The term *political subdivision* for purposes of section 3402(t) and § 31.3402(t)–1(a) is defined as a political subdivision within the meaning of § 1.103–1(b) of this chapter, except that a subdivision of an Indian tribal government is not considered a political subdivision. See section 7871(a) and (d).

(e) [Reserved].

(f) *Possessions of the United States.* For purposes of section 3402(t) and § 31.3402(t)–1(a), the government of a possession or territory of the United States is not treated as a government entity subject to the withholding requirements of section 3402(t)(1).

(g) *Passthrough entities.* See § 31.3402(t)–5(c) for the treatment of payments from certain passthrough entities as subject to the withholding requirements of § 31.3402(t)–1.

(h) *Small entity exception.* See § 31.3402(t)–4(g) for the exception from the withholding requirements of § 31.3402(t)–1 for political subdivisions and instrumentalities thereof making less than $100,000,000 of payments for property or services annually.

(i) *Effective/applicability date.* This section is effective the later of January 1, 2011, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

§ 31.3402(t)–3 Payments subject to withholding.

(a) *In general.* A payment is subject to withholding for purposes of §§ 31.3402(t)–1 through 31.3402(t)–7 when paid by a government entity to any person, as defined in § 301.7701–

6(a) of this chapter, for property or services. If, however, the government entity uses a payment administrator to pay a person for property or services, payment occurs when the payment administrator pays such person. The government entity subject to the withholding requirements of § 31.3402(t)–1 is liable for the withholding required and responsible for all related reporting regardless of whether the government entity or its payment administrator makes the payment for property or services.

(b) *Payment threshold of $10,000*—(1) *In general.* The term *payment threshold* means an amount equal to $10,000. The withholding requirements of § 31.3402(t)–1 will not apply to any payment that is less than the payment threshold. Whether a payment is equal to or in excess of the payment threshold is determined when the payment is made.

(2) *Payment threshold applied per payment.* If a government entity makes a single payment to a person for property or services combining charges for more than one transaction with the person, the determination of whether the payment threshold provided by paragraph (b)(1) of this section applies will be based on the amount of the single payment, rather than the amount attributable to each separate transaction. Thus, if a government entity makes a single payment of $10,000 or more to a person, the government entity will be required to withhold on the payment, even if the payment is for more than one property or service. The same rule applies if a government entity enters into multiple transactions with a single person, each of which would result in a payment of less than $10,000 if paid separately, but elects to make a single payment covering all the transactions such that the aggregated payment is $10,000 or more. Under these circumstances, the government entity is required to withhold on the aggregated payment.

(3) *Anti-abuse rule.* If a government entity or payment administrator divides a payment or payments to any person for property or services into two or more payments primarily to avoid the $10,000 payment threshold provided in paragraph (b)(1) of this section on one or more of these payments, the divided payments will be treated as a single payment made on the date that the first of these payments is made.

(c) *No withholding on successive payments.* If a government entity or its payment administrator makes a payment that is subject to the withholding requirements of § 31.3402(t)–1 to a person, no subsequent transfer of cash or property from that payment by such person to another person is treated as a payment subject to withholding for purposes of §§ 31.3402(t)–1 through 31.3402(t)–7.

(d) *Payments made through a payment administrator or to a contractor*—(1) *Definition*—For purposes of this section—

(i) A *payment administrator* is any person that acts with respect to a payment solely as an agent for a government entity by making the payment on behalf of the government entity to a person providing property or services to, or on behalf of, the government entity.

(ii) A payment administrator is treated as a person providing property or services for purposes of the withholding requirements of section 3402(t) to the extent it receives a fee from the government entity for its services as a payment administrator for the government entity.

(2) *Payments to a contractor.* If a person provides property or services to a government entity under a contract and is not a payment administrator, the person, who is in privity with the government entity, is treated as the person providing property or services subject to withholding under section 3402(t) for all payments received from the government entity, regardless of whether some payments the person receives relate to invoices for property or services provided by subcontractors.

(3) *Application of payment threshold.* Where a government entity uses a payment administrator to make a payment, the determination of whether the payment meets the payment threshold is made at the time the payment administrator makes the payment to the person providing property or services. If a government entity makes one transfer of funds to a payment administrator that is composed of a fee to compensate the payment administrator for its services and other funds that are to be paid to persons providing property or services, the determination of whether the payment threshold is met on the portion that is the fee is made at the time of the transfer of funds to the payment administrator.

(e) *Payments by credit card or payment card.* For purposes of section 3402(t), a payment made by a government entity by credit card or payment card to a person for property or services occurs when the credit card or payment card is tendered at the point of sale. The government entity is liable for withholding under section 3402(t) and reporting associated with such withholding. See section 6050W of the Internal Revenue Code for separate reporting obligations imposed on the acquiring bank of the person receiving payment by credit card or payment card.

(f) *Examples.* This section is illustrated by the following examples:

Example 1. (i) Prime contractor *X* has a contract with a government entity to provide services and property to the government entity. *X* contracts with numerous subcontractors to provide services and property in connection with the contract. While the engagement of any particular subcontractor is subject to approval by the government entity, the subcontractors are not parties to the contract between *X* and the government entity, and the government entity is not a party to the contracts between *X* and subcontractors. Under its contract with the government entity, *X* submits an invoice for $48,000 for providing services and property to the government entity, including charges for services and property provided by two subcontractors, *M* and *N*. The invoice reflects charges of $16,000 for *M* and $2,000 for *N*. The government entity pays *X* the entire amount of the invoice in one payment of $48,000. *X* pays *M* for *M*'s billed portion of the invoice in a single payment of $16,000, and *X* pays *N* for *N*'s billed portion of the invoice in a single payment of $2,000.

(ii) Under the facts of this *Example 1, X* is the person providing property or services to, or for the benefit of, the government entity with respect to the entire amount of the $48,000 payment under the invoice, including the charges for services or property provided by its subcontractors *M* and *N*. *X* is not a payment administrator (as defined in paragraph (d)(1)(i) of this section) because *X* is not making payments solely as an agent of the government entity to persons providing property or services. Instead, *X* makes payments to subcontractors *M* and *N* pursuant to *X*'s separate contracts with these subcontractors to which the government entity is not a party. Therefore, under paragraphs (a) and (d)(2) of this section, the entire amount of the $48,000 payment to *X* under the invoice, including the charges for services and property provided by its subcontractors *M* and *N*, is the payment subject to withholding for purposes of section 3402(t).

(iii) Under paragraph (b)(1) of this section, the determination whether the payment meets the payment threshold is based on the entire amount of the payment from the government entity to *X*. Withholding under section 3402(t) applies to the government entity's $48,000 payment to *X* because the payment meets the payment threshold and is not otherwise excepted from section 3402(t) withholding. Thus, the payment is subject to withholding of 3 percent, or $1,440.

(iv) Payments made by *X* to the subcontractors, *M* and *N*, are not payments by the government entity or its payment administrator. Thus, *X*'s $16,000 payment to *M* and *X*'s $2,000 payment to N for services or property under the contract are not subject to withholding under section 3402(t). See paragraphs (c) and (d)(2) of this section.

(v) The government entity is liable for the $1,440 withholding required under section 3402(t) on its payment to *X* and is

responsible for the related reporting required under § 31.6051–5. See paragraph (a) of this section. *X* is the person receiving the payment for purposes of reporting under § 31.6051–5. Thus, the government entity is responsible for providing *X* with a Form 1099 including the entire amount of the payment ($48,000) and the entire amount of the withholding ($1,440).

Example 2. (i) *Z* has a contract with a government entity to make payments as an agent of the government entity to persons providing services or property to, or on behalf of, the government entity. The only services *Z* provides under the contract are its services in acting as an agent for the government entity in making payments to persons providing property or services to, or on behalf of, the government. The government entity transfers funds of $71,000 to *Z*, which includes a fee of $1,000 to *Z* for its services as an agent under the contract. *Z* then makes payments of the $70,000 remainder of the funds to persons providing property or services to, or on behalf of, the government entity, including a single payment of $18,000 to *P* and a single payment of $7,000 to *R*.

(ii) Under the facts of this *Example 2, Z* is a payment administrator (as defined in paragraph (d)(1)(i) of this section) because *Z* makes payments solely as an agent for the government entity to persons providing property or services to, or on behalf of, the government entity. Under paragraphs (a) and (d) of this section, *Z* is not treated as a person providing property or services with respect to $70,000 of the transfer of funds (the amount of the funds to be paid to persons providing property or services to, or on behalf of, the government entity). Because *Z* is not treated as a person providing property or services with respect to this $70,000 portion of the funds, this portion of the transfer of funds by the government entity to *Z* is not subject to withholding under section 3402(t) when transferred to *Z*.

(iii) Under paragraph (d)(1)(ii) of this section, the payment administrator is treated as a person providing property or services with respect to the portion of the $71,000 fund transfer that is a fee for its services as a payment administrator, or $1,000. Under paragraph (d)(3) of this section, the determination of whether the payment threshold is met with respect to the fee portion of the payment from the government entity to *Z* is made at the time of the payment from the government entity to *Z*. Because the $1,000 fee portion of the payment falls beneath the $10,000 payment threshold, withholding under section 3402(t) is not required with respect to that portion of the payment.

(iv) *P* and *R* are persons providing services or property to, or on behalf of, the government entity with respect to the payments they receive from *Z*.

(v) Withholding is required under section 3402(t) on the payment by *Z*, a payment administrator, to a person providing property or services to, or on behalf of, a government entity provided the payment meets the payment threshold and is not otherwise excepted. Under paragraph (d)(3) of this section, the determination of whether the payment threshold is met on the payment *Z* makes to a person providing property or services is made at the time *Z* pays the person providing property or services. Under the facts of this *Example 2, Z*'s payment to *P* of $18,000 meets the payment threshold, and therefore withholding of $540 under section 3402(t) applies. *Z*'s payment to R of $7,000 does not meet the payment threshold, and therefore, no withholding under section 3402(t) is required.

(vi) The government entity, not *Z*, is liable for any withholding required under section 3402(t) on the payments from *Z* to persons providing property or services. Also, the government entity, not *Z*, is responsible for any reporting required under § 31.6051–5 on the payment from *Z* to persons providing property or services. See paragraph (a) of this section. Each person providing property or services with respect to which withholding is required, not *Z*, is the person receiving the payment for purposes of the reporting required under § 31.6051–5 if withholding under section 3402(t) applies. Thus, the government entity is responsible for issuing *P* a Form 1099 reflecting the amount of the payment from *Z* to *P* of $18,000 and the amount of withholding of $540.

(g) *Effective/applicability date.* This section is effective for payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

§ 31.3402(t)–4 Certain payments excepted from withholding.

(a) *Payments subject to withholding under chapter 3 or chapter 24 (other than section 3406)*—(1) *In general.* Payments are excepted from withholding under section § 31.3402(t)–1(a) if they are subject to withholding under chapter 3 of the Internal Revenue Code (Code) or under sections 3401 through 3405 of the Code (other than section 3402(t)).

(2) *Payments subject to withholding under chapter 3.* Payments subject to withholding under chapter 3 include those payments that are subject to, but exempt from, withholding under chapter 3 on the ground that the payments are exempt from United States income tax pursuant to an income tax convention to which the United States is a party.

(3) *Payments subject to withholding at election of payee.* For purposes of this exception from section 3402(t), payments for which the payee may elect withholding are exempt from withholding under § 31.3402(t)–1(a) regardless of whether the payee in fact makes such an election. These payments include—

(i) Unemployment compensation as defined in section 85(b) (see section 3402(p)(2));

(ii) Social security benefits as defined in section 86(d) (see section 3402(p)(1)(C)(i));

(iii) Any payment referred to in the second sentence of section 451(d) that is treated as insurance proceeds, relating to certain disaster payments received under the Agricultural Act of 1949, as amended, or Title II of the Disaster Assistance Act of 1988 (see section 3402(p)(1)(C)(ii));

(iv) Any amount that is includible in gross income under section 77(a), relating to amounts received as loans from the Commodity Credit Corporation that the taxpayer has elected to treat as income (see section 3402(p)(1)(C)(iii)); and

(v) Any payment of an annuity to an individual.

(b) *Payments subject to withholding under section 3406 with backup withholding deducted.* A payment is not subject to withholding under section 3402(t) if the payment is subject to withholding under section 3406, relating to backup withholding, and if backup withholding is actually being withheld from such payment.

(c) [Reserved].

(d) *Payments for real property.* Payments for real property are not subject to the withholding requirements of § 31.3402(t)–1. For purposes of this exception, the term *payments for real property* includes the purchase and the leasing of real property. However, payments for the construction of buildings or other public works projects, such as bridges or roads, are not payments for real property.

(e) *Payments to government entities, tax-exempt organizations, and foreign governments*—(1) *Government entities.* Payments are not subject to withholding under section 3402(t) if the payments are made to government entities that are subject to the withholding requirements of section 3402(t)(1) pursuant to § 31.3402(t)–2. For purposes of this exception, payments to government entities that qualify for the exception for political subdivisions and instrumentalities making less than $100,000,000 of payments for property and services annually, as provided by section 3402(t)(2)(G) and paragraph (g) of this section, are treated as payments to government entities that are subject to the withholding requirements of section 3402(t)(1).

(2) *Tax-exempt organizations.* Payments to an organization that is exempt from taxation under section

501(a) as an organization described in section 501(c), 501(d), or 401(a) are not subject to withholding under section 3402(t).

(3) *Foreign governments.* Payments to foreign governments are not subject to withholding under section 3402(t). For purposes of this paragraph (e), a government of a possession or territory of the United States is treated as a foreign government.

(f) *Payments made pursuant to a classified or confidential contract.* Payments made pursuant to a classified or confidential contract described in section 6050M(e)(3) are not subject to withholding under section 3402(t).

(g) *Exception for political subdivisions or instrumentalities thereof making less than $100,000,000 of payments for property or services annually*—(1) *In general.* Section 3402(t) withholding is not required on payments made by a political subdivision of a State (or any instrumentality of a political subdivision of a State) that makes less than $100,000,000 of payments for property or services annually.

(2) *Determination of whether an entity is a political subdivision of a State.* The determination of whether an entity is a political subdivision of a State is made under § 31.3402(t)–2(d).

(3) *Determination of whether a political subdivision or instrumentality makes less than $100,000,000 of payments for property or services annually.* The determination of whether the exception provided by paragraph (g)(1) of this section applies is made for each calendar year. For purposes of any calendar year, the determination of whether a political subdivision or instrumentality makes less than $100,000,000 of payments for property or services annually is based on the total payments made by the entity for property or services in the entity's accounting year ending with or within the second preceding calendar year. For purposes of this paragraph (g), payments that would have qualified for the exceptions from withholding under § 31.3402(t)–4(a) through (l) had these regulations been in effect shall not be included in calculating the total payments made. However, payments that would have been excepted from withholding only because such payments were less than the $10,000 payment threshold contained in § 31.3402(t)–3(b) are included in calculating the total payments for purposes of this paragraph (g). Also, payments that were not subject to withholding under section 3402(t) solely based on the effective date rules or transition rules contained in § 31.3402(t)–1(d), § 31.3402(t)–2(i), § 31.3402(t)–3(g), § 31.3402(t)–4(m), § 31.3402(t)–5(e), or § 31.3402(t)–7 are included in calculating total payments for purposes of this paragraph (g). For purposes of this determination, the accounting year refers to the fiscal year (consisting of 12 months) or calendar year used by the government entity in setting its budgets and keeping its accounting books. If a political subdivision or instrumentality was not in existence in the second preceding calendar year or if no 12-month accounting year exists ending in the second preceding calendar year, the determination of whether this exception applies for a calendar year shall be based on the total payments as projected for the accounting year consisting of 12 months ending in that calendar year.

(4) Example. (i) Government entity *X*, which qualifies as a political subdivision or instrumentality thereof for the calendar years 2011 and 2012, uses a fiscal year ending June 30 to determine its budgets and to keep its accounting books. During its fiscal year ending June 30, 2009, *X* made payments to persons for property and services of $200,000,000, including $102,000,000 of payments that would have been excepted under § 31.3402(t)–4(a) through (l) if section 3402(t) had been in effect.

(ii) During its fiscal year ending June 30, 2010, *X* made payments for property and services of $210,000,000, including $106,000,000 that would have been excepted under § 31.3402(t)–4(a) through (l) if section 3402(t) had been in effect. In addition, during the fiscal year ending June 30, 2010, *X* made $15,000,000 of payments that were below the payment threshold of $10,000 in § 31.3402(t)–3(b) if section 3402(t) had been in effect.

(iii) For the calendar year 2011, *X* determines whether it is eligible for the exception provided by this paragraph (g) based on the total payments *X* made for its accounting year ending June 30, 2009. Because total payments for this purpose exclude payments that would be excepted under § 31.3402(t)–4(a) through (l), total payments were $200,000,000 less $102,000,000, or $98,000,000. Therefore, for calendar year 2011, *X* would qualify for the exception provided by this paragraph (g), and would not be required to withhold under section 3402(t).

(iv) For the calendar year 2012, *X* determines whether it is eligible for the exception provided by this paragraph (g) based on the total payments it made for its accounting year ending June 30, 2010. Because total payments for this purpose exclude payments that would have been excepted under § 31.3402(t)–4(a) through (l), but include payments below the payment threshold of $10,000 provided under § 31.3402(t)–3(b), total payments were $210,000,000 less $106,000,000, or $104,000,000. Therefore, for calendar year 2012, *X* would not qualify for the exception provided by this paragraph (g) and would be required to withhold under section 3402(t).

(h) *Payments made in connection with a public assistance or public welfare program*—(1) *In general.* Section 3402(t) withholding shall not apply to payments made in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test.

(2) *Needs or income test.* Eligibility for a public assistance or public welfare program is not considered to be determined by a needs or income test if eligibility for the program is based solely on the age of the beneficiary. A public assistance program providing disaster relief to victims of a natural or other disaster is considered to be a program for which eligibility is determined under a needs test. Payments under government programs to provide health care or other services that are not based on the needs or income of the recipient are subject to section 3402(t) withholding, including programs where eligibility is based on the age of the beneficiary.

(3) *Payments to third parties.* The exception provided by this paragraph (h) also applies to payments made to third parties to provide benefits to beneficiaries under a public assistance or public welfare program for which eligibility is determined by a needs or income test.

(i) *Payments made to any government employee with respect to his or her services.* Section 3402(t) withholding shall not apply to payments made to any government employee with respect to his or her services as an employee of the government. This exception applies to contributions to deferred compensation plans on behalf of an employee, contributions to employee benefit plans on behalf of an employee, fringe benefits provided to employees, and payments to employees under accountable plans for the individual travel expenses of the employee. This exception also applies to payments made by the government employee under accountable plans to providers of the employee's travel, meals, and lodging when the government employee is traveling on government business.

(j) *Payments received by nonresident alien individuals and foreign corporations.* Section 3402(t) withholding shall not apply to any payment received by a nonresident alien individual or foreign corporation (foreign person) for providing services or property if the payment is derived from sources outside the United States, as determined under sections 861, 862, 863, and 865, and is not effectively connected with the conduct of a trade or business within the United States by the foreign person.

(k) *Payments to Indian tribal governments.* Section 3402(t) withholding shall not apply to any payment made to an Indian tribal government or its political subdivisions.

(l) *Payments in emergency or disaster situations.* The Secretary may provide by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) for additional exceptions from section 3402(t) withholding for certain payments made in an emergency or disaster situation if the Secretary determines that withholding from the payments would impede a government entity's efforts to respond to the emergency or disaster.

(m) *Effective/applicability date.* This section is effective for payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

§ 31.3402(t)–5 Application to passthrough entities.

(a) *In general.* This section sets forth rules that provide that section 3402(t)(1) does not apply to payments made by passthrough entities except as described in paragraph (c) of this section. In addition, the rules provide that section 3402(t)(1) applies to payments made to passthrough entities except as described in paragraph (d) of this section.

(b) *Definitions.* The following definitions set forth the meaning of certain terms for purposes of this section:

(1) *Passthrough entity.* The term *passthrough entity* means a partnership (for Federal income tax purposes) or an S corporation.

(2) *Owner.* The term *owner* means a partner (for Federal income tax purposes) or an S corporation shareholder.

(3) *Ownership percentage.* The term *ownership percentage* means an owner's interest, as a percentage, in partnership profits or capital (whichever is greater) in the case of a partnership, or an owner's interest, as a percentage, in S corporation stock in the case of an S corporation.

(4) *Testing day.* The term *testing day* refers to the first day of a passthrough entity's taxable year.

(c) *Payments from a passthrough entity*—(1) *General rule.* Section 3402(t)(1) shall not apply to payments made by passthrough entities during the taxable year, except as provided in paragraph (c)(2) of this section.

(2) *Exception.* Section 3402(t)(1) shall apply to any payment during the taxable year from a passthrough entity if the aggregate ownership percentage held, directly or indirectly, in the entity on the testing day by government entities described in section 3402(t)(1) is at least 80 percent. For purposes of this paragraph (c)(2), any manipulation of the ownership percentage with an intent to avoid application of section 3402(t) will be recharacterized as appropriate to reflect the actual ownership percentage.

(d) *Payments to a passthrough entity*—(1) *General rule.* Section 3402(t)(1) shall apply to payments made to passthrough entities during the taxable year, except as provided in paragraph (d)(2) of this section.

(2) *Exception.* Section 3402(t)(1) shall not apply to any payment during a taxable year to a passthrough entity if the aggregate ownership percentage held, directly or indirectly, in the entity on the testing day by persons described in section 3402(t)(2)(E) is at least 80 percent. For purposes of this paragraph (d)(2), any manipulation of the ownership percentage with an intent to avoid application of section 3402(t) will be recharacterized as appropriate to reflect the actual ownership percentage.

(e) *Effective/applicability date.* This section is effective for payments by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies) to any person providing property or services made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

§ 31.3402(t)–6 Crediting of tax withheld under section 3402(t).

[Reserved].

§ 31.3402(t)–7 Effective date and transition rules.

(a) *General Rule.* Except as provided in paragraph (b) of this section, the requirement to withhold under § 31.3402(t)–1(a) applies to payments made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

(b) *Exception for payments made under existing written binding contracts.* Payments made under a written binding contract that was in effect on the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t), are not subject to the withholding requirements in § 31.3402(t)–1. The preceding sentence does not apply to payments made under any contract that is materially modified after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

(c) *Good faith exception for interest and penalties on payments made before January 1, 2012.* Government entities that make a good faith effort to comply with the provisions of these regulations will not be liable for penalties and interest with respect to income tax withholding under section 3402(t) that the government entity failed to withhold from payments made before January 1, 2012. However, this provision shall not relieve the government entity of liability for income tax that it failed to withhold. See, however, § 31.3402(d)–1.

Par. 3. Section 31.3406(g)–2 is amended by adding paragraphs (h) and (i) to read as follows:

§ 31.3406(g)–2 Exception for reportable payment for which withholding is otherwise required.

* * * * *

(h) *Certain payments made by government entities.* A government entity that is required to withhold both on reportable payments pursuant to section 3406(a) and on certain payments pursuant to section 3402(t), must comply with the withholding requirements of section 3406, and not section 3402(t), with respect to a payment to which both types of withholding would apply. Pursuant to section 3402(t)(2)(B), withholding under section 3402(t) shall not apply if amounts are being withheld under section 3406 with respect to a payment. If a government entity fails to withhold as required under section 3406, the payment will not be deemed to be subject to withholding under another provision of the Code for purposes of this paragraph (h). Thus, even if the government entity withholds on such payment pursuant to section 3402(t), it will remain liable for the amount required to be withheld under section 3406.

(i) *Effective/applicability date.* Paragraph (h) relating to certain payments made by government entities applies to payments made by government entities under section 3402(t) made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

Par. 4. Section 31.6011(a)–4 is amended by adding paragraphs (b)(6) and (d) to read as follows:

§ 31.6011(a)–4 Returns of income tax withheld.

* * * * *

(b) * * *

(6) Certain payments made by government entities subject to withholding under section 3402(t).

* * * * *

(d) *Effective/applicability date.* Paragraph (b)(6) relating to certain payments made by government entities subject to withholding under section 3402(t) applies to payments made by government entities under section 3402(t) made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

Par. 5. Section 31.6051–5 is added to read as follows:

§ 31.6051–5 Statement and information return required in case of withholding by government entities.

(a) *Statements required from government entities.* Every government entity required to deduct and withhold tax under section 3402(t) must furnish to the payee a written statement containing the information required by paragraph (d) of this section.

(b) *Information returns required from government entities.* Every government entity required to furnish a payee statement under paragraph (a) of this section must file a duplicate of such statement with the Secretary. Such duplicate shall constitute an information return.

(c) *Prescribed form.* The prescribed form for the statement required by this section is Form 1099–MISC, ''Miscellaneous Income.''

(d) *Information required.* Each statement on Form 1099–MISC must show the following—

(1) The name, address, and taxpayer identification number of the person receiving the payment subject to withholding under section 3402(t);

(2) The amount of the payment withheld upon;

(3) The amount of tax deducted and withheld under section 3402(t);

(4) The name, address, and taxpayer identification number of the government entity filing the form;

(5) A legend stating that such amount is being reported to the Internal Revenue Service; and

(6) Such other information as is required by the form.

(e) *Time for furnishing statements.* The statement must be furnished to the payee no later than January 31 of the year following the calendar year in which the payment subject to withholding was made.

(f) *Cross references.* For provisions relating to the time for filing the information returns required by this section and to extensions of the time for filing, see §§ 31.6071(a)–1(a)(3) and 1.6081–1(b)(3), respectively. For penalties applicable to failure to file information returns and furnish payee statements, see sections 6721 through 6724.

(g) *Effective/applicability date.* This section is effective on the later of January 1, 2011, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

Par. 6. Section 31.6071(a)–1 is amended by revising paragraph (a)(3)(i) to read as follows:

§ 31.6071(a)–1 Time for filing returns and other documents.

* * * * *

(3) *Information returns*—(i) *General rule.* Each information return in respect of wages as defined in the Federal Insurance Contributions Act or of income tax withheld from wages which is required to be made under § 31.6051–2 or of income tax withheld from payments by government entities as required under § 31.6051–5 shall be filed on or before the last day of February (March 31 if filed electronically) of the year following the calendar year for which it is made, except that, if a tax return under § 31.6011(a)–5(a) is filed as a final return for a period ending prior to December 31, the information statement shall be filed on or before the last day of the second calendar month following the period for which the tax return is filed.

* * * * *

Par. 7. Section 31.6302–1 is amended by adding paragraph (e)(1)(iii)(E) and revising paragraph (n) to read as follows:

§ 31.6302–1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

* * * * *

(e) * * * (1) * * *

(iii) * * *

(E) Certain payments made by government entities under section 3402(t); and

* * * * *

(n) *Effective/applicability date.* Except for the deposit of employment taxes attributable to payments made by government entities under section 3402(t), §§ 31.6302–1 through 31.6302–3 apply with respect to the deposit of employment taxes attributable to payments made after December 31, 1992. Section 31.6302–1(e)(1)(iii)(E) applies with respect to the deposit of employment taxes attributable to payments made by government entities under section 3402(t) made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

Par. 8. Section 31.6302–4 is amended by revising paragraph (b)(5) and adding paragraphs (b)(6) and (e) to read as follows:

§ 31.6302–4 Federal tax deposit rules for withheld income taxes attributable to nonpayroll payments made after December 31, 1993.

* * * * *

(b) * * *

(5) Amounts withheld under section 3406, relating to backup withholding with respect to reportable payments; and

(6) Amounts withheld under section 3402(t), relating to certain payments made by government entities.

* * * * *

(e) *Effective/applicability date.* Paragraph (b)(6) relating to certain payments made by government entities applies to payments made by government entities under section 3402(t) made after the later of December 31, 2010, or the date that is 6 months after the date of publication in the **Federal Register** of final regulations under section 3402(t).

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E8–28789 Filed 12–4–08; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2008–0194; A–1–FRL–8718–1]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Enhanced Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a State Implementation Plan

(SIP) revision submitted on December 19, 2007 by the State of Connecticut. This SIP revision includes regulations to update the enhanced motor vehicle inspection and maintenance (I/M) program in Connecticut. The revised program includes a test and repair network and on-board diagnostic (OBD2) testing of 1996 and newer vehicles. The intended effect of this action is to propose approval of the revised program into the Connecticut SIP.

DATES: Written comments must be received on or before January 5, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2008–0194 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: arnold.anne@epa.gov.*
3. *Fax:* (617) 918–0047.
4. *Mail*: ''EPA–R01–OAR–2008–0194'', Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (mail code CAQ), Boston, MA 02114–2023.
5. *Hand Delivery or Courier:* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, (CAQ), Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Robert C. Judge, Office of Ecosystem Protection, EPA New England, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023; 617–918–1045 (phone); 617–918–0045 (fax); e-mail at *judge.robert@epa.gov*.

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: September 12, 2008.

Robert W. Varney,

Regional Administrator, EPA New England.

[FR Doc. E8–28735 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0788; FRL–8745–3]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from large water heaters and small boilers and process heaters. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by *January 5, 2009*.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2008–0788], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.
2. *E-mail: steckel.andrew@epa.gov.*
3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 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 *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 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: Idalia Perez, EPA Region IX, (415) 972–3248, *perez.idalia@epa.gov*.

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rule: SCAQMD 1146.2. In the Rules and Regulations section of this **Federal Register**, we are approving this local rule in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: November 6, 2008.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E8–28726 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–0290, FRL–8745–7]

Revisions to the California State Implementation Plan, Great Basin Unified Air Pollution Control District and Kern County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Great Basin Unified Air Pollution Control District (GBUAPCD) and Kern County Air Pollution Control District (KCAPCD) portions of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve local rules that address permitting and exemptions from permitting.

DATES: Any comments on this proposal must arrive by *January 5, 2009.*

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2007–0290, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.
- *E-mail: R9airpermits@epa.gov.*
- *Mail or deliver:* Gerardo Rios (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

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 *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an anonymous access system, 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 IX, 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: Laura Yannayon, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the approval of GBUAPCD Rule 201 and KCAPCD Rule 205. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe this SIP revision is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: October 24, 2008.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. E8–28733 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

49 CFR Part 89

[Docket No. DOT–OST–2008–0329]

RIN 2105–AD78

Administrative Wage Garnishment

AGENCY: Office of the Secretary of Transportation (OST), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This proposed rule would implement the authority established under the Debt Collection Improvement Act of 1996 (DCIA) for DOT to collect the Department's past due indebtedness through administrative wage garnishment. The proposed rule would adopt, without change, the hearing procedures issued by the Department of the Treasury implementing administrative wage garnishment under the DCIA. This proposed rule would apply only to individuals who are not Federal employees. The proposed rule also would amend regulations on procedures for the collection of claims to conform DOT regulations to applicable provisions of the DCIA.

DATES: Comments must be received on or before February 3, 2009.

ADDRESSES: Comments should reference Docket No. DOT–OST–2008–0329 and may be submitted the following ways:

- *E-Gov Web site: http://www.regulations.gov.* This Web site allows the public to enter comments on any **Federal Register** notice issued by any agency. Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* DOT Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington DC, 20590–0001.
- *Hand Delivery:* DOT Docket Management System; West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket ID, DOT–ST–2008–0329, at the beginning of your comments. If you submit your comments by mail, submit two copies. To receive confirmation that OST received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov.* **Note:**

Comments are posted without changes or edits to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this NPRM.

Electronic Access and Filing

You may submit or retrieve comments online through *http://www.regulations.gov*, which is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov/federal_register* and the Government Printing Office's Web page at *http://www.gpoaccess.gov*.

FOR FURTHER INFORMATION CONTACT: Edward C. Ramos, Collections Specialist, Office of the Secretary of Transportation, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–5905. Hearing and speech-impaired persons may access this number via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

Electronic Access and Filing

You may submit or retrieve comments online through *http://www.regulations.gov*, which is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov/federal_register* and the Government Printing Office's Web page at *http://www.gpoaccess.gov*.

SUPPLEMENTARY INFORMATION:

Background

In 1996, Congress enacted the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321–1358, approved April 26, 1996), which amended the Debt Collection Act of 1982. Section 31001(o) of the DCIA authorizes collection of Federal agency debt by administrative wage garnishment (section 31001(o) is codified at 31 U.S.C. 3720D). Wage garnishment is a legal process whereby an employer withholds amounts from an employee's wages and pays those amounts to the employee's creditor in satisfaction of a withholding order. The DCIA authorizes Federal agencies to garnish up to 15% of the disposable pay of a debtor to satisfy delinquent nontax debt owed to the United States. Prior to the enactment of the DCIA, agencies were required to obtain a court judgment before garnishing the wages of non-Federal employees.

The DCIA directed the Secretary of the Treasury to issue implementing regulations (see 31 U.S.C. 3720D(h)) on this subject. On May 6, 1998 (63 FR 25136), the Department of the Treasury published a final rule implementing the statutory administrative wage garnishment requirements at 31 CFR 285.11. Paragraph (f) of 31 CFR 285.11 provides that ''[a]gencies shall prescribe regulations for the conduct of administrative wage garnishment hearings consistent with this section or shall adopt this section without change by reference.'' Under the DCIA, the Treasury Department serves as a coordinator for Federal debt collection through its Treasury Offset Program.

This proposed rule would amend DOT's regulations at 49 CFR part 89, subpart B to adopt 31 CFR 285.11 in its entirety. Specifically, the proposed rule would establish a new 49 CFR 89.35 that would contain a cross-reference to 31 CFR 285.11.

Overview of the Administrative Wage Garnishment Process

Readers should refer to the Department of the Treasury regulation at 31 CFR 285.11 for details regarding the administrative wage garnishment procedures that would be adopted by this proposed rule. For the convenience of readers, the following presents a very brief overview of the rules and procedures codified at 31 CFR 285.11.

1. Notice to debtor. At least 30 days before the agency initiates garnishment proceedings, the agency will give the debtor written notice informing him or her of the nature and amount of the debt, the intention of the agency to collect the debt through deductions from pay, and an explanation of the debtor's rights regarding the proposed action.

2. Rights of debtor. The agency will provide the debtor with an opportunity to inspect and copy records related to the debt, to establish a repayment agreement, and to receive a hearing concerning the existence or amount of the debt and the terms of a repayment schedule. A hearing must be held prior to the issuance of a withholding order if the debtor's request is timely received. For hearing requests that are not received in the specified timeframe, the agency need not delay the issuance of a withholding order prior to conducting a hearing. An agency may not garnish the wages of a debtor who has been involuntarily separated from employment until that individual has been reemployed continuously for at least 12 months. The debtor bears the responsibility of notifying the agency of the circumstances surrounding an involuntary separation from employment.

3. Hearing official. The Department of the Treasury regulations authorize the head of each agency to designate any qualified individual as a hearing official. This proposed rule would provide that any hearing required to establish DOT's right to collect a debt through administrative wage garnishment will be conducted by a qualified individual selected by the Secretary of Transportation. The hearing official is required to issue a written decision no later than 60 days after the request for a hearing is made. The hearing official's decision is the final agency action for purposes of judicial review.

4. Employer's responsibilities. The Treasury Department will send a wage garnishment order to the employer of a delinquent debtor, directing that the employer pay a portion of the debtor's wages to the Federal Government. The employer is required to certify certain payment information about the debtor. Employers are not required to vary their normal pay cycles in order to comply with these requirements. Employers are prohibited from taking disciplinary actions against the debtor because the debtor's wages are subject to administrative garnishment. An agency may sue an employer for amounts not properly withheld from the wages payable to the debtor.

5. Garnishment amounts. As provided in the DCIA, no more than 15% of the debtor's disposable pay for each pay period may be garnished. Special rules apply to calculating the amount to be withheld from a debtor's pay that is subject to multiple withholding orders. A debtor may request a review by the agency of the amount being garnished under a wage garnishment order based on materially changed circumstances, such as disability, divorce, or catastrophic illness, which result in financial hardship.

Rulemaking Analyses and Notices

E.O. 12866 and DOT Regulatory Policies and Procedures

The Department has evaluated this NPRM in accordance with existing regulatory policies and procedures and has concluded that it is a nonsignificant regulatory action under E.O. 12866, and a nonsignificant rule under section 5(a)(4) of the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

The NPRM is not a significant regulatory action under E.O. 12866 because it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; will not create a serious inconsistency with an action planned or underway by another Federal agency; will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of the Executive Order.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), we have evaluated the effects of this action on small entities and have determined that the action will not have a significant economic impact on a substantial number of small entities. Therefore, the Department certifies that this rule would not have a significant economic impact on a substantial number of small entities.

Employers of delinquent debtors must certify certain information about the debtor such as the debtor's employment status and earnings. This information is contained in the employer's payroll records. Therefore, it will not take a significant amount of time or result in a significant cost for an employer to complete the certification form. Even if an employer is served withholding orders on several employees over the course of a year, the cost imposed on the employer to complete the certifications would not have a significant economic impact on an entity. Employers are not required to vary their normal pay cycles in order to comply with a withholding order issued pursuant to this proposed rule.

Notwithstanding DOT's determination that this rule will not have a significant economic impact on small entities, DOT specifically invites comments regarding alternatives to this rule that would meet DOT's objectives as described in this preamble.

Executive Order 13132 (Federalism)

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order.

This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Executive Order 13084

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this rule would not significantly or uniquely affect the Indian tribal communities, and would not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector.

This rule would not impose a Federal mandate on any State, local, or tribal government, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) addresses the collection of information by the Federal government from individuals, small businesses and State and local government and seeks to minimize the burdens such information collection requirements might impose. A collection of information includes requiring answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities or employees of the United States.

This proposed rule contains information that would apply to individuals and possibly small entities. However, there are no reporting or other collection requirements associated with this proposed rule, even though it relates to an employer's certification of certain information about the debtor, such as the debtor's employment status and earnings, which would be inquiries on a one-time basis. In any case, comments in this area are welcomed.

National Environmental Policy Act

In accordance with 24 CFR 50.19(c)(1) of the Department's regulations, this proposed 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. Therefore, this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' See 66 FR 28355 (May 22, 2001). Under the Executive Order a ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

The Department has evaluated this NPRM in accordance with Executive Order 13211 and it has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, the Department has determined that this NPRM is not a ''significant energy action'' within the meaning of the Executive Order.

Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc). You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may visit: *http://www.regulations.gov*.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 89

Claims, Debt collection.

The Proposed Rule

For the reasons set forth in the preamble, OST proposes to amend Part 89 of subtitle A of title 49, Code of Federal Regulations, as set forth below:

PART 89—[AMENDED]

1. The authority citation for 49 CFR part 89 continues to read as follows:

Authority: Pub. L. 89–508; Pub. L. 89–365, secs. 3, 10, 11, 13(b), 31 U.S.C. 3701–3720A; Pub. L. 98–167; Pub. L. 98–369; Pub. L. 99–578; Pub. L. 101–552, 31 U.S.C. 3711(a)(2).

2. Add new § 89.35 to read as follows:

§ 89.35 Administrative wage garnishment.

(a) General. The Secretary may use administrative wage garnishment for debts referred to cross-servicing at Financial Management Service, Department of Treasury. Regulations in 31 CFR 285.11 govern the collection of debts owed to federal agencies through administrative wage garnishment. Whenever the Financial Management Service collects a debt for the Secretary using administrative wage garnishment, the statutory administrative requirements in 31 CFR 285.11 will govern.

(b) Hearing official. Any hearing required to establish the Secretary's right to collect a debt through administrative wage garnishment shall be conducted by a qualified individual selected at the discretion of the Secretary of Transportation, as specified in 31 CFR 285.11. The qualified individual may include an Administrative Law Judge.

Dated: November 24, 2008.

Mary E. Peters,

Secretary of Transportation.

[FR Doc. E8–28768 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 573 and 579

[Docket No. NHTSA–2008–0169; Notice 1]

RIN 2127–AK28

Early Warning Reporting Regulations

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes amendments to certain provisions of the early warning reporting (EWR) rule published pursuant to the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, responds to a petition for rulemaking, and proposes amendments to information identifying products involved in a recall under 49 CFR part 573 *Defect and Noncompliance Responsibility and Reports*. This document proposes to modify the threshold for submitting quarterly EWR reports for light vehicle, bus, and trailer manufacturers. It further proposes to require manufacturers to submit product names that are consistent from reporting quarter to quarter or advise NHTSA of changes; to add a requirement that light vehicle manufacturers specify the vehicle type and the fuel or propulsion system type of each model in their quarterly EWR submissions; to add a new component category for light vehicle manufacturers; and to correct the definition of ''other safety campaign.'' It also proposes to amend part 573 *Defect and Noncompliance Responsibility and Reports* to add a requirement that tire manufacturers provide tire identification numbers of recalled tires and manufacturers provide the country of origin of a component involved in a recall.

DATES: Written comments regarding these proposed rule changes may be submitted to NHTSA and must be received on or before: February 3, 2009.

ADDRESSES: Written comments may be submitted using any one of the following methods:

- *Mail:* Send Comments to: Docket Management Facility, U.S. Department of Transportation, West Building, RM. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Fax:* Written comments may be faxed to (202) 493–2251.
- *Internet:* To submit comments electronically, go to the U.S. Government regulations Web site at *http://www.regulations.gov*. Once here, follow the online instructions for submitting comments to an NPRM.
- *Hand Delivery:* If you plan to submit written comments by hand or courier, please do so at West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.

Whichever way you submit your comments, please remember to mention the docket number of this document within your correspondence. The docket may be accessed via phone at 202–366–9324.

Instructions: All comments submitted in relation to these proposed rule changes must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Request for Comments heading of the **SUPPLEMENTARY INFORMATION** section of this document. Please note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Privacy Act: Please see the Privacy Act heading under Rulemaking Analyses and Notices.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, contact Tina Morgan, Office of Defects Investigation, NHTSA (phone: 202–366–0699). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202–366–5263). You may send mail to these officials at National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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Introduction

In October 2000, Congress enacted the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, which the President signed into law on November 1, 2000 (Pub. L. 106–414). TREAD was, in part, a response to the controversy surrounding the recall of certain tires that had been involved in numerous fatal crashes. Up until that time, in its efforts to identify safety defects in motor vehicles and equipment, NHTSA relied primarily on its analysis of complaints from consumers and technical service bulletins from manufacturers. Congress concluded that NHTSA did not have access to data that may have provided an earlier warning of the safety defects that existed in the tires that were eventually recalled. Accordingly, the TREAD Act included a requirement that NHTSA prescribe rules establishing early warning reporting requirements.

In response to the TREAD Act requirements, NHTSA issued rules (49 CFR part 579; 67 FR 45822; 67 FR 63295) that, in addition to the information motor vehicle and equipment manufacturers were already required to provide, required that they provide certain additional information on foreign recalls and early warning indicators. The rules require:

- Monthly reporting of manufacturer communications (e.g., notices to distributors or vehicle owners, customer satisfaction campaign letters, etc.) concerning defective equipment or repair or replacement of equipment;
- Reporting (within five days of a determination to take such an action) of information concerning foreign safety recalls and other safety campaigns in foreign countries; and
- Quarterly reporting of early warning information: Production information; information on incidents involving death or injury; aggregate data on property damage claims, consumer complaints, warranty claims, and field reports; and copies of field reports (other than dealer reports) involving specified vehicle components, a fire, or a rollover.

We use the term ''Early Warning Reporting'' (EWR) here to apply to the requirements in the third category above, which are found at 49 CFR part 579, subpart C. As described more fully in the Background section, below, the requirements vary somewhat depending on the nature of the reporting entity (motor vehicle manufacturers, child restraint system manufacturers, tire manufacturers, and other equipment manufacturers) and the annual production of the entity. All of the EWR information NHTSA receives is stored in a database called ARTEMIS (which stands for Advanced Retrieval, Tire, Equipment, and Motor Vehicle Information System), which also contains additional information (e.g., recall details and complaints filed directly by consumers) related to defects and investigations.

EWR reporting was phased in. The first quarterly EWR reports were submitted on or about December 1, 2003. However, actual copies of field reports were first submitted on or about July 1, 2004. 68 FR 35145, 35148 (June 11, 2003). Accordingly, NHTSA has just over four years of experience using the EWR information.

The Early Warning Division of the Office of Defects Investigation (ODI) reviews and analyzes a huge volume of early warning data and documents submitted by manufacturers. Using both its traditional sources of information, such as complaints from vehicle owner questionnaires (VOQs) and manufacturers' own communications, as well as the additional quantum of information provided by EWR submissions, ODI conducts many investigations of potential safety defects and influences manufacturers to conduct recalls where defects have been determined to be present. In 2007, for example, manufacturers recalled more than 13 million vehicles for defective conditions, a majority of which involved recalls influenced by ODI's investigations.

The TREAD Act requires NHTSA periodically to review the EWR rule. 49 U.S.C. 30166(m)(5). In previous EWR rulemakings, the agency indicated that we would begin a review of the EWR rule after two full years of reporting experience. When it had completed two full years of reporting in 2006, NHTSA began its review of the rule and presented proposed rule changes for public comment based on these evaluations.

NHTSA is evaluating the EWR rule in two phases. NHTSA completed phase one in 2007 and, after notice and comment, published a final rule on May 29, 2007. 72 FR 29435. The May 2007 final rule made three (3) changes to the EWR rule. First, the agency eliminated the requirement to produce hard copies of a subset of field reports known as ''product evaluation reports.'' *See* 72 FR 29435, 29443. Second, the final rule amended the definition of fire to more accurately capture fire-related events. *Id*. Last, under the phase one final rule, the agency limited the requirement to update missing vehicle identification number (VIN)/tire identification number (TIN) or components on incidents of death or injury to a period of no more than one year after NHTSA receives the initial report. 72 FR 29444.

The majority of this document contains the second part of our evaluation of the EWR rule. This rulemaking addresses issues that required more analysis than those addressed in the first phase. In this phase, we address the threshold level for providing comprehensive quarterly EWR reports for certain industry categories. This required studying and assessing the quantity and quality of data that might be lost if the threshold is increased to particular levels and analyzing whether such a loss would have an appreciable effect on ODI's ability to identify possible safety defects.

This document also contains proposals that amend part 573 *Defect and Noncompliance Responsibility and Reports* to require further information that identifies the tire identification number (TIN) of all the tires within the scope of a recall by a tire manufacturer and identifies the country of origin of recalled components. In part 573, we also propose to add an optional method to submit the TINs by uploading them directly to ODI via ODI's Web site.

I. Summary of the Proposed Rule

The early warning reporting (EWR) rule requires certain manufacturers of motor vehicles and motor vehicle equipment to submit information to NHTSA. 49 CFR part 579, subpart C. Under today's proposal, the EWR reporting threshold would be modified for some categories of vehicle manufacturers and a new requirement would be added to require manufacturers to provide consistent naming conventions for their models that are consistent from quarter to quarter. In addition, we propose to add one component to the light vehicle reporting category and require light vehicle manufacturers to specify the vehicle type and the fuel and/or propulsion system type.

Under the EWR rule, certain motor vehicle manufacturers and motor vehicle equipment manufacturers are required to report information and submit documents to NHTSA that could be used to identify safety-related defects. The amount and frequency of reporting required of a manufacturer is dependent upon the level of its annual production volume.

The EWR regulation requires manufacturers of light vehicles and manufacturers of trailers to submit quarterly reports if they produce 500 or more vehicles or trailers annually. Manufacturers of light vehicles or trailers that produce fewer than 500 vehicles or trailers annually do not submit quarterly reports. These manufacturers are required to submit a report to NHTSA when they receive a claim or notice identifying an incident that involves a death. 49 CFR 579.27. Today's proposed rule would raise the EWR threshold for light vehicle manufacturers and trailer manufacturers from 500 or more units to 5,000 or more units. Manufacturers in the light vehicle and trailer categories producing 5,000 or more units annually would be required to report on a quarterly basis. Those light vehicle and trailer manufacturers producing fewer than 5,000 units per year would have a lower reporting burden, only being required to submit information related to incidents that involve a death.

Similar to light vehicles and trailers, the EWR regulation requires manufacturers of medium-heavy vehicles and buses to submit quarterly reports if they produce 500 or more vehicles annually. These manufacturers are required to report more comprehensive data on a quarterly basis, while those with a production volume below this threshold are required to submit information only on incidents that involve a death. Today's proposed rule would eliminate the reporting threshold for manufacturers of buses, which would require all manufacturers of buses to provide quarterly EWR reports.

Today's proposed rule would add new requirements that would require vehicle and equipment manufacturers to provide consistent naming conventions for their products that are consistent from quarter to quarter, or provide NHTSA with timely notice of any changes, and to require light vehicle manufacturers to include the vehicle type in the aggregate portion of their quarterly EWR reports.

Today's proposed rule would add one new component to the light vehicle reporting category and add a requirement that manufacturers specify their fuel and/or propulsion system when providing model designations. The new component is electronic stability control. These two amendments are intended to capture new technologies that have been introduced to the light vehicle market.

Last, today's proposed rule amends two subsections of section 573.6 to add language that will require further information that identifies the tire identification number (TIN) of all the tires within the scope of a recall by a tire manufacturer and identifies the country of origin of recalled components in a manufacturer's Part 573 Defect or Noncompliance Information Report. Specifically, we are proposing to amend 573.6(c)(2)(iii) to add a requirement to report tire identification numbers (TINs) and 573.6(c)(2)(iv) to add a requirement to identify the country of origin of a component that is the subject of a recall. We also propose to add language to section 573.9 to facilitate the submission of reports affected by the proposal to require TINs.

II. Background

A. The Early Warning Reporting Rule

On July 10, 2002, NHTSA published a rule implementing the early warning reporting provisions of the TREAD Act, 49 U.S.C. 30166(m). 67 FR 45822. This rule requires certain motor vehicle manufacturers and motor vehicle equipment manufacturers to report information and submit documents to NHTSA that could be used to identify potential safety-related defects.

The EWR regulation divides manufacturers of motor vehicles and motor vehicle equipment into two groups with different reporting responsibilities for reporting information. The first group consists of (a) larger vehicle manufacturers (manufacturers of 500 or more vehicles annually) that produce light vehicles, medium-heavy vehicles and buses, trailers and/or motorcycles; (b) tire manufacturers that produce over a certain number per tire line; and (c) all manufacturers of child restraints. The first group must provide comprehensive reports every calendar quarter. 49 CFR 579.21–26. The second group consists of smaller vehicle manufacturers (e.g., manufacturers of fewer than 500 vehicles annually) and all motor vehicle equipment manufacturers other than those in the first group. The second group has limited reporting responsibility. 49 CFR 579.27.

On a quarterly basis, manufacturers in the first group must provide comprehensive quarterly reports for each make and model for the calendar year of the report and nine previous model years. Tire and child restraint manufacturers must provide comprehensive reports for the calendar year of the report and four previous production years. Each report is subdivided so that the information on each make and model is provided by specified vehicle systems and components. The vehicle systems or components on which manufacturers provide information vary depending upon the type of vehicle or equipment manufactured.[1]

In general (not all of these requirements apply to manufacturers of child restraints or tires), manufacturers that provide comprehensive reports must provide information relating to:

- Production (the cumulative total of vehicles or items of equipment manufactured in the year),
- Incidents involving death or injury based on claims and notices received by the manufacturer,
- Claims relating to property damage received by the manufacturer,
- Warranty claims paid by the manufacturer pursuant to a warranty program (in the tire industry these are warranty adjustment claims),
- Consumer complaints (a communication by a consumer to the manufacturer that expresses dissatisfaction with the manufacturer's product or performance of its product or an alleged defect),
- Field reports (a report prepared by an employee or representative of the manufacturer concerning the failure,

[1] For instance, light vehicle manufacturers must provide reports on twenty (20) vehicle components or systems: Steering, suspension, service brake, parking brake, engine and engine cooling system, fuel system, power train, electrical system, exterior lighting, visibility, air bags, seat belts, structure, latch, vehicle speed control, tires, wheels, seats, fire and rollover.

In addition to the systems and components reported by light vehicle manufacturers, medium-heavy vehicle and bus manufacturers must report on the following systems or components: Service brake system air, fuel system diesel, fuel system other and trailer hitch.

Motorcycle manufacturers report on thirteen (13) systems or components: Steering, suspension, service brake system, engine and engine cooling system, fuel system, power train, electrical, exterior lighting, structure, vehicle speed control, tires, wheels and fire.

Trailer manufacturers report on twelve (12) systems or components: Suspension, service brake system-hydraulic, service brake system-air, parking brake, electrical system, exterior lighting, structure, latch, tires, wheels, trailer hitch and fire.

Child restraint and tire manufacturers report on fewer systems or components for the calendar year of the report and four previous model years. Child restraint manufacturers must report on four (4) systems or components: Buckle and restraint harness, seat shell, handle and base. Tire manufacturers must report on four (4) systems or components: Tread, sidewall, bead and other.

malfunction, lack of durability or other performance problem of a motor vehicle or item of motor vehicle equipment).

Most of the provisions summarized above (i.e., property damage claims, warranty claims, consumer complaints and field reports) require manufacturers to submit information in the form of numerical tallies, by specified system and component. These data are referred to as aggregate data. Reports on deaths or injuries contain specified data elements. In addition, these manufacturers are required to submit copies of field reports, except field reports by dealers (referred to as ''non-dealer field reports'') and product evaluation reports.

In contrast to the comprehensive quarterly reports provided by manufacturers in the first group, the second group of manufacturers does not have to provide quarterly reports. These manufacturers only submit information about a death incident when they receive a claim or notice of a death.

B. Defect and Noncompliance Information Reports

Pursuant to 49 U.S.C. 30118 and 30119, manufacturers are required to provide notice to the Secretary if the manufacturer determines that a motor vehicle or item of motor vehicle equipment contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard. The regulation implementing the manufacturer's requirement to provide notice to NHTSA is located at 49 CFR part 573 *Defect and Noncompliance Responsibility and Reports*, which, among other things, requires manufacturers to provide reports (commonly referred to as Defect or Noncompliance reports, as the case may be) to NHTSA on defects in motor vehicles and motor vehicle equipment and noncompliances with motor vehicle safety standards prescribed under 49 CFR part 571. Section 573.6 specifies the information that manufacturers are required to submit to the agency and Section 573.9 specifies the address for submitting reports. An important element of the notice to NHTSA is the identification of the component containing the defect or noncompliance. Section 573.6(c)(2)(iii) requires manufacturers to identify items of motor vehicle equipment by the generic name of the component (tires, child seating system, axles, etc.), part number, size and function if applicable, the inclusive dates (month and year) of manufacturer if available and any other information to describe the items. Section 573.6(c)(2)(iv) requires manufacturers to identify the manufacturer of the component that contains the defect or noncompliance if the component was manufactured by a different manufacturer. In such a case, the reporting manufacturer must identify the component and the manufacturer of the component by name, business address, and business telephone number.

C. Scope of This Rulemaking

The TREAD Act requires NHTSA periodically to review the EWR rule. 49 U.S.C. 30166(m)(5). In previous EWR rulemakings, the agency indicated that we would begin a review of the EWR rule after two full years of reporting experience. After we gained two full years of reporting experience, we commenced our evaluation.

NHTSA is evaluating the EWR rule in two phases. The first phase covered definitional issues and culminated in the final rule published on May 29, 2007. 72 FR 29435. Today's proposed rule is the culmination of the second phase of our evaluation.

Today's proposed rule is limited in scope to the amendments to the EWR requirements and the part 573 notification requirements proposed in this NPRM, as well as logical outgrowths of the proposal. Excluding the proposed changes noted above in the summary section, NHTSA intends to leave the remaining current EWR regulations and part 573 regulations unchanged.

III. Discussion

A. Statutory Background on Early Warning and Notification Requirements

Under the early warning reporting requirements of the TREAD Act, NHTSA is required to issue a rule establishing reporting requirements for manufacturers of motor vehicles and motor vehicle equipment to enhance the agency's ability to carry out the provisions of Chapter 301 of Title 49, United States Code, which is commonly referred to as the National Traffic and Motor Vehicle Safety Act or Safety Act. 49 U.S.C. 30166(m)(1), (2). Under one subsection of the early warning provisions, NHTSA is to require reports of information in the manufacturers' possession to the extent that such information may assist in the identification of safety-related defects and which concern, *inter alia*, data on claims for deaths and aggregate statistical data on property damage. 49 U.S.C. 30166(m)(3)(A)(i); *see also* 49 U.S.C. 30166(m)(3)(C). Another subsection authorizes the agency to require manufacturers to report information that may assist in the identification of safety defects. Specifically, section 30166(m)(3)(B) states:

> Other data.—As part of the final rule * * * the Secretary may, to the extent that such information may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States, require manufacturers of motor vehicles or motor vehicle equipment to report, periodically or upon request of the Secretary, such information as the Secretary may request.

This subsection conveys substantial authority and discretion to the agency. Most EWR data, with the exception of information on deaths and property damage claims, is reported under regulations authorized by this provision.

The agency's discretion is not unfettered. NHTSA may not impose undue burdens upon manufacturers, taking into account the cost incurred by manufacturers to report EWR data and the agency's ability to use the EWR data meaningfully to assist in the identification of safety defects. More specifically, 49 U.S.C. 30166(m)(4)(D) provides:

> (D) Burdensome requirements.—In promulgating the final rule under paragraph (1), the Secretary shall not impose requirements unduly burdensome to a manufacturer of a motor vehicle or motor vehicle equipment, taking into account the manufacturer's cost of complying with such requirements and the Secretary's ability to use the information sought in a meaningful manner to assist in the identification of defects related to motor vehicle safety.

The Safety Act also requires manufacturers of motor vehicles or items of motor vehicle equipment to notify NHTSA and owners and purchasers of the vehicle or equipment if the manufacturer determines that a motor vehicle or item of motor vehicle equipment contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard. 49 U.S.C. 30118(b) & (c). Manufacturers must provide notification pursuant to the procedures set forth in section 30119 of the Safety Act. Section 30119 sets forth the contents of the notification, which includes a clear description of the defect or noncompliance, the timing of the notification, means of providing notification and when a second notification is required. 49 U.S.C. 30119. Subsection (a) of section 30119 confers considerable authority and discretion to NHTSA, by rulemaking, to require additional information in manufacturers' notifications. *See* 49 U.S.C. 30119(a)(7).

B. Matters Considered in Setting Thresholds for Early Warning Reporting

As part of our evaluation of the reporting thresholds for comprehensive reporting under the EWR rule, the agency is endeavoring to ensure that it collects a body of information that may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment. We are also considering the burden on manufacturers. In view of our authority, stated in the statute in broad terms, to require reporting of information to the extent that such information may assist in the identification of defects related to motor vehicle safety, we do not believe that it is necessary or appropriate to identify a prescriptive list of factors for delineating a reporting threshold. Nonetheless, based on our experience, the following considerations, among other things, have been identified as relevant to evaluating whether EWR information assists or would assist in the identification of safety-related defects:

- The number of manufacturers in a particular class of vehicles or equipment.
- The proportion of manufacturers reporting in a particular class of vehicles or equipment.
- The number of vehicles or items of equipment at issue.
- Whether the vehicles carry large numbers of people.
- The safety risks attendant to a particular class of motor vehicles.
- The nature/amount of EWR data that the manufacturers have reported or would report.
- Whether the EWR data have been useful or may be useful in opening investigations into potential safety related defects and whether those investigations have resulted or may result in recalls.
- The effect that the reduction and or addition of EWR data would have on the quantity and quality of the data and ODI's ability to open investigations and identify possible safety-related defects.
- ODI's ability to monitor a group of vehicles and identify possible defects without EWR data.
- The burden on manufacturers.
- The burden on NHTSA.

We emphasize that the general approach of the EWR program is to collect very large amounts of data on numerous systems and components in a very wide range and volume of vehicles and, to a lesser degree, equipment, and for the agency to then systematically review information, with the end result being the identification of a relatively small number of potential safety problems, compared to the amount of data collected and reviewed. These data are considered along with other information collected by and available to the agency in deciding whether to open investigations.

After extensive review of the EWR data currently collected, today's proposal would reduce overall the number of manufacturers that must provide comprehensive EWR submissions. The amount and usefulness of data that would no longer be required to be submitted would not be significant to NHTSA in assisting in the identification of safety related defects. Our proposal follows.

C. Light Vehicles

The EWR regulation requires light vehicle manufacturers that produce 500 or more vehicles per year to provide quarterly EWR reports to NHTSA. 49 CFR 579.21. Light vehicle manufacturers that produce fewer than 500 vehicles are not required to provide quarterly reports to NHTSA, but must provide information related to a claim or notice alleging a death received by the manufacturer. 49 CFR 579.27.

The light vehicle EWR reporting sector includes about 60 manufacturers. These companies submit an immense amount of EWR data to NHTSA every quarter. For instance, in the third quarter of 2007, they submitted EWR data reflecting approximately 2,300 property damage claims, 11.7 million warranty claims, 600,000 consumer complaints and 395,000 field reports [2] on 169 million light vehicles. In general, these data consist of numerical tallies (aggregate data) for specified components and systems on light vehicles. In light of the large number of distinct models (products) and the number of reporting subcategories (*see* 49 CFR 579.21(b)(2), (c)),[3] the light vehicle data consist of over 200,000 potential product-components (the number of distinct models reported by light vehicle manufacturers multiplied by the number of components for which reporting is required in the EWR light vehicle category). In addition to the large amount of aggregate data, light vehicle manufacturers submitted approximately 20,000 copies of field reports in the third quarter of 2007. Also in the third quarter of 2007, the agency received information on approximately 1,100 death and injury incidents, which consist of specific information for each incident, including the number of deaths and/or injuries, the state or foreign country where the incident occurred and the specified components, if any.

NHTSA employs several methods to identify potential concerns in the data. For example, for the aggregate information, ODI undertakes data mining and trend analysis to search for outliers and trends in the data. Outliers usually relate to specific product-components for which there may be a spike in the EWR data within a particular model and quarter. Trend analysis looks at the EWR data over time, such as the historical frequency, the amount of variation in data, current trend and anticipated future values. For the death and injury information, ODI compares the current quarter data to previous quarters of data on incidents involving a death or injury. For the copies of field reports, ODI manually reviews the field reports to identify those related to potential safety concerns. If any of the EWR data raise a potential concern, ODI then reviews other information sources such as other EWR data, recalls, complaints/Vehicle Owner Questionnaires (VOQs), technical service bulletins, Web-based technical sources, and other information sources that may be available. ODI may also send an information request to a manufacturer for additional information related to the manufacturer's EWR data. Based on the agency's assessment of the potential presence of a safety-related defect, ODI may then open an investigation.

Since the first quarter of EWR reporting, EWR light vehicle data has assisted or prompted 48 ODI investigations into potential safety defects in light vehicles, with the aggregate data or field reports (non-dealer) data sets most often providing the more useful information. Overall, these investigations resulted in 30 recalls involving more than 15 million units. A few of the investigations resulted in more than one recall. Many investigations ODI initiated in 2007 and 2008 are ongoing so there is a potential for the number of recalls based on investigations prompted or assisted by EWR data to increase.

[2] A field report is defined as a communication in writing, including communications in electronic form, from an employee or representative of a manufacturer of motor vehicles or motor vehicle equipment, a dealer or authorized service facility of such manufacturer, or an entity known to the manufacturer as owning or operating a fleet, to the manufacturer regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by that manufacturer and transported beyond the direct control of the manufacturer, regardless of whether verified or assessed to be lacking in merit, but does not include any document covered by the attorney-client privilege or the work product exclusion. *See* 49 CFR 579.4.

[3] See footnote 1 for a list of vehicle components or systems that light vehicle manufacturers must report on.

In general, light vehicle manufacturers that produce a significant volume of vehicles submit substantial amounts of EWR data. On the other hand, light vehicle manufacturers that produce relatively small numbers of vehicles, albeit at or above the 500 or more vehicles annually, generally do not submit much EWR information per quarter. This appears to be related to their relatively low production volumes. These relatively low-volume light vehicle manufacturers' EWR reports on various components or systems not uncommonly amount to zero (0) or one (1) complaint, claim or field report for a particular model. In contrast, larger light vehicle manufacturers provide reports with far more and larger numbers.

As NHTSA has observed in the past, the more robust the EWR data base, the better NHTSA is able to identify changes in trends or otherwise identify potential hazards. In contrast, the limited amount of EWR data from the relatively small light vehicle manufacturers is of little, if any, assistance to ODI in detecting potential safety-related defects. For example, a small light vehicle manufacturer contains zero (0) property damage claims for a particular product-component in a reporting quarter, then one (1) property damage claim the next quarter, followed by several quarters of zero (0) property damage claims. Using available methodologies, ODI cannot decipher possible trends that may be indicative of defects. ODI's reviews of the EWR submissions from the smaller-volume light vehicle manufacturers have not been productive in assisting it in identifying possible safety-related defects in light vehicles.

NHTSA considered a reporting threshold level higher than 500 or more vehicles annually when the EWR rule was adopted. In the July 2002 rule, we considered and rejected comments from industry that NHTSA set the threshold for triggering quarterly EWR reporting at 2,500 or 10,000 vehicles annually. 67 FR 45832. At that time, the agency stated that ''if experience shows that we do not get valuable information from relatively small vehicle manufacturers, we can and will adjust the threshold in the future.'' *Id.*

A year and one-half later, the agency again addressed the threshold level for EWR reporting. On January 23, 2004, NHTSA published a **Federal Register** notice denying petitions for reconsideration from the following industry associations: The National Association of Trailer Manufacturers (NATM), the National Truck Equipment Association (NTEA) and the Recreational Vehicle Industry Association (RVIA). 69 FR 3292. These industry associations petitioned the agency to raise the 500 annual vehicle production threshold for comprehensive EWR reporting, with NTEA and RVIA recommending 5,000 vehicles per year as the appropriate threshold. While we rejected raising the threshold at that time, we stated that ''if we find that the information submitted by relatively small vehicle manufacturers does not help in the prompt identification of safety defects, we will commence a rulemaking proceeding to adjust the reporting requirements appropriately.'' [4] 69 FR 3297.

We tentatively believe that NHTSA's experience in reviewing 4 years of EWR reports provides a sufficient basis for adjustment of certain EWR reporting thresholds. Nonetheless, we are proceeding with some caution, as the agency should not act in a way that would meaningfully limit the agency's capabilities.

We are proposing to raise the reporting threshold for light vehicle manufacturers in 49 CFR 579.21 to 5,000 vehicles per year from 500 vehicles per year. This would reduce the number of reporting manufacturers from 60 to 30.

Only three-tenths of one percent (0.3%) of all light vehicles are produced by manufacturers that make fewer than 5,000 vehicles annually. Almost all of the light vehicle EWR data is submitted by manufacturers producing 5,000 or more vehicles annually. In the third quarter of 2007, manufacturers producing fewer than 5,000 vehicles annually reported only 0.2% (19,224 data points) of the total aggregate data in the third quarter of 2007.

Furthermore, manufacturers that produce fewer than 5,000 light vehicles annually do not submit large numbers of copies of non-dealer field reports.[5] Only two small volume light vehicle manufacturers have submitted copies of field reports. In 15 quarters of EWR reporting, these two manufacturers submitted a total of 61 copies of field reports. The information in these reports has not been used to identify a safety-related concern. In contrast, larger-volume light vehicle manufacturers submit hundreds or thousands of copies of field reports per quarter.

Over the past five (5) years, the vast majority of all safety-related light vehicle recalls have been conducted by manufacturers producing 5,000 or more vehicles annually. Between January 2003 and January 2008, there were a total of 646 light vehicle recalls. Of these recalls, 93 percent involved manufacturers producing 5,000 or more vehicles annually. More significantly, none of the EWR data submitted by light vehicle manufacturers that produce fewer than 5,000 vehicles annually prompted an investigation leading to one of these recalls. In fact, all of the ODI light vehicle investigations that were influenced by EWR data involved vehicles from manufacturers that produced 5,000 or more light vehicles annually. In the past five years, only two recalls pertaining to manufacturers that produce fewer than 5,000 light vehicles annually were influenced by ODI. These two recalls involved vehicles where ODI had information other than EWR data to prompt its investigations. One such recall involved handicap accessible vans in which the wheelchair securement retractor assemblies can fail resulting in the securement system not supporting the wheelchair in a crash (NHTSA Recall No. 04V–589). The other recall involved vans with Sure-lok wheelchair securement systems that can fail resulting in injuries to the wheelchair occupant because the wheelchair may not be adequately secured in a crash (NHTSA Recall No. 06V075).

If the proposed production reporting threshold of 5,000 or more vehicles is adopted, approximately 30 light vehicle manufacturers would no longer have to submit quarterly EWR reports. As noted above, the EWR data submitted by the relatively small volume light vehicle manufacturers is limited and has not yielded any assistance in the prompt identification of potential safety defects. Thus, ODI would lose very little data that would appear to be helpful to the program.

Even though 30 light vehicle manufacturers will no longer report EWR data quarterly, NHTSA will still have an ability to monitor the vehicles made by these relatively small volume manufacturers for potential safety concerns. Those manufacturers under the proposed threshold will still be required to report information related to a death in a claim or a notice received by the manufacturer. NHTSA will also continue to receive the traditional screening information on these vehicles, such as VOQs. In the light vehicle category, NHTSA receives substantially

[4] In late 2005 and early 2006, the Alliance of Automobile Manufacturers, National Truck Equipment Association and Truck Manufacturers Association all requested to have the vehicle reporting threshold raised to 5,000 units annually.

[5] Manufacturers are required to submit the number of product evaluation reports in their quarterly EWR reports, but are no longer required to submit hard copies of them to NHTSA. 72 FR 29435, 29437.

more VOQs from owners of light vehicles than any other industry sector in EWR.

Raising the reporting threshold would also have the effect of reducing the EWR reporting burden on light vehicle manufacturers that currently produce 500 or more vehicles, but fewer than 5,000 vehicles annually. These manufacturers would no longer incur the costs associated with collecting and reporting comprehensive quarterly reports to NHTSA.

Based upon the foregoing, we propose to amend 49 CFR 579.21 to raise the reporting threshold for light vehicle manufacturers from its current level of 500 or more vehicles produced annually to 5,000 or more vehicles produced annually. We seek comment on this proposed revised reporting threshold.

D. Trailers

The EWR regulation requires trailer manufacturers that produce 500 or more trailers annually to submit quarterly EWR reports to NHTSA. 49 CFR 579.24. Trailer manufacturers that produce fewer than 500 vehicles are not required to provide quarterly reports to NHTSA, but must provide information related to a claim or notice alleging a death received by the manufacturer. 49 CFR 579.27.

Under the EWR rule, the agency receives a large amount of data related to trailers every quarter. Approximately 250 trailer manufacturers submit quarterly EWR reports to NHTSA. For the third quarter of 2007, trailer manufacturers submitted approximately 180 property damage claims, 51,000 warranty claims, 5,000 consumer complaints and 1,000 field reports on 14 million trailers. With a large number of distinct models, the trailer category consists of over 1,800,000 potential product-components (the number of distinct models reported by trailer manufacturers multiplied by the number of components in EWR). In contrast to the large amount of electronic data submitted, trailer manufacturers provide limited data on deaths and injuries and copies of non-dealer field reports. The agency received approximately six (6) death and injury incidents and twenty (20) copies of non-dealer field reports for the third quarter of 2007.

In order to review and analyze the EWR trailer data, ODI employs the same methods used to identify potential concerns in the light vehicle data. Like the EWR light vehicle data, the EWR trailer data is limited to the information in the possession of the manufacturer, which is then submitted to NHTSA. Smaller volume trailer manufacturers submit less data than the larger volume trailer manufacturers. Manufacturers that produce lower volumes of trailers generally do not collect much reportable EWR information per quarter. As a result of the limited amount of data they receive, the smaller manufacturers' EWR reports are mostly devoid of EWR data.

The lack of data presents several challenges to ODI. Without the ability to statistically analyze such meager data in a meaningful way, the EWR data from the smaller trailer manufacturers must be reviewed manually. These reviews have not produced much in the way of assistance in the identification of any safety concerns with these smaller trailer manufacturers. Based upon the foregoing, we are proposing to raise the reporting threshold for the trailer category to 5,000 or more vehicles produced annually to ensure that our resources are used efficiently.

As we discussed III.C above, a threshold level higher than 500 or more vehicles annually has been considered before by NHTSA. The January 2004 rulemaking considered raising the trailer category reporting threshold to 5,000 or more trailers annually. In late 2006, NATM requested that the trailer category reporting threshold be raised to 5,000 or more trailers produced annually. With trailers, our experience with four (4) full years of EWR reporting has shown that the EWR data provided by the relatively small volume trailer manufacturers has not yielded any assistance in the prompt identification of safety defects. Based upon this, we are proposing to raise the reporting threshold for the trailer category to the requested 5,000 or more trailers produced annually.

While we propose to raise the threshold for the trailer category to 5,000 or more trailers annually, we do not believe this elevated threshold will result in a meaningful reduction of EWR trailer data. Although raising the threshold for the trailer category to 5,000 eliminates 190 trailer manufacturers from quarterly EWR reporting, our analysis indicates that the majority of the EWR trailer data that can be consistently analyzed is data submitted by trailer manufacturers producing 5,000 or more trailers. Trailer manufacturers producing 5,000 or more trailers account for nearly 80% of all trailer production volume. The majority of the aggregate trailer EWR data is also submitted by large volume trailer manufacturers. Trailer manufacturers producing 5,000 or more trailers annually submit 70% of the aggregate trailer data. Additionally, compared to the other vehicles types, trailers manufacturers submit very few copies of non-dealer field reports. In total, trailer manufacturers have submitted 549 non-dealer field reports in fifteen (15) EWR quarters. Only 30% of non-dealer field reports have been submitted by manufacturers that produce fewer than 5,000 trailers a year. The majority of these field reports deal with non-safety issues such as: Paint issues, rusty rivets, and non-structural sheet-metal cracks.

While the potential reduction in EWR trailer production and aggregate data appear to be greater when compared to the light vehicle category, we do not believe that raising the trailer category reporting threshold will reduce our ability to identify safety related concerns with the EWR trailer data. This is based upon the type of EWR submissions that will be eliminated from EWR reporting by raising the threshold. While trailer manufacturers that produce fewer than 5,000 trailers annually submit 30% of the aggregate data, our analysis of these data indicates that the aggregate data are sparsely populated and lack consistency. With trailer manufacturers, this is due in large part to the way the smaller trailer manufacturers operate their businesses. Smaller volume manufacturers often produce numerous trailer models with small production runs. As a result, the aggregate data submitted for these models have many product-component fields with zeros (0) or ones (1) (in other words there are zero or very few claims of any kind related to these particular trailers). This limited amount of product-component information is insufficient to establish a trend that would provide an early warning of a potential safety concern. As a result, these EWR data are of limited use to ODI as part of its efforts to analyze the EWR data for potential safety issues with smaller trailer manufacturers.

Our analysis of EWR trailer data indicates that when ODI did identify a potential safety concern, with one exception, it always concerned a trailer manufacturer with annual production of 5,000 or more trailers. Our analysis found that 80% of potential safety concerns were contained within the EWR data supplied by those manufacturers that produce 5,000 or more trailers annually. For example, in the third quarter of 2006, there were five (5) potential safety concerns identified by ODI, with four (4) associated with manufacturers with an annual production level 5,000 or more. We identified one potential safety concern within the EWR data provided by trailer manufacturers producing between 2,500 and 4,999 trailers. We did not identify any concerns in the EWR data submitted by manufacturers producing fewer than

2,500 trailers. Ultimately, the concerns identified did not result in ODI opening a defects investigation.

Our analysis of EWR trailer data for the last five (5) years of reporting indicates, on the one hand, that the EWR data for trailer manufacturers producing fewer than 5,000 trailers are insufficient to yield data that are likely to lead to ODI opening a defects investigation. On the other hand, it appears that ODI's traditional screening tools have proven effective at identifying safety concerns in the smaller volume trailer category and leading to a defects investigation. Over the past five (5) years, EWR data submitted by trailer manufacturers producing fewer than 5,000 trailers annually have not influenced any ODI investigations. From January 2003 through January 2008, there were 421 trailer recalls. Almost 40 percent (160) of those recalls were conducted by trailer manufacturers that produce more than 5,000 trailers per year. There were 121 trailer recalls conducted by trailer manufacturers that produce fewer than 5,000 trailers per year. Of the 121 trailer recalls conducted by trailer manufacturers producing fewer than 5,000 trailers, 43 of those recalls were influenced by ODI.

If the proposed reporting threshold were adopted, approximately 190 trailer manufacturers (72% of trailer manufacturers) would no longer have to submit quarterly EWR reports. As noted above, ODI would lose some EWR data, but the EWR trailer data that provide detailed, usable information on safety concerns will continue to be submitted by manufacturers that produce 5,000 or more trailers annually. Even though some trailer manufacturers would no longer submit quarterly reports, ODI will still have the ability to monitor trailers manufactured by small volume manufacturers for potential safety concerns. Those manufacturers who produce fewer than 5,000 trailers per year will be required to continue to report information related to a death and any associated injuries. ODI will also continue to receive the traditional investigative screening information on these trailers, such as technical service bulletins.

Raising the reporting threshold would also have the effect of reducing the EWR reporting burden on scores of trailer manufacturers that currently produce 500 or more vehicles, but fewer than 5,000 vehicles. These manufacturers will no longer have the costs associated with collecting and reporting comprehensive quarterly reports to NHTSA, without compromising NHTSA's ability to detect potential safety concerns.

Based upon the foregoing, we propose to amend 49 CFR 579.24 to raise the reporting threshold for trailer manufacturers from its current level of 500 or more trailers annually to 5,000 or more trailers annually. We seek comment on our proposal to raise the reporting threshold for trailer manufacturers.

E. Buses

The EWR regulation requires medium-heavy vehicle and bus manufacturers that produce 500 or more units annually to submit quarterly EWR reports to NHTSA. 49 CFR 579.22. Currently, there are approximately 25 bus manufacturers submitting quarterly EWR reports to NHTSA. For the third quarter of 2007, bus manufacturers submitted, for the aggregate data, approximately 25 property damage claims, 290,000 warranty claims, 3,000 consumer complaints and 10,400 field reports on 800,000 buses. They also submitted 645 copies of field reports.

In our view, there is a significant need to amend the threshold level of reporting for manufacturers of buses. Buses—whether school buses, transit buses, or motorcoaches—have a unique character compared to other vehicles. These vehicles carry more occupants than other vehicle types, which means that safety risks on a per-vehicle basis are potentially greater with regard to buses. One crash involving a bus may result in multiple fatalities and injuries. Because of the potential for increased fatalities and injuries from bus crashes, NHTSA has reconsidered how it views buses within the EWR framework.

Today, we propose to eliminate the reporting threshold for buses because of the potential for multiple fatalities and injuries from a single crash. In our view, the safety consequences surrounding a single bus crash increase the urgency of identifying safety concerns at the earliest time possible. We believe that in the case of buses it is paramount to ensure that any potential safety issue relating to these vehicles is detected at an early stage. Several bus crashes over the last few years have led us to reconsider the importance of creating a special status for bus manufacturers in EWR, much like we treat manufacturers of child restraints (all manufacturers of child restraints must submit quarterly EWR reports to NHTSA, regardless of annual production). Some of the recent bus crashes that have caused us to rethink the status of bus manufacturers for the purposes of EWR reporting are:

- On April 18, 2005, a school bus crash in Arlington, Virginia resulted in one (1) fatality and fourteen (14) injuries.
- On September 23, 2005, a motor coach bus carrying nursing home residents fleeing from Hurricane Rita caught fire outside Dallas, Texas resulting in twenty-three (23) fatalities.
- On November 20, 2006, a school bus crash in Huntsville, Alabama resulted in four (4) fatalities and 34 injuries.
- On March 2, 2007, a charter bus plunged from an overpass in Atlanta, Georgia resulting in seven (7) fatalities and twenty-eight (28) injuries.
- On February 19, 2008, four (4) students were killed and fourteen (14) injured in a school bus crash in Minnesota.
- On February 24, 2008, a motor coach traveling north of Scranton, Pennsylvania crashed and flipped over injuring 40 people.

While we do not assert or even imply that bus manufacturers were responsible for any of these crashes or that manufacturing or design defects played a causal role, we do believe that they demonstrate the scale of the consequences that could occur should a defect cause a crash. As a result, we believe that universal reporting by bus manufacturers will provide the agency with information that may identify safety concerns at an early stage to prevent future crashes.

We believe that the potential scale of the per-vehicle risk outweighs the potential for limited EWR data from the smaller bus manufacturers. As we have done in evaluating the thresholds for all vehicle categories, we carefully considered factors such as the likelihood of capturing data that will be useful in opening investigations in to safety defects and the safety risks associated with buses, balanced against the industry's burden of submitting the data and the agency's burden of reviewing the data. The risk to motor vehicle safety presented by just one bus crash warrants the collection and analysis of comprehensive EWR data from all bus manufacturers.

The need to eliminate the threshold for buses is illustrated by the number of recalls conducted in the last (5) years by bus manufacturers that produce fewer than 500 buses annually. Since 2003, there have been a total of 352 recalls totaling nearly one (1) million buses, regardless of production by the manufacturer. Bus manufacturers that produce fewer than 500 buses annually conducted 39 recalls in the same period for a total of nearly 8,000 buses. On average, 1,600 buses are recalled annually by manufacturers that produce fewer than 500 buses annually. Because

each bus transports a sizeable number of passengers, the impact of 1,600 buses could potentially affect ten of thousands of passengers per year. Without comprehensive early warning reports from bus manufacturers that produce fewer than 500 buses annually, ODI does not have data to promptly identify possible safety defects in buses produced by these low production bus manufacturers even though those vehicles transport large numbers of passengers annually. Some of the ODI's traditional sources of information are lacking in the area of buses. For example, vehicle owner complaints, which are a vital source of information on light vehicles, are a rarity in the bus area. Given the magnitude of the potential harm that could result in just one bus crash, we believe eliminating the threshold for buses would allow ODI to identify potential problems that may have escaped its consideration since the inception of EWR reporting.

We estimate that there are seventeen (17) additional bus manufacturers that would be required to report comprehensive EWR data to NHTSA under this proposal. We estimate that the costs for each additional bus manufacturer would include a one-time start-up cost of approximately $3,500 and an annual reporting cost of approximately $13,000. Considering the safety consequences associated with a crash involving a vehicle transporting large numbers of individuals and the likelihood that NHTSA may receive early warning information even from these small manufacturers that may help prevent such crashes, this burden on bus manufacturers does not appear to be unduly burdensome. As discussed further in section VII.B, below, eleven (11) of these bus manufacturers are considered small businesses according to criteria used for analysis under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.* For the reasons explained in that section, we do not believe that this burden will be a significant economic impact on these bus manufacturers.

Based upon the foregoing, we propose to amend 49 CFR 579.22 to eliminate the current reporting threshold for bus manufacturers that produce 500 or more buses annually. We are also proposing that for those manufacturers that produce both buses and medium-heavy vehicles, the reporting threshold will be separate. Thus, a manufacturer who produces both buses and medium heavy vehicles does not have to also submit quarterly EWR reports for its medium-heavy vehicles until it produces 500 or more medium-heavy vehicles annually.

We seek comment on our proposal to require universal reporting by bus manufacturers.

F. Medium-Heavy Vehicles and Motorcycles

The EWR regulation requires medium-heavy vehicle manufactures and motorcycle manufacturers that produce 500 or more units annually to submit quarterly EWR reports to NHTSA. 49 CFR 579.22, 23. For these medium-heavy vehicles (other than buses) and motorcycle manufacturers, we have decided to keep threshold level for reporting at 500 or more units annually. We discuss our reasons for leaving the threshold level for reporting unchanged below.

1. Medium-Heavy Vehicles

The EWR regulation requires medium-heavy vehicle and bus manufacturers that produce 500 or more units annually to submit quarterly EWR reports to NHTSA. 49 CFR 579.22. The types of vehicles that report under this category include emergency vehicles, recreational vehicles, trucks and tractors.[6] In a January 2006 letter, the Truck Manufacturers Association (TMA) requested that the agency raise the EWR reporting threshold for medium-heavy vehicles from 500 or more to 5,000 or more vehicles annually. In response to TMA's request, we considered raising the threshold for medium-heavy vehicle manufacturers from 500 or more units annually to various annual production levels, such as 1,000, 2,500, and 5,000 units annually. However, we have decided to leave the current threshold for these manufacturers unchanged based upon a combination of factors, such as, the proportion of manufacturers that would no longer have to report, the proportion of vehicles that would no longer be subject to reporting and the effect that the reduction of EWR data would have on ODI's ability to determine whether to open investigations and identify possible safety-related defects. We discuss these reasons below.

Approximately 65 emergency vehicle, recreational vehicle, truck, and tractor manufacturers now submit quarterly EWR reports to NHTSA. For the third quarter of 2007, these manufacturers submitted approximately 95 property damage claims, 395,000 warranty claims, 16,000 consumer complaints and 19,000 field reports on 6 million vehicles. These vehicle manufacturers report data on approximately 400,000 potential products-components (the number of distinct models reported by these manufacturers multiplied by the number of components in EWR). In addition to the large amount of aggregate data submitted for the third quarter of 2007, these manufacturers reported approximately 40 death and injury incidents and provided two thousand (2,000) copies of non-dealer field reports.

If we were to raise the threshold for reporting quarterly reports from 500 or more to 1,000, 2,500, 5,000 or more medium-heavy vehicles annually, a significant number of medium-heavy vehicle manufacturers would no longer be required to provide quarterly early warning reports. At a threshold level of 1,000 or more vehicles annually, 50 percent of emergency vehicle, 26 percent of recreational vehicle, and 34 percent of truck manufacturers would not be required to submit comprehensive quarterly EWR reports. At a threshold level of 2,500, 63 percent of emergency vehicle, 47 percent of recreational vehicle, and 57 percent of truck manufacturers would not be required to submit comprehensive quarterly EWR reports. At a threshold level of 5,000 or more vehicles annually, 75 percent of emergency vehicle, 58 percent of recreational vehicle, 74 percent of truck, and seventeen (17) percent of tractor manufacturers would not be required to submit comprehensive quarterly EWR reports.

If we were to raise the reporting threshold for reporting quarterly reports from 500 or more to 1,000, 2,500, 5,000 or more medium-heavy vehicles annually, ODI would not receive quarterly EWR data on a significant amount of medium-heavy vehicle production. At a threshold level of 1,000 or more vehicles annually, 55 percent of all emergency vehicles produced, four (4) percent of all recreational vehicles produced and four (4) percent of all trucks produced would be eliminated from the requirement of comprehensive quarterly EWR reporting. At a threshold level of 2,500 or more vehicles annually, 84 percent of all emergency vehicles produced, sixteen (16) percent of recreational vehicles produced and nine (9) percent of all trucks produced would be eliminated from the requirements of comprehensive quarterly EWR reporting. At a threshold level of 5,000 or more vehicles annually, 84 percent of all emergency vehicles produced, 28 percent of recreational vehicles produced and twenty-three (23) percent of all trucks produced would be

[6] For medium-heavy vehicle and bus category, vehicle type means: Truck, tractor, transit bus, school bus, coach, recreational vehicle, emergency vehicle or other. While buses are included within this category, they have been addressed previously in section E of this notice and are not included in the following discussion. 49 CFR 579.4.

eliminated from the requirements of quarterly EWR reporting.

The elimination of manufacturers and vehicles from the medium-heavy reporting category would severely impact the quantity of EWR data that ODI receives and utilizes in identifying potential safety-related defects. The reduction of data is most severe in the aggregate data for the medium-heavy category. If we were to raise the threshold to 1,000 or more medium-heavy vehicles annually, there would be a reduction in the aggregate data of 33 percent for emergency vehicles, five (5) percent for recreational vehicles and four (4) percent for trucks. If we were to raise the threshold to 2,500 or more medium-heavy vehicles annually, there would be a reduction in the aggregate data of 54 percent for emergency vehicles, twenty-three (23) percent for recreational vehicles and seven (7) percent for trucks. If we were to raise the threshold to 5,000 or more medium-heavy vehicles annually, there would be a reduction in the aggregate data of 54 percent for emergency vehicles, 30 percent for recreational vehicles and thirteen (13) percent for trucks.

The recent recall history of medium-heavy vehicles details the detrimental impact the reduction of EWR data would have on ODI's ability to identify potential safety recalls. For the time period of January 2003 through July 2007, there were 656 medium and heavy vehicle safety recalls (applicable to codes for recreational vehicles (RV), emergency vehicles (EV), trucks (TK) tractors (TT) and ''other'' (OT)). Slightly more than half (330) of those recalls were conducted by manufacturers producing 5,000 or more vehicles annually. The remaining 326 recalls were conducted by manufacturers producing fewer than 5,000 vehicles annually. ODI influenced 82 of the 656 recalls. Of the recalls influenced by ODI, more then half (50) involved manufacturers producing fewer than 5,000 vehicles annually. Many of the recalls conducted by medium-heavy vehicle manufacturers that produce fewer than 5,000 vehicles annually involved serious safety issues. The following are illustrative of recalls conducted by medium-heavy vehicle manufacturers during the past several years:

- Recall No. 03V–035, in which a 250 amp ground fuse became overloaded and was replaced with a 350 amp fuse.
- Recall No. 03V–224, in which an incorrect seat belt anchor was replaced.
- Recall No. 03V–465, in which a defective microwave oven could automatically activate and result in a fire.
- Recall No. 04V–491, in which a diode in the ABS module may experience a short resulting in a fire.
- Recall No. 05V–262, in which a positive battery cable shorts on the frame resulting in a fire.
- Recall No. 05V–334, in which non-conforming castings in the suspension may have fractured and failed under normal operating loads that could result in pieces of the casting becoming projectiles and the suspension's transverse beam dropping down low enough to contact the road surface, causing sparks that could potentially ignite a fire.
- Recall No. 06V–107, in which equipment compartment doors become stuck on emergency vehicle preventing access to equipment during an emergency.
- Recall No. 06V–157, in which an auto belt tensioner fails resulting in a stalled vehicle.

If we were to raise the threshold for medium-heavy vehicle manufacturers to 5,000 or more vehicles annually, we would not receive timely early warning information about these types of safety problems on a significant number of vehicles.

The importance of the receipt of quarterly EWR data from medium-heavy vehicle manufacturers is underscored when compared to the limited data that ODI has historically received from other sources in connection with medium-heavy vehicles. For example, for light vehicles, the agency relies upon, among other things, owner complaints to identify a problem that may be safety related. Over the last five years, ODI has received, on average, 40,000 owner complaints annually from all sources on all types of motor vehicles. Of these, an extremely low number relate to medium-heavy vehicles. For the period from December 1, 2007 through May 18, 2008, ODI received only 237 complaints related to medium-heavy vehicles. Broken down by vehicle type, those complaints are 173 (73%) recreational vehicles, 43 (18%) trucks, and twenty-one (21) (9%) tractors. ODI's lack of data can hamper its ability to identify defects in a timely manner in this population of vehicles. Because field information is difficult to obtain, the EWR data has become an increasing resource for screening for safety-related defect trends and supplements the meager complaint data. Thus, in our view, any reduction in medium-heavy vehicle EWR data would be a severe detriment to ODI's mission to identify safety-related defects.

Based upon the foregoing, we have decided to keep the reporting threshold for the medium-heavy category at 500 or more vehicles annually. If we were to raise the threshold to a level greater than 5,000 or more vehicles annually, significant reductions in the proportion of manufacturers reporting and vehicles subject to reporting would occur, resulting in a significant loss of EWR data. This reduction is further compounded by the limited data related to medium-heavy vehicles that ODI receives from other sources. We believe this loss of data would detrimentally impact ODI's ability to identify safety-related defects. Accordingly, we have decided not to raise the threshold for the medium-heavy vehicle category.

2. Motorcycles

The EWR regulation requires motorcycle manufacturers that produce 500 or more units annually to submit quarterly EWR reports to NHTSA. 49 CFR 579.23. We considered raising the threshold for motorcycle manufacturers from 500 to 5,000 units annually. However, we have decided to leave the current threshold for motorcycle manufacturers unchanged based upon a combination of factors, such as, the proportion of manufacturers that would no longer have to report, the proportion of motorcycles that would no longer be subject to reporting, the effect that the reduction of EWR data would have on ODI's ability to determine when to open investigations and identify possible safety-related defects, and the safety risks attendant to motorcycles. We discuss these reasons below.

If we were to raise the threshold for reporting quarterly reports from 500 or more to 5,000 or more motorcycles annually, the agency would lose nearly 40 percent of motorcycle manufacturers currently providing quarterly EWR reports. Currently, twenty-one (21) motorcycle manufacturers provide comprehensive quarterly reports to NHTSA pursuant to section 579.23. Raising the threshold to 5,000 or more motorcycles would eliminate eight (8) motorcycle manufacturers from the requirement to submit quarterly reports. If those eight (8) manufacturers did not submit quarterly reports, the agency would not receive quarterly EWR data on approximately 15,000 motorcycles per year.[7] In our view, combined with the safety risks attendant to motorcycles, as discussed below, the loss of data on thousands of motorcycles would have a detrimental effect on ODI's ability to determine when to open

[7] The eight (8) manufacturers would still be required to submit information on incidents involving a death pursuant to 49 CFR 579.27.

investigations and identify possible safety-related defects.

The recent recall history of manufacturers producing fewer than 5,000 motorcycles annually offers some insight into the potential detrimental effect that raising the threshold would have on ODI's ability to identify safety concerns. Since 2002, manufacturers that produce fewer than 5,000 motorcycles annually have conducted a total of twenty-two (22) recalls, or nearly ten (10) percent of all motorcycle recalls in that time period, with a combined population of 60,000 motorcycles. Many of these recalls involved serious safety issues. The following are illustrative of recalls by these motorcycle manufacturers during the past several years:

- Recall No. 04V–523, in which there was an unintended kick stand deployment from a broken return spring mount.
- Recall No. 05V–199, in which a rear suspension failure occurred due to a broken shock absorber mount.
- Recall No. 07V–460, in which fuel leaks lead to fire incidents.
- Recall No. 07V–580, in which a rear fender detachment resulted from broken hardware.
- Recall No. 03V–521, in which a brake caliper failure resulted in wheel lock.
- Recall No. 06V–090, in which a wheel spoke failure lead to rapid loss of tire inflation.
- Recall No. 07V–450, involved engine stalling.

If we were to raise the threshold for motorcycle manufacturers to 5,000 or more motorcycles annually, we would not receive timely early warning information about these types of safety problems on a significant number of motorcycles.

Any reduction of the EWR data regarding motorcycles and potential diminution of ODI's ability to identify potential safety problems is particularly troubling when considering the increase in motorcycle ownership and use in the last decade. Between 1996 and 2006, the number of registered motorcycles nationwide increased from 3.87 million to 6.68 million and the vehicle miles traveled increased from 9.92 million miles to 12.4 million. *See* 2006 Motorcycle Traffic Safety Facts, March, 2008.[8] This growth in motorcycle use in the past several years has coincided with a dramatic increase in motorcycle fatalities and injuries. In 1996, there were 2,161 fatalities and 55,000 injuries to motorcyclists. *Id*. In 2006, there were 4,810 fatalities and 88,000 injuries of motorcyclists. *Id*. Between 1996 and 2006, the number of motorcycle fatalities grew from a rate of 55.82 per 100,000 riders to 71.94 per 100,000 riders. *Id*. Based upon per vehicle mile traveled in 2006, motorcyclists were about 35 times more likely than passenger car occupants to die in a motor vehicle traffic crash and eight (8) times more likely to be injured. *Id*. The increases in miles driven by motorcyclists and fatalities and injuries to motorcyclists do not appear to be slowing. *Id*.

With the sharp increase in motorcycle use and the increase in fatalities and injuries as a result, we are reluctant to eliminate quarterly reporting from 40 percent of motorcycle manufacturers and on thousands of motorcycles. These manufacturers recall and remedy thousands of motorcycles per year with serious safety defects. Accordingly, we have decided to keep the threshold for EWR quarterly reporting by motorcycle manufacturers at 500 or more units annually.

G. Response to the National Truck Equipment Association Petition for Rulemaking

In April 2006, the National Truck Equipment Association (NTEA) petitioned the agency for a rulemaking to amend the EWR rule to raise the EWR reporting threshold for vehicle manufacturers from 500 to 5,000 vehicles annually, which would include final-stage manufacturers of multi-stage manufactured vehicles, include multi-stage manufacturers in the low volume category, formalize incomplete vehicle reporting to be consistent with NTEA's proposal, and require the incomplete vehicle manufacturer to provide comprehensive EWR reports. Essentially, NTEA petitions the agency to amend the EWR rule to raise the reporting threshold for final-stage manufacturers from 500 to 5,000 vehicles annually, or alternatively, to permit these manufacturers, regardless of their production, to report on the limited basis required of manufacturers whose production is fewer than 500 vehicles. NTEA states that it currently has over 1,600 member companies and they estimate that as many as 300 may be final-stage manufacturers producing a total of 500 or more trucks per year.

NTEA asserts that final-stage manufacturers do not receive the bulk of EWR data from the end user. According to NTEA, the primary reason for the limited amount of EWR information is because most final-stage vehicles are often custom or semi-custom work trucks. It states that a typical work truck is purchased at the dealer of the chassis or incomplete vehicle manufacturer. The dealer works with the customer to detail the type of truck, truck body and equipment the customer will need. Once the truck requirements are specified, the dealer contacts a final-stage manufacturer, which will install the body and required equipment to meet the order. The final-stage manufacturer certifies that the completed vehicle meets all applicable federal motor vehicle safety standards and the vehicle is returned to the dealer. The dealer will then deliver the truck to the customer. Accordingly, the final-stage manufacturer has limited contact with the customer. If there are any concerns or complaints, in general, the customer contacts the dealer. In the vast majority of cases, the complaint is chassis related and handled at the dealership. NTEA asserts that the final-stage manufacturer has limited, if any, contact with the end user of the work truck, and as a result, the final-stage manufacturer will file the required reports with nothing to report.

NTEA further claims the costs for complying with EWR are disproportionate to the reporting obligations of final-stage manufacturers. According to NTEA, initial start-up costs can cost from $26,000 to $75,000, depending upon the software program and not including annual software upgrades. NTEA estimates the annual costs for submitting quarterly reports is in excess of $25,000. Alternatively, for manufacturers producing fewer than 500 vehicles annually the start-up costs are approximately $10,000 and annual maintenance is approximately $5,000.

NHTSA has decided not to adopt the recommendations made by NTEA at this time. To the extent that any of NTEA's members are manufacturers of light vehicles, of course, they would be beneficiaries of the proposed increase of the reporting threshold for light vehicles to 5,000. However, its members that produce multi-stage vehicles are primarily producing medium and heavy trucks. Our explanation above for why we are not proposing to raise the threshold for medium and heavy trucks would apply to these multi-stage vehicles. We do not find persuasive NTEA's argument that multi-stage vehicle manufacturers are a special category of medium-heavy vehicle manufacturers that should be subject to different reporting rules. While NTEA asserts that the incomplete vehicle manufacturer is the point of contact for customers for a large number of chassis related concerns, there are a substantial number of concerns that are related to

[8] NHTSA's 2006 Motorcycle Traffic Safety Facts, March, 2008, is located at *http://www-nrd.nhtsa.dot.gov/Pubs/810806.PDF*.

the equipment added by the final-stage manufacturer.

NHTSA's understanding of the multi-stage vehicle process is that the purchaser decides on a chassis manufacturer and the type of completed vehicle he/she wishes to purchase. A dealer that sells the required chassis or incomplete vehicle is contacted. Based on the specifications of the completed vehicle, a chassis model and appropriate equipment, i.e., axles with adequate load rating, are selected. The chassis may range from being relatively close to completion (such as a chassis cab[9]) to being relatively far from completion (such as a stripped chassis[10]). To produce a completed vehicle, a platform or body type is added to the chassis. The purchaser, with assistance from the dealer, chooses a manufacturer of the platform or body. The chassis is ordered from the chassis manufacturer by the dealer and is typically sent to the manufacturer of the platform or body, or to a distributor of the platform or body. The platform or body is manufactured and installed on the chassis or is sent to the distributor who installs it on the chassis, completing the vehicle. NHTSA recognizes the company that completed the vehicle by installing the platform as its final-stage manufacturer. A number of different vehicle types can be produced from the same chassis including a school bus, flatbed truck, dump truck, tow truck, box truck, service truck, utility truck or other specialized application. Regardless of the state of completion of the chassis or where it goes after it leaves the incomplete vehicle manufacturer's plant, there is one fundamental fact: Once the incomplete vehicle is out of the incomplete vehicle manufacturer's hands, the incomplete vehicle manufacturer does not have control over what is done with, or what components are added to, the incomplete vehicle.

There can be problems with the vehicle once it is completed that may not be attributed to the incomplete vehicle manufacturer, but that may be attributed to the final-stage manufacturer. These problems may never be brought to the attention of the incomplete vehicle manufacturer. A common scenario would be that the owner takes the vehicle to a dealer. If the problem is with the body or platform, the dealer would probably recommend that the owner contact the manufacturer of the platform or body or its distributor to resolve the problem. If the problem is with the chassis, the chassis dealer would take appropriate action, including notifying the chassis manufacturer, i.e., to obtain warranty reimbursement. However, if the problem on the chassis is a result of work performed by the vehicle's final-stage manufacturer, the dealer would likely repair the problem but seek reimbursement from the final-stage manufacturer.

Consider the following examples:

- An incomplete vehicle manufacturer ships a chassis to a final-stage manufacturer, who then installs an ambulance body. If, during the body installation process, the brake lines were to be squeezed by the body, in time, the brake line would leak brake fluid. In this case, given that the chassis is beyond the control of the incomplete vehicle manufacturer, the responsibility lies with the final-stage manufacturer, even though the chassis manufacturer installed the original brake lines on the chassis. While the initial contact by the customer may be with a dealer, in at least some cases the dealer is also the final-stage manufacturer or authorized to implement repairs on behalf of the final-stage manufacturer. For those that are not, normally the dealer will submit an invoice for reimbursement of the repairs and therefore the final-stage manufacturer would have possession of the complaint or warranty claim information.
- A final-stage manufacturer adds a dump truck body to a cab and chassis. During the body installation, the positive battery cable (originally installed by the chassis manufacturer) is positioned in such a way that it chafes on the body/frame interface during normal operation. At some point, the cable shorts out, creating sparks and possibly a fire. The owner would report the problem to a dealer who would most likely implement the repair and record the complaint/warranty claim in the company's warranty/complaint system. An invoice would be sent to the final-stage manufacturer for reimbursement and thus be available for EWR reporting purposes.
- A final-stage manufacturer mounts a top-heavy gasoline tank on the chassis, which causes the suspension to become overloaded. Due to the overloading, the suspension fails prematurely resulting in the body dropping down on top of the tires. The final-stage manufacturer would be responsible (even though the chassis manufacturer installed the suspension) and would record the complaint.
- A final-stage manufacturer makes modifications to the interior compartment of a chassis cab, potentially resulting in an overloaded electrical harness. This type of overloading could result in a fuse circuit becoming overloaded with possible headlight or brake light failure or perhaps an interior fire. Such issues would most likely be reported to a dealer who may also be the final-stage manufacturer. However, if not, the final-stage manufacturer would submit an invoice for reimbursement and thus have a record of the repair.

These examples serve to illustrate the substantial number of issues that may emerge after the final-stage manufacturer completes the vehicle. NHTSA agrees that the initial contact for a problem will most often be a dealer; however, some dealers are final-stage manufacturers and even if they are not, they will make contact with the final-stage manufacturer (if appropriate) for reimbursement of any repairs performed. In many cases, the dealer would also be the correct entity to service the cab/chassis (incomplete vehicle). Clearly, both incomplete vehicle manufacturers and final-stage manufacturers may receive complaints and concerns with their respective products and frequently these complaints will come through the dealer network.

NTEA estimates that as many as 300 final-stage manufacturers produce 500 or more vehicles annually and are subject to EWR quarterly reporting. NTEA's numbers of reporting final-stage manufacturers appear to be overstated. NHTSA receives EWR data from 139 vehicle manufacturers who indicate that they produce either light or medium-heavy and bus vehicles (light vehicles are included in this discussion to capture the 1-ton series cab and chassis from various manufacturers). Some manufacturers produce both, so the total number of manufacturers reporting in both categories is 150. NHTSA is unable to identify exactly which of the 150 vehicle manufacturers are final-stage

[9] A chassis cab is an incomplete vehicle with a completed occupant compartment that requires only the addition of cargo-carrying, work-performing, or load-bearing components to perform its intended function. *See* 49 CFR 567.3 (2007). For illustration purposes, an example is a pickup truck without a standard pickup truck bed. These may be built into various trucks including a tradesman's utility service truck, a tow truck, a dump truck, a box truck or a specialized work truck.

[10] A stripped chassis may be viewed as meeting the definition of an incomplete vehicle without more. As shipped by the incomplete vehicle manufacturer, it would have steering control and braking systems (to meet the definition of incomplete vehicle). It ordinarily would not have the windshield, roof, A-pillar (the pillar to which the windshield attaches), B pillar (the pillar behind the (front) doors) or body components. Ford's E-series incomplete vehicle manual refers to this as a basic chassis. These may not be particularly evident on the road and may underlie, for illustration purposes, school buses or large recreation vehicles.

manufacturers. However, we know that the number of final-stage manufacturers is a subset of the 150 manufacturers reporting under the light vehicle and medium-heavy and bus categories. We also know that not all of these 150 manufacturers are final-stage manufacturers.[11]

The actual number of NTEA members providing EWR quarterly reports appears to be significantly lower then NTEA's estimates. In January 2006, NTEA submitted to NHTSA a spreadsheet that listed 702 of its ''Distributor'' members. Using NTEA's ''Distributor'' list, NHTSA searched its EWR database to identify those manufacturers who had established EWR accounts in order to submit EWR reports. We found that only eleven (11) of the 702 members had existing EWR accounts. Of the eleven (11) NTEA members reporting, three (3) members submit reports only for the light vehicle category, one (1) member submits reports only for the trailer category, three (3) members submit reports for only medium-heavy and bus category and the remaining four (4) members submit quarterly reports for both light vehicles and medium-heavy and bus categories. At a minimum, potentially, four (4) of the eleven (11) NTEA members will realize a reduction in their burden to provide quarterly EWR reports with the proposed increase of the threshold for light vehicle and trailer reporting. With only eleven (11) members of NTEA providing EWR reports, NTEA's claims that 300 of its members submit quarterly EWR reports appears to be greatly exaggerated. In contrast to NTEA's claim, it appears that the vast majority of its members are under the current 500 vehicle threshold and subject only to the limited reporting applicable to small volume manufacturers under 49 CFR 579.27.

NTEA also claims that final-stage manufacturers do not receive much of the reportable EWR data. Our experience with EWR contradicts NTEA's allegation. EWR data indicates that final-stage manufacturers that produce 500 or more vehicles or trailers submit quarterly EWR reports that include property data claims, warranty claims, consumer complaints, and field reports. For final-stage manufacturers that produce fewer than 5,000 light vehicles and trailers, they should see a reduction in their reporting burden if today's proposal is adopted. But for the medium-heavy and bus categories, as we noted in sections E and F above, there would be detrimental impacts upon our ability to identify safety-related defects if we were to raise the threshold for final-stage manufacturers. Based upon NHTSA's general understanding of the 90 manufacturers reporting under the medium-heavy and bus category, we were able to estimate that 40 percent of the production volume of the medium-heavy and bus category is reported by final-stage manufacturers. In our view, losing 40 percent of the current production volume submitted by medium-heavy and bus manufacturers would negatively affect our ability to find potential safety defects in these vehicles.

NTEA also asserts that the costs for EWR submissions are between $26,000 and $75,000 for start-up and $25,000 for annual reporting. NTEA did not submit any evidence to support its cost estimates. Based upon NTEA's ''Distributors'' members list, only eleven (11) manufacturers submit quarterly EWR reports, and these manufacturers have already incurred the one-time start-up fee for EWR reporting. Several of those members may have their annual reporting costs reduced because they are final-stage manufacturers submitting reports in the light vehicle and trailer categories. Furthermore, for the remaining final-stage manufacturers, the costs of complying with EWR are low because they are under the 500 vehicle threshold for quarterly reports.

Based on the above analysis, NHTSA is leaving the threshold for EWR reporting for final-stage manufacturers unchanged. We seek comment on our decision to leave the threshold for EWR reporting for final-stage manufacturers unchanged.

H. Data Consistency

The EWR regulation requires manufacturers to follow certain filing naming conventions when submitting their quarterly EWR reports. 49 CFR 579.29(a). The naming requirement does not specify a format for manufacturers to provide the model names of their products submitted with their EWR quarterly reports. Manufacturers are under no obligation to provide the same make, model and model name from quarter to quarter, although the overwhelming majority of manufacturers do so. Our experience with the EWR data submissions reveals that some manufacturers do not provide consistent model naming across EWR quarters, which impedes our ability to analyze the EWR data.

Our analysis of the EWR data reveals that some manufacturers' production and aggregate data do not align across reporting quarters due to inconsistent model names submitted by manufacturers from one reporting period to another. We have also found that in some instances, we cannot analyze data because a particular model's run ended prematurely or started later than would be normally expected based on a typical model year.

To illustrate the inconsistencies we have encountered, we provide the following examples.

- Manufacturers inadvertently insert spaces or slightly alter the make, model and model year of a product. For instance, manufacturer submits quarterly reports for product with the make, model and model year as a 2004 Pontiac Sunbird. This product name is provided for the quarterly reports for the third quarter of 2003 through the fourth quarter 2005. However, in the first quarter of 2006, the manufacturer submits the 2004 Pontiac Sunbird as the 2004 Pontiac Sun bird. The manufacturer inadvertently added a blank space between the ''Sun'' and ''bird.''
- Manufacturers provide shorthand names for their products. For example, changing the make of a product from ''Oldsmobile'' to ''Olds'' or changing the model name from ''Mark7'' to ''Mark VII.''

Adding a blank space, shortening a make or model name, replacing a number with text or adding text to the vehicle make or model (in the case of tires, the tire line) will make the data from one quarter inconsistent from another quarter. Inconsistent product naming in the data reported under EWR rules significantly diminishes NHTSA's ability to utilize the EWR data for identifying potential safety concerns. In particular, the inconsistency found in model naming across report periods makes it impossible to perform a longitudinal (time series) analysis of the EWR data. Additionally, NHTSA is unable to efficiently automate the review of data across reporting periods due to an inability to map data from one period to another. The lack of a consistent model naming means there is no ''key'' with which to merge data across report periods.

To improve the quality of EWR data, today we propose to amend 49 CFR 579.29 to add a requirement that manufacturers must provide the identical make, model and model year of products previously submitted to

[11] Based on our review of manufacturers submitting EWR reports, it appears that the majority of final-stage manufacturers of vehicles manufactured in multiple stages submit reports in the light vehicle category. As we stated before, 30 light vehicle manufacturers will no longer have to submit quarterly EWR reports if the proposed 5000 or more vehicle threshold for light vehicles is adopted.

NHTSA or to inform NHTSA in a timely way of changes in these names. This proposal would require manufacturers reporting EWR data on a quarterly basis to maintain a consistent model naming convention for each unique product from one report to the next, and throughout the full reporting period. This does not preclude the manufacturer from changing or creating another name when a ''new'' product (e.g., a new model and/or model year) is reported, just that the product's make, model, and model year must remain consistent from the first time it is included in an EWR report throughout subsequent EWR reports. If this proposal is adopted, we plan on implementing a screening process within ARTEMIS to ensure data integrity and reject any quarterly submission where a product name is inconsistent with prior quarterly submissions, or is otherwise unrecognizable.

Our intention to amend ARTEMIS to reject quarterly reports raises the issue of how a manufacturer notifies NHTSA that it is adding a new model to its product line and reporting in its EWR quarterly report. We plan to amend the EWR reporting template required by 49 CFR 579.29(a)(1) to add a new field so that a manufacturer can indicate that it is introducing a new make, model and model year vehicle. A manufacturer may populate the field with an ''n'' for a make, model, model year vehicle with a new model name in its EWR submission for the quarter that the new model debuts. Otherwise, manufacturers must provide an ''h'' to indicate that the make, model, model year is not new, but a historical product.

We believe that this proposed change would have a minimal burden on those manufacturers required to submit quarterly EWR data. Manufacturers would need to implement a system to ensure a consistent naming convention for each unique product submitted in their EWR reports. In addition, there would be an increased burden on manufacturers to populate the additional field in the EWR reporting template.

We seek comment on our proposal to amend 49 CFR 579.29 to add a new paragraph to require manufacturers to provide consistent product names in their EWR quarterly reports and indicate whether when a new model is added to the manufacturer's product line.

I. Vehicle Type for Light Vehicle Aggregate Data

The EWR regulation requires light vehicle manufacturers that produce 500 or more vehicles annually to submit production information that includes the make, the model, the model year, the type, the platform and the production. 49 CFR 579.21(a). Manufacturers must provide the production as a cumulative total for the model year, unless production of the product has ceased. *Id.* While light vehicle manufacturers are required to provide the type of vehicle with their production, they are not required to provide the type of vehicle when they submit their death and injury data pursuant to 49 CFR 579.21(b) or with their aggregate data under 49 CFR 579.21(c).[12] Under today's notice, we propose to amend 579.21(b) and (c) to require light vehicle manufacturers to provide the type of vehicle when they submit their death and injury data and aggregate data under those sections.

Because light volume manufacturers that provide quarterly EWR reports are not obligated to provide the vehicle type in all their EWR reports, NHTSA is unable to distinguish whether the light vehicle death and injury and aggregate data are associated with a certain type of vehicle such as a car, light truck, multi-purpose vehicle or incomplete vehicle. Without being able to isolate this information by vehicle type, ODI cannot match the aggregate data with the production data.

If today's proposal is adopted, NHTSA could perform a more focused analysis of the EWR information. For instance, warranty claims by vehicle type from the aggregate data can be matched with the corresponding vehicle type production volume data, allowing us to determine the occurrence of warranty claims per vehicle type. This ratio can then be used to guide our efforts in a subsequent and more focused and thorough analysis of EWR data; a high ratio of warranty claims per production unit may warrant further examination of EWR and other ODI sources of information. Today's proposal would permit a more efficient and targeted use of the EWR data in terms of detecting and identifying potential safety concerns.

Light vehicle manufacturers should be able to readily identify the vehicle type from the VIN provided in the information they receive. About 95 percent of the EWR reports on incidents involving a death or injury include a VIN when initially submitted by manufacturers. 71 FR 52040, 52046 (September 1, 2006). Warranty claims and field reports normally contain a VIN because the manufacturer's authorized dealer or representative has access to the vehicle and, in the case of warranty claims, a vehicle manufacturer will not pay a warranty claim unless the claim includes the VIN. For consumer complaints and property damage claims, the VIN or other information is available to identify the type of vehicle. If in some instances the VIN is not available, we propose that the manufacturer submit ''UN'' for ''unknown'' in the required field.

NHTSA believes that a one-time burden would be placed on light vehicle manufacturers as a result of this change. Each manufacturer would need to add an additional field to their EWR database that will contain the light vehicle type information. This burden should be minimal.

We seek comment on today's proposed amendments to 49 CFR 579.21(b) and (c) to add the requirement that the vehicle type be reported included in death and injury and aggregate data EWR reports.

J. New Component Category for Light Vehicles and Reporting by Fuel and/or Propulsion System Type

The EWR regulation requires vehicle and equipment manufacturers for each reporting category to report the required information by specific component categories. 49 CFR 579.21(b)(2), 579.22(b)(2), 579.23(b)(2), 579.24(b)(2), 579.25(b)(2), and 579.26(b)(2). The component categories for each industry have remained unchanged since the EWR regulation was published in July 2002. Since that time, new technologies have been introduced into the marketplace, such as hybrid vehicles and Electronic Stability Control (ESC). As these new technologies proliferate throughout the industry, and demand for these products increase in the market place, we are concerned that the EWR component categories are unsuitable for capturing these newer technologies. As a result, today we propose to add a component for the light vehicles and to amend the model designation for motor vehicles.

We propose to add one new component for light vehicles in 49 CFR 579.21(b)(2) for Electronic Stability Control (ESC) systems. On April 6, 2007, NHTSA published a final rule adding Federal Motor Vehicle Safety Standard (FMVSS) No.126; Electronic stability control systems. 72 FR 17310, as amended 72 FR 34410, June 22, 2007. FMVSS No. 126 is phased-in, requiring that all new light vehicles must be equipped with an ESC system that meets the requirements of the standard

[12] For light vehicles, type means a vehicle certified by its manufacturer pursuant to 49 CFR 567.4(g)(7) as a passenger car, multipurpose passenger vehicle, or truck or a vehicle identified by its manufacturer as an incomplete vehicle pursuant to 48 CFR 568.4. *See* 49 CFR 579.4.

by September 1, 2011, with certain exceptions. As a result of this Standard, the number of vehicles containing ESC entering the market is increasing and will be standard on all light vehicles by the 2011 model year.

Adding an ESC component category to light vehicle reporting category will allow NHTSA to capture data on this mandatory system and analyze ESC data for potential safety concerns. The EWR regulation currently does not have a specific component for ESC issues. *See* 49 CFR 579.21(b)(2). Many manufacturers report ESC issues under ''03 service brakes'' because the definition of ''service brake'' includes ESC. As a result, potential ESC issues will be masked within the broader service brake category, making NHTSA unable to examine and detect potential safety concerns that may be associated directly with a vehicle's ESC system.

We propose to amend 49 CFR 579.4(b) to add the regulatory definition of ESC systems, found in 49 CFR 571.126.S4 and to amend the definition of ''service brake system'' to remove ESC from the definition. We seek comments on our proposal to amend 49 CFR 579.21(b)(2) to add the component ''Electronic Stability Control system.'' We also seek comments on the proposed definitions for this component.

The current national focus on automobile fuel efficiency is likely to cause a rapid increase in the number of vehicles with alternative fuel and/or propulsion systems and a proliferation in the types of those systems. NHTSA believes that the large scale introduction of new fuel/propulsion systems, particularly in light vehicles, may present safety issues peculiar to those new systems.

Therefore, NHTSA believes it is an opportune time to start collecting EWR information in a way that facilitates sorting the light vehicle data by type of fuel/propulsion system. In this way, problems with a particular make and model that may be unique to only one fuel/propulsion system can readily be distinguished from problems that may apply to that make and model regardless of the fuel/propulsion system. Also, NHTSA would be able to more readily investigate problems that could possibly appear in many vehicles with similar fuel/propulsion systems (e.g., a battery problem in a plug-in electric vehicle or a hydrogen fuel cell problem that may extend to similarly equipped vehicles).

NHTSA believes that the most useful way to collect this information is at the vehicle model level. We considered asking for the information at the component level, but have tentatively concluded that asking manufacturers to simply describe the fuel/propulsion system type at the model level would be the least costly and most efficient method.

Accordingly, we propose to amend 49 CFR 579.21 by adding the words ''(separately reported by fuel and/or propulsion system type and code)'' after the word ''model'' the first time it is used in that section (i.e., before subsection (a)). That language applies to paragraphs (a) and (c) of that section, which cover production information and aggregate data on property damage claims, consumer complaints, warranty claims, and field reports. To ensure that we get the same level of detail on incidents involving a death or injury, we propose to add the same words, i.e., ''(separately reported by fuel and/or propulsion system type and code),'' after the word ''model'' the first time it is used in paragraph (b)(2).

In order to ensure some standardization in terms of how fuel/propulsion system types are reported, we propose to add to 49 CFR 579.4 a new definition of ''fuel and/or propulsion system type'' immediately after the current definition of ''fuel system.'' The new definition would provide that ''*Fuel and/or propulsion system type* means the variety of fuel and/or propulsion systems used in a vehicle, coded as follows: 01 gasoline only, 02 diesel only, 03 gasoline—dual fueled, 04 diesel—dual fueled, 05 hybrid—gas/electric, 06 hybrid—diesel/electric, 07 electric—battery, 08 electric—hydrogen fuel cell, 09 natural gas, 10 liquefied petroleum gas, 11 hydrogen internal combustion, 12 alcohol only, 13 other.''

We do not suggest that this definition includes every possible fuel and/or propulsion system type. Nor do we suggest that these are the only ways to describe these systems. We solicit comment on whether additional fuel and/or propulsion system types should be added and on how each distinct type of system might be best described.

However, we do not believe it is necessary to add definitions of each particular fuel system type. We are content, once we have developed a sufficiently complete list, to have the manufacturer choose which description best fits its vehicle. If its fuel and/or propulsion system is not described, the manufacturer may always choose ''other.'' Eventually, based on experience, we may have to expand the number of choices. We did not incorporate the ''dual fueled automobile'' definition used for fuel economy purposes and found in 49 U.S.C. 32901. That definition incorporates that statute's definition of ''alternative fuel,'' which includes electricity. We think that could lead to confusion about how to categorize hybrid electric vehicles for EWR purposes. When we use ''dual fueled'' in the definition of ''Fuel and/or propulsion system type,'' we are intending to include only vehicles that run on either gasoline or diesel fuel and another liquid fuel (e.g., ethanol or methanol) combined with either gasoline or diesel fuel. We specifically seek comment on whether to incorporate ''dual fueled automobile'' definition 49 U.S.C. 32901 for EWR purposes and, if we do, how to make appropriate distinctions.

Adding this brief description of the fuel and/or propulsion system type to the model name should not be a burden for manufacturers. They already make these distinctions in marketing their vehicles and their databases presumably distinguish within models by fuel and/or propulsion system type for a variety of reasons. However, we ask that commenters address what steps manufacturers would have to take to ensure that their EWR submissions complied with the proposed standard. We believe that the simple addition of the appropriate fuel and/or propulsion system type and its code to the model name will provide measurable benefits throughout the coming years by enhancing NHTSA's ability to identify and address potential safety defects that may be related to specific fuel and/or propulsion systems.

In addition to comments on above proposals, we also seek comment on whether the EWR reports should contain additional component categories for other emerging technologies. Among those technologies are adaptive cruise control, lane departure warning, lane keeping, automatic braking, and forward collision avoidance. Problems that may develop in several of these technologies may be reported under existing component categories, but may be very hard to identify within those categories. We seek comment on the possible need for such particularized data, the extent to which manufacturers are already separately tracking these categories, and the additional burden on manufacturers that would be caused by requiring that EWR reports clearly identify these technologies as components.

K. Lead Time

We understand that if today's proposed amendments to the EWR regulation were adopted, manufacturers would require time to either install systems to meet their new obligations under the EWR regulation or modify

their existing EWR databases and/or IT systems to take into account the changes to the regulation. The proposed amendments that would require some lead time for manufacturers to modify their databases and IT systems include the elimination of the reporting threshold for submitting quarterly EWR reports to NHTSA by bus manufacturers, the requirement for consistent product naming, the requirement for light vehicle manufacturers to provide the vehicle type in their quarterly EWR submissions, the addition of another component for light vehicle manufacturers and the requirement for fuel and/or propulsion vehicle model reporting. Because manufacturers will need time to modify existing EWR databases and/or IT systems to confirm their systems to meet the amendments proposed today, we propose a lead time of (1) calendar year from the date the final rule is published. We believe that a one year lead time is an adequate amount of time for manufacturers to comply with the proposed amendments. Accordingly, the effective date for the amendments to the reporting threshold for buses, consistent product naming, light vehicle type, light vehicle component and fuel and /or propulsion system model reporting will be the first reporting quarter that is one year from the date the final rule is published.

For the proposed amendments to the reporting threshold for manufacturers of light vehicles and trailers, we do not believe a long lead time is necessary. We propose that the effective dates for these amendments be 30 days after date the final rule is published.

We seek comments on our proposed lead time and effective dates.

L. Technical Correction to the Definition of Customer Satisfaction Campaign and Other Safety Campaign

Attorney Stephen Selander pointed out an inconsistency in the definitions of ''customer satisfaction campaign'' and ''other safety campaign'' in 49 CFR 579.4. He points out that the language in the two definitions is similar and that there appears to be a misplaced closed parenthetical in the definition of in ''other safety campaign.'' The definition of ''customer satisfaction campaign'' states: ''Customer satisfaction campaign, consumer advisory, recall, or other activity involving the repair or replacement of motor vehicles or motor vehicle equipment means any communication by a manufacturer to, or made available to, more than one dealer, distributor, lessor, lessee, other manufacturer, or owner, whether in writing or by electronic means, relating to repair, replacement, or modification of a vehicle, component of a vehicle, item of equipment, or a component thereof, the manner in which a vehicle or child restraint system is to be maintained or operated (excluding promotional and marketing materials, customer satisfaction surveys, and operating instructions or owner's manuals that accompany the vehicle or child restraint system at the time of first sale); or advice or direction to a dealer or distributor to cease the delivery or sale of specified models of vehicles or equipment.''

The definition of ''other safety campaign'' states: ''Other safety campaign means an action in which a manufacturer communicates with owners and/or dealers in a foreign country with respect to conditions under which motor vehicles or equipment should be operated, repaired, or replaced that relate to safety (excluding promotional and marketing materials, customer satisfaction surveys, and operating instructions or owner's manuals that accompany the vehicle or child restraint system at the time of first sale; or advice or direction to a dealer or distributor to cease the delivery or sale of specified models of vehicles or equipment).''

We agree with Mr. Selander that the closed parenthesis in the definition ''other safety campaign'' is misplaced and should be moved to immediately after the term ''of first sale'' to be consistent with the definition of ''customer satisfaction campaign.'' Accordingly, we propose to amend the definition of ''other safety campaign'' to reflect this change. The new definition would read as follows: ''Other safety campaign means an action in which a manufacturer communicates with owners and/or dealers in a foreign country with respect to conditions under which motor vehicles or equipment should be operated, repaired, or replaced that relate to safety (excluding promotional and marketing materials, customer satisfaction surveys, and operating instructions or owner's manuals that accompany the vehicle or child restraint system at the time of first sale); or advice or direction to a dealer or distributor to cease the delivery or sale of specified models of vehicles or equipment.''

We seek comment on this proposed change.

M. Amendments to Information Required To Be Submitted in a Part 573 Defect or Noncompliance Information Reports

Pursuant to 49 U.S.C. 30118 and 30119, manufacturers must provide notification to the agency if the manufacturer decides or the agency determines that a defect or noncompliance exists in a motor vehicle or item of motor vehicle equipment. NHTSA has significant discretion in determining the contents of this notification. 49 U.S.C. 30119(a)(7). NHTSA's regulation specifying the contents of the notification to the agency is located at 49 CFR Part 573, Defect and Noncompliance Responsibility and Reports. Among other things, Part 573 delineates the information to be contained in the notification to NHTSA in section 573.6 and the address for submitting reports in section 573.9. We are proposing to amend subsections 573.6(c)(2)(iii) & (iv) to add language that will further assist the agency and the public to identify components or identify the items of motor vehicle equipment involved in the subject recall and section 573.9. In turn, we propose to add language to section 573.9 to facilitate the submission of reports affected by the proposal to subsection 573.6(c)(2)(iii). These proposals are discussed in detail below.

Subsection 573.6(c)(2)(iii) concerns the identification of motor vehicle equipment containing the defect or noncompliance. It requires the manufacturer of the item of motor vehicle equipment to identify the item that contains the defect, with other identifying information. Subsection 573.6(c)(2)(iii) currently states: ''In the case of items of motor vehicle equipment, the identification shall be by the generic name of the component (tires, child seating systems, axles, etc.), part number, size and function if applicable, the inclusive dates (month and year) of manufacture if available and any other information necessary to describe the items.''

With respect to tire recalls, tire manufacturers generally provide the brand name, model name and size of the particular tire recalled. In addition, tire manufacturers identify the tires that contain the defect by providing the build dates of the tires. Build dates are of limited assistance to consumers who undertake to determine if a tire is subject to a recall because there is no ''build date'' on the tire. Rather, the tire build date is encoded within the Tire Identification Number (TIN) which is molded to the side of the tire. In addition to providing build dates, we are proposing that tire manufacturers submit a list of all unique TINs of the tires containing the defect. Alternatively, we propose that tire manufacturers provide a range of TINs if providing a list of all unique TINs

would be difficult and costly. We believe that providing a list of TINs or range of TINs will further assist consumers in identifying whether their tire is the subject of the recall. Therefore, we propose to amend subsection 573.6(c)(2)(iii) as follows: ''In the case of items of motor vehicle equipment, the identification shall be by the generic name of the component (tires, child seating systems, axles, etc.), part number (for tires, a list of tire identification numbers), size and function if applicable, the inclusive dates (month and year) of manufacture if available and any other information necessary to describe the items.''

We seek comments on our proposal to require a list of unique TINs for tires subject to a recall. We also seek comment on our alternate proposal to require a range of TINs in lieu of a list of unique TINs. We are particularly interested in practical concerns tire manufacturers would face in providing a unique list of TINs or a range of TINs. In either case, we are interested in comments on whether providing additional TIN information will assist consumers in identifying tires subject to manufacturer recalls and the best method of disseminating that information (for example: In range or list form, or as a lookup application on the NHTSA Web site). If we adopt the alternative proposal for a range of TINs, we will amend the proposed language of section 573.6(c)(2)(iii) to reflect that decision.

We recognize that should we adopt the proposal to require a list of unique TINs or a range of TINs that tire manufacturers could in practice submit long lists because in some tire recalls or noncompliances the list of unique TINs number in the tens of thousands or hundreds of thousands. In order to facilitate the submission of a large list of unique TINs with a manufacturer's Part 573 Report, we are proposing to amend section 573.9 to provide for the submission of the list of unique TINs or a range of TINs in an electronic format that can be e-mailed or submitted through the Internet. Section 573.9 currently permits manufacturers to submit their 573 Defect or Noncompliance Report as a portable document format (pdf.) attachment to an e-mail message to the agency. *See* 72 FR 32014 (June 11, 2007). That option does not supersede the requirement in 49 U.S.C. 30118(c) [13] that manufacturers notify NHTSA by certified mail when they learn a product they manufacture contains a safety defect or does not comply with a FMVSS. Currently, section 573.9 states: ''All submissions, except as otherwise required by this part, shall be addressed to the Associate Administrator for Enforcement, National Highway Traffic Safety Administration, Attention: Recall Management Division (NVS–215), 1200 New Jersey Avenue, SE., Washington, DC 20590. These submissions may be submitted as an attachment to an e-mail message to *RMD.ODI@dot.gov* in a portable document format (.pdf). Whether or not they are also submitted electronically, defect or noncompliance reports required by section 573.6 of this part must be submitted by certified mail in accordance with 49 U.S.C. 30118(c).''

We are proposing to amend section 573.9 to permit manufacturers to submit a unique list of TINs to NHTSA electronically as an attachment to the e-mail submitting a Defect or Noncompliance Report or through the Intranet via NHTSA's Internet Web address. If we adopt the alternative proposal for a range of TINs, we will amend the proposed language of section 573.9 to reflect that decision. If a manufacturer chooses to submit the list of TINs as an attachment to the e-mail submitting its Part 573 Defect or Noncompliance report, the TIN data must be in a commercially available text format such as Microsoft Access or an Excel spreadsheet. If a manufacturer has an established EWR identification and password or establishes an EWR identification and password with NHTSA,[14] we propose that the manufacturer may submit the TIN data to NHTSA via a Secure File Transfer Protocol (SFTP) server located at *http://www-odi.nhtsa.dot.gov/safetrecall/TINupload*. Accordingly, we propose to amend section 573.9 to read: ''All submissions, except as otherwise required by this part, shall be addressed to the Associate Administrator for Enforcement, National Highway Traffic Safety Administration, Attention: Recall Management Division (NVS–215), 1200 New Jersey Avenue, SE., Washington, DC 20590. These submissions may be submitted as an attachment to an e-mail message to *RMD.ODI@dot.gov* in a portable document format (.pdf). Tire Identification Numbers that are required to be submitted pursuant to 573.6(c)(2)(iii) may be submitted as an attachment to the aforementioned e-mail message and provided in a commercially available text format (e.g. Microsoft Access or Excel), or, if the manufacturer has an early warning reporting identification and password pursuant to 49 CFR 579.28, submitted to NHTSA's tire identification number repository identified on the Office of Defects' Internet homepage (*http://www-odi.nhtsa.dot.gov/safetrecall/TINupload*). Whether or not these submissions are also submitted electronically, defect or noncompliance reports required by section 573.6 of this part must be submitted by certified mail in accordance with 49 U.S.C. 30118(c).''

We seek comments on our proposal to amend section 573.9 to permit the submission of a list of unique TINs for tires subject to a recall or noncompliance by e-mail or directly uploading the list to NHTSA.

We are also proposing to amend subsection 573.6(c)(2)(iv). That subsection concerns the identification of the manufacturer that supplies the defective or noncompliant component to the manufacturer reporting the defect to NHTSA. It requires the reporting manufacturer to identify the component and the manufacturer of the component by name, address and telephone number. 49 CFR 573.6(c)(2)(iv). Subsection 573.6(c)(2)(iv) currently states: ''In the case of motor vehicles or items of motor vehicle equipment in which the component that contains the defect or noncompliance was manufactured by a different manufacturer from the reporting manufacturer, the reporting manufacturer shall identify the component and the manufacturer of the component by name, business address, and business telephone number. If the reporting manufacturer does not know the identity of the manufacturer of the component, it shall identify the entity from which it was obtained.''

When this regulation was adopted, the identification of the manufacturer of the component by name and business address was sufficient to provide NHTSA with the country of origin of the component. By providing the name of the manufacturer, NHTSA could determine the location where the component was finally assembled or fabricated. However, with the increasing globalization of the automotive industry, the identification of the manufacturer of a component by name and business address sometimes does not provide information related to the country of origin where the component that is the subject of the recall was manufactured. Instead, this information may only identify the location of a distributor and have no bearing on the actual location of manufacture. We believe that it is important for the

[13] 49 U.S.C. 30118(c) states in pertinent part: ''A manufacturer of a motor vehicle or replacement equipment shall notify the Secretary by certified mail * * *.''

[14] Manufacturers submitting EWR reports to NHTSA must request an identification number and a password. 49 CFR 579.28

agency to know where the component that is the subject of the recall is fabricated or assembled so as to appropriately focus follow-up activities of our Recall Management Division to ensure that products imported into this country meet all applicable Federal Motor Vehicle Safety Standards and are free of safety-related defects. Therefore, we are proposing to amend subsection 573.6(c)(2)(iv) to add language requiring the reporting manufacturer to provide the country of origin of the component identified containing the defect or noncompliance. By country of origin, we intend for the reporting manufacturer to provide the location of the manufacturing or assembly process where the component is assembled or manufactured in its completed form. Accordingly, we propose to amend subsection 573.6(c)(2)(iv) to read: ''In the case of motor vehicles or items of motor vehicle equipment in which the component that contains the defect or noncompliance was manufactured by a different manufacturer from the reporting manufacturer, the reporting manufacturer shall identify the component and its country of origin (i.e., final place of manufacture or assembly), and the manufacturer and/or assembler of the component by name, business address, and business telephone number. If the reporting manufacturer does not know the identity of the manufacturer of the component, it shall identify the entity from which it was obtained.''

We seek comments on our proposal to require the reporting manufacturer to provide the country of origin for the component that contains the defect or noncompliance.

IV. Request for Comments

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments. Your comments must not be more than 15 pages long.[15] We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit your comments by any of the following methods:

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

If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.[16]

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html*. DOT's guidelines may be accessed at *http://dmses.dot.gov/submit/DataQualityGuidelines.pdf*.

How Can I Be Sure That My Comments Were Received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation.[17]

In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the Docket by one of the methods set forth above.

Will the Agency Consider Late Comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments received after that date. Therefore, if interested persons believe that any new information the agency places in the docket affects their comments, they may submit comments after the closing date concerning how the agency should consider that information for the final rule.

If a comment is received too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How Can I Read the Comments Submitted by Other People?

You may read the materials placed in the docket for this document (e.g., the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov*. Follow the online instructions for accessing the dockets. You may also read the materials at the Docket Management Facility by going to the street address given above under **ADDRESSES**. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

V. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://dms.dot.gov*.

VI. Rulemaking Analyses and Notices

A. Regulatory Policies and Procedures

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993) provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines as ''significant

[15] *See* 49 CFR 553.21.

[16] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

[17] *See* 49 CFR part 512.

regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

This document was reviewed under E.O. 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking action is not considered ''significant'' under Department of Transportation policies and procedures. The effects of these proposed rule changes have been analyzed in a Preliminary Regulatory Evaluation. Two of the proposed rule changes presented within this document would raise the reporting thresholds under EWR rules and have the effect of lowering the reporting burden on manufacturers of light vehicles and trailers. Although we are proposing to eliminate the reporting threshold for bus manufacturers, the result of this action will not impose a significant burden on this industry. Finally, the proposals being made within this document related to data consistency and the addition of reporting field for light vehicle manufacturers would place only a minimal burden on EWR manufacturers through a one-time adjustment to their EWR databases. The agency estimates that the proposal will result in a net annual reduction in costs of $3.5 million.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule would affect 237 manufacturers (30 light vehicle manufacturers, 190 trailer manufacturers, and 17 bus manufacturers). The rule would relieve reporting burdens currently imposed on some light vehicle manufacturers and trailer manufacturers and impose modest new burdens on the bus manufacturers. In order to determine if any of these manufacturers are small entities under the RFA, NHTSA reviewed the North American Industry Classification System (NAICS) codes. Under those criteria, manufacturers of light vehicles, light and heavy duty trucks, buses, or motor vehicle bodies are classified as a small business if they have fewer than 1,000 employees. For trailer manufacturers, the company must have fewer than 500 employees to be considered a small business. All employees from the parent company and its subsidiaries are considered when determining the number of employees.

Based on our application of these criteria (for details of our analysis, see our Preliminary Regulatory Evaluation in the docket of this rulemaking), NHTSA has concluded that the majority of the light vehicle manufacturers and almost all of the 190 trailer manufacturers that would be relieved of quarterly reports by this rule (except for instances of fatalities) are small businesses.

In the bus industry, we estimate there are 45 businesses, 28 of which currently report to us and 17 of which will be required to report all EWR data to us. Of those 17 bus companies that would be required to report data fully under this rule, based on our review of publicly available information, we estimate that 11 companies are small businesses having fewer than 1,000 employees. In our view, 11 small businesses out of a total of 17 entities (64.7 percent) constitute a substantial number.

To determine whether the proposal would have a significant economic impact on the small bus companies, we look at our estimated cost of the proposal (an annual reporting cost of $13,238 per average company and a one time start-up cost of $3,500 per company) and compare that to the revenues of the company (which would include the parent company and its subsidiaries). The two smallest bus companies that are not a subsidiary of a larger company appear to be Ebus with 60 employees and U.S. Bus Corporation with 70 employees. U.S. Bus has sales revenues of $9.7 million. Costs imposed by this rule would equal 0.17 percent of revenue ($16,500 divided by $9,700,000), which the agency does not consider to be a significant economic impact. Based on publicly available information, Ebus sells approximately 12 vehicles per year at an estimated cost of about $100,000 each. Thus, its estimated revenues are at least $1.2 million and its costs under this rule would equal 1.37 percent of revenue ($16,500 divided by $1,200,000), which the agency does not consider to be a significant economic impact.

For the automobile and light truck manufacturers affected by this proposal, we estimate a cost savings of $47,282 per manufacturer. For trailer manufacturers affected by this proposal, we estimate a cost savings of $11,832 per manufacturer. Even though we do not have revenue estimates for these manufacturers, these are cost savings and not burdens and we do not believe that they are economically significant.

In summary, while this proposal will affect a substantial number of small businesses (a majority of the light vehicle manufacturers, most of the trailer manufacturers, and 11 bus manufacturers), the agency believes that the proposal will not have a significant economic impact on those entities. Accordingly, I certify that this proposed rule would not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132 (Federalism)

Executive Order 13132 on ''Federalism'' requires us 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.' '' The Executive Order defines this phrase to include regulations ''that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' The agency has analyzed this proposed rule in accordance with the principles and criteria set forth in Executive Order 13132 and has determined that it will not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The changes proposed in this document only affect a rule that regulates the manufacturers of motor vehicles and motor vehicle equipment, which does not have 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, as specified in Executive Order 13132.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation with base year of 1995). Adjusting this amount by the implicit gross domestic product price deflator for the year 2007 results in $130 million (119.682 ÷ 92.106 = 1.30). This proposal would not result in expenditures by State, local or tribal governments of more than $130 million annually. The proposal would result in an annual savings of about $3.4 million. The Final Rule did not have unfunded mandates implications. 67 FR 49263 (July 30, 2002).

E. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, ''Civil Justice Reform'' [18] the agency has considered whether this proposed rule would have any retroactive effect. We conclude that it would not have a retroactive or preemptive effect, and judicial review of it may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid Office of Management and Budget (OMB) control number. The collection of information associated with Part 579 is titled ''Reporting of Information and Documents About Potential Defects'' and has been assigned OMB Control Number 2127–0616. At present, OMB is reviewing NHTSA's request for an extension of approval to collect this information. Based on Part 579 as presently written, NHTSA has estimated that the collection of information will result in 2,355 responses, with a total of 82,391 burden hours on affected manufacturers.

NHTSA has published today's NPRM in order to reduce the reporting burden on manufacturers associated with Part 579. NHTSA believes that if this NPRM is made final, there will be a reduction of 26,247 burden hours on those reporting. The reduction in burden hours was calculated by separating the type of reports that manufacturers are required to submit under EWR into two groups, A and B. Group A reports include reports that all manufacturers, regardless of industry, are required to submit if they meet the specific industry threshold. Group B reports are reports that not all manufacturers are required to submit even if they meet the specific industry threshold. Our calculation follows:

GROUP A REPORTS

	At present	NPRM	Change
Claims and notices of injury/fatality	508.9 hours	508.4 hours	·0.4 hours.
Property damage	1200.6 hours	1198.3 hours	·2.3 hours.
Field reports	12,691.5 hours	12,686.25 hours	·5.25 hours.
Foreign Death claims	18 hours	18 hours	0.
			Total change of ·8 hours.

Bus Manufacturers—As noted, if the NPRM is made final, there will be an extra collection of information burden on bus manufacturers. NHTSA estimates that bus manufacturers will file an additional 7 claims and notices of injury/fatality reports a year, for a total of 35 minutes. NHTSA estimates an additional 19 reports on property damage, for a total of 95 minutes. NHTSA estimates an additional 579 manufacturer field reports, for a total of 2,895 minutes. NHTSA estimates there will be no additional foreign death claim reports. Thus, if the NPRM is made final, NHTSA estimates there will be an additional 605 reports or 50.42 burden hours on bus manufacturers.

50.42 additional burden hours minus 8 hours of reduced burden on other vehicle manufacturers that submit Group A reports, results in a total of 42.42 burden hours a year if this NPRM is made final.

Group B Reports

Group B reports consist of warranty claims, consumer complaints, and dealer field reports. If this NPRM is made final, the number of manufacturers reporting on light vehicles will be reduced from 56 to 26 (a reduction of 30 manufacturers) or ·636.5 burden hours. The number of bus manufacturers reporting will increase from 28 to 45 (an addition of 17 manufacturers) for a total of +225.4 burden hours. The number of trailer manufacturers will decrease from 251 to 61 (a reduction of 190 trailer manufacturers), or ·503.93 burden hours.

Thus, if this NPRM is made final, NHTSA estimates there will be a reduction of 915 burden hours on vehicle manufacturers for Group B reports.

Computer Maintenance Burden Hours

If this NPRM is made final, there will be 30 fewer light vehicle manufacturers reporting, or 30 × 347 burden hours per manufacturer, for ·10,410 fewer burden hours. There will be 17 more bus manufacturers reporting, or 17 × 86.52 burden hours per manufacturer, for a total increase of +1470.84 more burden hours on bus manufacturers. There will be 190 fewer trailer manufacturers reporting multiplied by 86.5 burden hours each, for a total of ·16,435 burden hours for trailer manufacturers. Thus, there will be a reduction of 25,374 burden hours on industry resulting from computer maintenance, if this NPRM is made final.

TOTAL BURDEN HOURS ON INDUSTRY, IF TODAY'S NPRM IS MADE FINAL

Group A Reports	+42 burden hours.
Group B Reports	·915 burden hours.
Computer Maintenance Reports.	·25,374 burden hours.
Grand total	·26,247 burden hours.

[18] *See* 61 FR 4729 (February 7, 1996).

For these reasons, if this NPRM is made final, NHTSA believes industry will incur 26,247 fewer burden hours a year in reporting requirements to NHTSA.

G. Executive Order 13045

Executive Order 13045 applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental, health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we 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 us.

This rulemaking is not economically significant.

H. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in or about April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

I. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this proposal.

J. Data Quality Act

Section 515 of the FY 2001 Treasury and General Government Appropriations Act (Pub. L. 106–554, section 515, codified at 44 U.S.C. 3516 historical and statutory note), commonly referred to as the Data Quality Act, directed OMB to establish government-wide standards in the form of guidelines designed to maximize the ''quality,'' ''objectivity,'' ''utility,'' and ''integrity'' of information that Federal agencies disseminate to the public. As noted in the EWR final rule (67 FR 45822), NHTSA has reviewed its data collection, generation, and dissemination processes in order to ensure that agency information meets the standards articulated in the OMB and DOT guidelines. The changes proposed by today's document would alleviate some of the burden for manufacturers to provide EWR reports by reducing the reporting requirement on light vehicle manufacturers and trailer manufacturers. Where the proposed rule change is requiring additional reporting by manufacturers, the new requirement will serve to improve the quality of the data NHTSA receives under the EWR rule, enabling the agency to be more efficient and productive in proactively searching for potential safety concerns as mandated through the TREAD Act.

VII. Proposed Regulatory Text

List of Subjects in 49 CFR Parts 573 and 579

Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

In consideration of the foregoing, NHTSA proposes that 49 CFR parts 573 and 579 be amended as set forth below:

PART 573—DEFECT AND NONCOMPLIANCE RESPONSIBILITY AND REPORTS

1. The authority citation for part 573 is revised to read as follows:

Authority: 49 U.S.C. 30102, 30103, 30116–30121, 30166; delegation of authority at 49 CFR 1.50 and 49 CFR 501.8.

2. Amend § 573.6 by revising paragraphs (c)(2)(iii) and (iv) to read as follows:

§ 573.6 Defect and noncompliance information report.

* * * * *

(c) * * *

(2) * * *

(iii) In the case of items of motor vehicle equipment, the identification shall be by the generic name of the component (tires, child seating systems, axles, etc.), part number (for tires, a list of tire identification numbers), size and function if applicable, the inclusive dates (month and year) of manufacture if available and any other information necessary to describe the items.

(iv) In the case of motor vehicles or items of motor vehicle equipment in which the component that contains the defect or noncompliance was manufactured by a different manufacturer from the reporting manufacturer, the reporting manufacturer shall identify the component and its country of origin (i.e. final place of manufacture or assembly), and the manufacturer and/or assembler of the component by name, business address, and business telephone number. If the reporting manufacturer does not know the identity of the manufacturer of the component, it shall identify the entity from which it was obtained.

* * * * *

3. Revise § 573.9 to read as follows:

§ 573.9 Address for submitting required reports and other information.

All submissions, except as otherwise required by this part, shall be addressed to the Associate Administrator for Enforcement, National Highway Traffic Safety Administration, Attention: Recall Management Division (NVS–215), 1200 New Jersey Avenue, SE., Washington, DC 20590. These submissions may be submitted as an attachment to an e-mail message to *RMD.ODI@dot.gov* in a portable document format (.pdf). Tire Identification Numbers that are required to be submitted pursuant to § 573.6(c)(2)(iii) may be submitted as an attachment to the aforementioned e-mail message and provided in a commercially available text format (e.g. Microsoft Access or Excel) or, if the manufacturer has an early warning reporting identification and password pursuant to 49 CFR 579.28, submitted to NHTSA's tire identification number repository identified on the Office of Defects' Internet homepage (*http://www-odi.nhtsa.dot.gov/safetrecall/TINupload*). Whether or not these submissions are also submitted electronically, defect or noncompliance reports required by § 573.6 of this part must be submitted by certified mail in accordance with 49 U.S.C. 30118(c).

PART 579—REPORTING OF INFORMATION AND COMMUNICATIONS ABOUT POTENTIAL DEFECTS

4. The authority citation for part 579 is amended to read as follows:

Authority: 49 U.S.C. 30102–103, 30112, 30117–121, 30166–167; delegation of authority at 49 CFR 1.50 and 49 CFR 501.8.

Subpart A—General

5. Amend § 579.4 by adding at the end of paragraph (b) a new sentence and amending paragraph (c) by revising the definitions of ''Model,'' ''Other safety

campaign,'' and ''Service brake system'' and adding the definition of ''Fuel and/or propulsion system type'' in alphabetical order, to read as follows:

§ 579.4 Terminology.

* * * * *

(b) *Regulatory terms.* * * * The term *Electronic Stability Control System* is used as defined in S4. of § 571.126 of this chapter.

(c) *Other terms.* * * *

* * * * *

Fuel and/or propulsion system type means the variety of fuel and/or propulsion systems used in a vehicle, coded as follows: 01 gasoline only, 02 diesel only, 03 gasoline—dual fueled, 04 diesel—dual fueled, 05 hybrid—gas/electric, 06 hybrid—diesel/electric, 07 electric—battery, 08 electric—hydrogen fuel cell, 09 natural gas, 10 liquefied petroleum gas, 11 hydrogen internal combustion, 12 alcohol only, 13 other.

* * * * *

Model means a name that a manufacturer of motor vehicles applies to a family of vehicles within a make that have a degree of commonality in construction, such as body, chassis or cab type. For light vehicles, if a model has sub-models with different fuel and/or propulsion system types, it means each such sub-model. For equipment other than child restraint systems, it means the name that the manufacturer uses to designate it. For child restraint systems, it means the name that the manufacturer uses to identify child restraint systems with the same shell, buckle, base (if so equipped) and restraint system.

* * * * *

Other safety campaign means an action in which a manufacturer communicates with owners and/or dealers in a foreign country with respect to conditions under which motor vehicles or equipment should be operated, repaired, or replaced that relate to safety (excluding promotional and marketing materials, customer satisfaction surveys, and operating instructions or owner's manuals that accompany the vehicle or child restraint system at the time of first sale); or advice or direction to a dealer or distributor to cease the delivery or sale of specified models of vehicles or equipment.

* * * * *

Service brake system means all components of the service braking system of a motor vehicle intended for the transfer of braking application force from the operator to the wheels of a vehicle, including the foundation braking system, such as the brake pedal, master cylinder, fluid lines and hoses, braking assist components, brake calipers, wheel cylinders, brake discs, brake drums, brake pads, brake shoes, and other related equipment installed in a motor vehicle in order to comply with FMVSS Nos. 105, 121, 122, or 135 (except equipment relating specifically to a parking brake). This term also includes systems and devices for automatic control of the brake system such as antilock braking, traction control, and enhanced braking, but does not include systems or devices necessary for electronic stability control. The term includes all associated switches, control units, connective elements (such as wiring harnesses, hoses, piping, etc.), and mounting elements (such as brackets, fasteners, etc.).

* * * * *

Subpart C—Reporting of Early Warning Information

6. Amend § 579.21 by:

a. Revising the section heading;

b. Revising the introductory text;

c. Revising the first sentence of paragraph (b)(2);

d. Revising the first sentence of paragraph (c); and

e. Adding a fifth sentence to paragraph (c) to read as follows:

§ 579.21 Reporting requirements for manufacturers of 5000 or more light vehicles annually.

For each reporting period, a manufacturer whose aggregate number of light vehicles manufactured for sale, sold, offered for sale, introduced or delivered for introduction in interstate commerce, or imported into the United States, during the calendar year of the reporting period or during each of the prior two calendar years is 5000 or more shall submit the information described in this section. For paragraphs (a) and (c) of this section, the manufacturer shall submit information separately with respect to each make, model (separately reported by fuel and/or propulsion system type and code), and model year of light vehicle manufactured during the reporting period and the nine model years prior to the earliest model year in the reporting period, including models no longer in production.

* * * * *

(b) * * *

(2) For each incident described in paragraph (b)(1) of this section, the manufacturer shall separately report the make, model (separately reported by fuel and/or propulsion system type and code), model year, the type and VIN of the vehicle, the incident date, the number of deaths, the number of injuries for incidents occurring in the United States, the State or foreign country where the incident occurred, each system or component of the vehicle that allegedly contributed to the incident, and whether the incident involved a fire or rollover, coded as follows: 01 steering system, 02 suspension system, 03 service brake system, 05 parking brake, 06 engine and engine cooling system, 07 fuel system, 10 power train, 11 electrical system, 12 exterior lighting, 13 visibility, 14 air bags, 15 seat belts, 16 structure, 17 latch, 18 vehicle speed control, 19 tires, 20 wheels, 22 seats, 23 fire, 24 rollover, 25 electronic stability control system, 98 where a system or component not covered by categories 01 through 22 or 25, is specified in the claim or notice, and 99 where no system or component of the vehicle is specified in the claim or notice. * * *

(c) *Numbers of property damage claims, consumer complaints, warranty claims, and field reports.* Separate reports on the numbers of those property damage claims, consumer complaints, warranty claims, and field reports which involve the systems and components that are specified in codes 01 through 22, or 25 in paragraph (b)(2) of this section, or a fire (code 23), or rollover (code 24). * * * For each report, the manufacturer shall separately state the vehicle type if the manufacturer stated more than one vehicle type for a particular make, model, model year in paragraph (a) of this section.

* * * * *

7. Amend § 579.22 by revising the section heading and by revising the introductory text to read as follows:

§ 579.22 Reporting requirements for manufacturers of buses and manufacturers of 500 or more medium-heavy vehicles (other than buses) annually.

For each reporting period, any manufacturer who has manufactured for sale, sold, offered for sale, introduced or delivered for introduction in interstate commerce, or imported one or more buses into the United States, during the calendar year of the reporting period or during either of the prior two calendar years shall submit the information described in this section. For each reporting period, any manufacturer who has manufactured for sale, sold, offered for sale, introduced or delivered for introduction in interstate commerce, or imported a total of 500 or more medium-heavy vehicles (a sum that does not include buses) shall submit the information described in this section.

For paragraphs (a) and (c) of this section, the manufacturer shall submit information separately with respect to each make, model, and model year of medium-heavy vehicle and/or bus manufactured during the reporting period and the nine model years prior to the earliest model year in the reporting period, including models no longer in production.

* * * * *

8. Amend § 579.24 by revising the section heading and by revising the first sentence of the introductory text to read as follows:

§ 579.24 Reporting requirements for manufacturers of 5000 or more trailers annually.

For each reporting period, a manufacturer whose aggregate number of trailers manufactured for sale, sold, offered for sale, introduced or delivered for introduction in interstate commerce, or imported into the United States, during the calendar year of the reporting period or during either of the prior two calendar years is 5000 or more shall submit the information described in this section. * * *

* * * * *

9. Amend § 579.27 by revising the section heading to read as follows:

§ 579.27 Reporting requirements for manufacturers of fewer than 500 medium-heavy vehicles or motorcycles annually, for manufacturers of fewer than 5000 light vehicles or trailers annually, for manufacturers of original equipment, and for manufacturers of replacement equipment other than child restraint systems and tires.

* * * * *

10. Amend § 579.29 by adding paragraph (a)(3) to read as follows:

§ 579.29 Manner of reporting.

(a) * * *

(3) For each report required under paragraphs (a) through (c) of §§ 579.21 through 579.26 and submitted in the manner provided in paragraph (a)(1) of this section, a manufacturer must provide a make, model and model year that is identical to the make, model, model year provided in the manufacturer's previous report. A manufacturer that intends to provide a make, model, model year in its report that is not identical to the manufacturer's previous report, must notify NHTSA by populating the appropriate field in the template required under paragraph (a)(1) of this section.

* * * * *

Issued on: November 26, 2008.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E8–28873 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R2-ES-2008-0110; MO-9221050083 – B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) as Endangered with Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90–day petition finding and initiation of a status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90–day finding on a petition to list the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) as an endangered species and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). We find the petition provides substantial scientific or commercial information indicating that listing this subspecies under the Act may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the species, and we will issue a 12–month finding to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data regarding this species. We will make a determination on critical habitat for this subspecies if and when we initiate a listing action.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before February 3, 2009.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R2-ES-2008-0110; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Wally ''J'' Murphy, Field Supervisor, New Mexico Ecological Services Office, 2105 Osuna NE, Albuquerque, NM 87113; by (telephone at 505-346-2525, or by facsimile at 505-346-2542. If you use a telecommunications devise for the deaf (TTD), you may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the status of the Sacramento Mountains checkerspot butterfly. We request information from the public, other concerned governmental agencies, Tribes, the scientific community, industry, or any other interested parties concerning the status of the Sacramento Mountains checkerspot butterfly. We are seeking information regarding the subspecies' historical and current status and distribution, its biology and ecology, its taxonomy, ongoing conservation measures for the subspecies and its habitat, and threats to either the subspecies or its habitat.

If we determine that listing the Sacramento Mountains checkerspot butterfly is warranted, we intend to propose critical habitat to the maximum extent prudent and determinable at the time we would propose to list the subspecies. Therefore, with regard to areas within the geographical range currently occupied by the Sacramento Mountains checkerspot butterfly, we also request data and information on what may constitute physical or biological features essential to the conservation of the subspecies, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the subspecies that are essential to the conservation of the subspecies. Please provide specific

information as to what, if any, critical habitat should be proposed for designation if the subspecies is proposed for listing, and why that proposed habitat meets the requirements of the Act (16 U.S.C. 1531 *et seq.*).

Please note that comments merely stating support or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' Based on the status review, we will issue a 12–month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this finding by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90–day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species.

In making this finding, we based our decision on information provided by the petitioners and information available in our files at the time of the petition review, and we evaluated that information in accordance with 50 CFR 424.14(b). Our process for making a 90–day finding under section 4(b)(3)(A) of the Act and §424.14(b) of our regulations is limited to a determination of whether the information contained in the petition meets the ''substantial information'' threshold.

Previous Federal Actions

On January 28, 1999, we received a petition from Mr. Kieran Suckling of the Southwest Center for Biological Diversity (now Center for Biological Diversity) requesting emergency listing of the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) (butterfly) as endangered with critical habitat. On December 27, 1999, we published a 90–day finding that the petition presented substantial information that listing the butterfly may be warranted, but that emergency listing was not warranted; that document also initiated a status review of the subspecies (64 FR 72300). On September 6, 2001, we published a 12–month finding and proposed rule to list the butterfly as endangered with critical habitat (66 FR 46575). On October 7, 2004, we published a notice of availability of a draft of the Conservation Plan for the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) (Conservation Plan) (69 FR 60178), which was finalized in 2005 (Service *et al.* 2005). On November 8, 2004, we published a notice of availability of a draft economic analysis and draft environmental assessment on our proposed designation of critical habitat for the butterfly (69 FR 64710). On December 21, 2004, we published a withdrawal of the proposed rule (69 FR 76428), concluding that the threats to the species were not as great as we had perceived when we proposed it for listing.

Petition

On July 5, 2007, we received a petition dated June 28, 2007, from Forest Guardians (now WildEarth Guardians) and the Center for Biological Diversity requesting that we emergency list the butterfly as endangered, and that we designate critical habitat concurrently with the listing. The petition clearly identifies itself as a petition, and includes the information required in 50 CFR 424.14(a). The petitioners assert that insect control, climate change, private development, roads, livestock grazing, wildfire, recreational impacts, and noxious weed management threaten the butterfly. The petitioners state that many of the threats identified in the September 6, 2001, proposed rule to list the species (66 FR 46575) are still valid. They claim that the Service erred in 2004 (69 FR 76428) when we withdrew the 2001 proposed listing rule. The petitioners also claim that insect control and climate change pose an imminent and significant risk to species and request that the Service emergency list the butterfly.

Emergency listing is not a petitionable action under the Act. Emergency listing is allowed under the Act whenever immediate protection is needed to address a significant risk to the species' well being. Based on currently available information evaluated below, we determine that emergency listing is not needed for the butterfly.

On July 26, 2007, we notified the petitioners that, to the maximum extent practicable, we would decide whether the petition presented substantial information that the petitioned action may be warranted. On October 16, 2007, we informed the petitioners that an emergency listing of the butterfly was not warranted at that time because the insect control that had been scheduled to occur had been postponed until later in the autumn when the butterfly larvae were likely to be inactive and not threatened by the insect control actions. On December 10, 2007, we notified the petitioners that funding was available to complete the 90–day finding in fiscal year 2008. On January 3, 2008, Forest Guardians filed suit against the Service for failure to issue a 90–day finding on the petition (*Forest Guardians, et al.* v. *Kempthorne*, 1:08-cv-00011-RMU (D. D.C.)). On April 15, 2008, a settlement was reached that requires the Service to submit to the **Federal Register** a determination of whether the petition presents substantial information indicating that the petitioned action of listing the butterfly may be warranted. The settlement stipulated that the determination would be submitted to

the **Federal Register** on or before November 28, 2008. This 90–day finding complies with the settlement agreement.

Species Information

The Sacramento Mountains checkerspot butterfly is a member of the brush-footed butterfly family (Nymphalidae). The adults have a wingspan of approximately 5 centimeters (cm) (2 inches (in)), and they are checkered with dark brown, red, orange, white, and black spots and lines. Larvae are black-and-white banded with orange dorsal bumps and black spines. Checkerspot larvae reach a maximum length of about 2.5 cm (1 in) (Pittenger and Yori 2003, p. 8). The taxon was described in 1980 (Ferris and Holland 1980).

The butterfly inhabits meadows within the mixed-conifer forest (Lower Canadian Zone) at an elevation between 2,380 to 2,750 meters (m) (7,800 to 9,000 feet (ft)) in the vicinity of the Village of Cloudcroft, Otero County, New Mexico. The adult butterfly is often found in association with the larval food plants *Penstemon neomexicanus* (New Mexico penstemon) and *Valeriana edulis* (valerian) and adult nectar sources, such as *Helenium hoopesii* (sneezeweed). *Penstemon neomexicanus* is a narrow endemic species (Sivinski and Knight 1996), restricted to the Sacramento and Capitan Mountains of south-central New Mexico.

Adult butterflies are only known to lay their eggs on *Penstemon neomexicanus* (Service *et al.* 2005, p.10), although the larvae feed on both *P. neomexicanus* and *Valeriana edulis* (Service *et al.* 2005, p.11). After hatching, larvae feed on host plants and, during the 4th or 5th instar (the period between molts in the larval stage of the butterfly), enter an obligatory and extended diapause (maintaining a state of extended inactivity), generally as the food plants die back in the autumn from freezing. Some larvae may remain in diapause for more than one year, depending on environmental conditions. During diapause, larvae probably remain in leaf or grass litter near the base of shrubs, under the bark of conifers, or in the loose soils associated with pocket gopher (*Thomomys bottae*) mounds (Service *et al.* 2005, p.10). Once the larvae break diapause, they feed and grow through three or four more instars before pupating (entering the inactive stage within a chrysalis) and emerging as adults. Diapause is generally broken in spring (March and April) and adults emerge in summer (June and July).

We do not know the extent of the historical range of the butterfly due to limited information collected on this subspecies prior to the time it was formally acknowledged as a new subspecies (Ferris and Holland 1980). The known range of the butterfly is restricted to the Sacramento Mountains and is bordered on the north by the Mescalero Apache Nation lands, on the west by Bailey Canyon at the mouth of Mexican Canyon, on the east by Spud Patch Canyon, and on the south by Cox Canyon (USFS 2000; Service *et al.* 2005, p. 12). The potential range of the butterfly to the east and west is likely restricted because the non-forested areas are below 7,800 ft in elevation and the checkerspot butterfly does not occur below this elevation (Service *et al.* 2005, p. 9).

The U.S. Forest Service (USFS) estimates that there are about 1,096 hectares (ha) (2,712 acres (ac)) of suitable butterfly habitat on USFS and private lands. Of this, 484 ha (1,196 ac) are occupied by the butterfly on USFS lands and 314 ha (777 ac) are occupied on private lands (USFS 2004a). About 298 ha (736 ac) of the 1,096 ha (2,712 ac) of suitable habitat are unoccupied, with 79 ha (194 ac) on USFS lands and 219 ha (542 ac) on private lands (USFS 2004a). This estimate is the best and most recent information we have regarding the range and distribution of the butterfly and the same information we used in our 2004 withdrawal of the proposed rule (69 FR 76428).

For more information on the butterfly, refer to the September 6, 2001, proposed rule (66 FR 46575); the November 1, 2005, Conservation Plan (Service *et al.* 2005); and the December 21, 2004, withdrawal of the proposed rule (69 FR 76428). Some of this information is discussed in our analysis below. The Conservation Plan (Service *et al.* 2005) with the Village of Cloudcroft, Otero County, USFS, and the Service was developed to identify and commit to implementing actions to conserve the butterfly so it would not warrant future listing under the Act.

Threats Analysis

Section 4 of the Act and implementing regulations at 50 CFR 424 set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species on the basis of any of five factors, as follows: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90–day finding, we evaluated whether information on threats to the Sacramento Mountains checkerspot butterfly, as presented in the petition and other information available in our files at the time of the petition review, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The petition asserts that the following conditions under Factor A threaten the butterfly: recreational impacts; roads, corridors, and powerlines; livestock grazing; catastrophic wildfire and fire suppression; noxious weeds; and private property development and the potential expiration of the Otero County Subdivision Ordinance on July 1, 2011. The petitioners assert that, although development (residential, commercial, and recreational associated with residential) within the Village of Cloudcroft decreased following the 2001 publication of the proposed rule to list the butterfly (66 FR 46575), development has nonetheless continued and, combined with other threats to the butterfly, remains significant. The petitioners correctly note that, as passed, the amended Otero County Subdivision Ordinance of 2005 will expire on July 1, 2011 (Otero County 2005, p. 2). The ordinance requires that, for any new subdivision to be developed within potential butterfly habitat, a survey be conducted for the butterfly, its habitat, and its host plant *Penstemon neomexicanus.* If the survey is positive, the developer is required to submit plans to address wildfire control, avoidance of destruction of the butterfly and its habitat, and, if avoidance is not possible, relocation of butterflies and restoration of destroyed habitat. The ordinance also contains a section on enforcement, penalties, and remedies. The amendment to the subdivision ordinance was not in place when we made our withdrawal of the proposed listing rule in 2004, so we did not rely on it when we concluded that development was not a significant threat to the butterfly. The Village of Cloudcroft has received no permit applications for new subdivisions since the Ordinance became effective in 2005. This may be because it has experienced water shortages in recent years (Friederici 2007). The petition presents information on these issues that was

previously submitted in comments on the 2004 draft Conservation Plan (69 FR 60178), draft environmental assessment, and draft economic analysis (69 FR 64710) for the butterfly. The draft environmental assessment and draft economic analysis did not contemplate effects of the future ordinance.

In our 2004 draft economic analysis, we found that approximately 8 to 10 new homes had been constructed annually since 2000 within the boundary of the proposed critical habitat designation of approximately 140 square kilometers (54 square miles) in the vicinity of the Village of Cloudcroft (Service 2004). Based upon this trend of 8 to 10 new homes annually, over the next 20 years, approximately 160 to 200 new residential projects may occur within the boundary of the then-proposed critical habitat for the butterfly. Of these, the economic analysis assumed that 55 to 69 of the landowners may conduct butterfly surveys because they would be located within areas that were proposed as critical habitat and that provide butterfly habitat. Our draft economic analysis estimated that butterflies could be found in 8 to 24 of those 55 areas surveyed. Our draft economic analysis also estimated that the median lot size of these developments was 0.14 ha (0.34 ac), indicating that up to 3.4 ha (8.2 ac) of suitable butterfly habitat may be impacted from commercial and private development activities. For a detailed discussion see Service 2004. In the 2001 proposed rule, we described an additional 4 ha (10 ac) of impacts from a private development on the east side of the Village of Cloudcroft. Thus, we continue to estimate that about 2 percent of the suitable butterfly habitat on private lands (7.4 of 314 ha (18 of 777 ac), using the USFS (2004a, p.2) estimate of occupied acres on private lands) may be subject to commercial and private development. Based on this information, we continue to believe that this level of impact is not a significant threat to the butterfly. We find no substantial information provided by the petitioners or in our files supporting the claim that commercial and private development threaten the butterfly.

The petitioners acknowledge that USFS has taken measures to reduce recreational impacts to the butterfly at two campgrounds and has proposed measures to reduce impacts at five additional campgrounds where the butterfly is present. However, the petitioners assert that increasing recreation demands, including off-road vehicle use, camping, and mountain biking, can result in harm to individual butterflies and to their food plants.

In our 2004 withdrawal of the proposed rule, we discussed increased efforts by the USFS to reduce off-road vehicle use in Bailey Canyon and campgrounds where the butterfly occurs, and we evaluated information on the extent and nature of off-road impacts to the butterfly and its food plants. We concluded that the actions the USFS had taken to reduce off-road vehicle impacts appeared to be effective, that only a small proportion of occupied habitat would be impacted annually by continuing off-road vehicle use, that the magnitude of the impact is low, and that off-road vehicle use does not significantly threaten the butterfly (69 FR 76428, December 21, 2004). The petitioners do not present information, and we have no information in our files, that off-road vehicle use has increased since 2004.

In our 2004 withdrawal of the proposed rule, we discussed increased efforts by the USFS to reduce impacts to the butterfly from dispersed camping and camping at established campgrounds. Although the petitioners acknowledge that USFS has taken measures to reduce recreational impacts to the butterfly at established campgrounds, they claim that increased camping can result in harm to the butterfly. We agree that increased camping can result in increased impacts to the butterfly. However, the petitioners did not present information that camping has increased in habitats occupied by the butterfly, and we have no information in our files that camping has increased.

In our 2004 withdrawal of the proposed rule, we acknowledged that butterfly larvae were known to occur on and adjacent to mountain bike trails, and we reviewed efforts routinely made by the USFS to address potential impacts to the butterfly, including larvae, during large events, such as mountain bike races (69 FR 76428). We concluded that, while mountain biking does impact the butterfly and its host plants to some extent, it did not appear that the impacts were likely significant to the butterfly. The petitioners do not present information that impacts from mountain biking have increased in habitats occupied by the butterfly, and we have no information in our files that such impacts have increased.

The petitioners discuss the impacts of roads, corridors, and powerlines by comparing our discussion of those impacts in our 2004 withdrawal of the proposed rule (69 FR 76428) to our discussion of those impacts in our 2001 proposed rule (66 FR 46575). Based on the discussion in the petition, we assume they are addressing only service roads and corridors related to powerline construction and maintenance. In our withdrawal, we acknowledged that, although some restrictions were likely to be placed on a powerline company when constructing a new powerline, because of the linear nature of these impacts and the recognition that adjacent habitat will remain intact, we concluded that the activity represented only a limited threat to the species (69 FR 73428). We also noted that no new projects are currently planned by that company, indicating no other powerline-related threats were foreseeable. We have no new information in our files, and the petitioners presented no new information on increased impacts to the butterfly and its habitat from powerlines and associated roads and corridors, since our withdrawal was published in 2004.

The petitioners claim that livestock grazing continues to threaten butterfly habitat. In our 2004 withdrawal of the proposed rule, we found that, because the USFS is managing these allotments for medium-intensity grazing, the effects on the butterfly and its habitat will be minimal and will not result in the butterfly population being compromised (69 FR 76428). We concluded that the current and future occurrence of grazing does not represent a principal factor in the viability of the butterfly and its habitat. The petitioners present no new information about livestock grazing since our 2004 withdrawal of the proposed rule, and we have no new information in our files to indicate that the threat from livestock grazing has increased.

In addressing the threat of fire suppression and wildfire, the petitioners compare the analysis used in our 2001 proposed rule (66 FR 46575) to our analysis in the 2004 withdrawal of the proposed rule (69 FR 76428). In our withdrawal, we used information from the USFS, assessed new and continued efforts to reduce the risk of catastrophic wildfire in the Sacramento Mountains, and concluded that the threat to the butterfly from catastrophic wildfire had been reduced and was no longer significant. We found that fire and activities conducted to reduce the risk of fire may be beneficial by increasing connectivity between areas of suitable butterfly habitat. We have no new information in our files that the threat of wildfires has increased since our 2004 withdrawal of the proposed rule.

The petitioners assert that the manual weed-pulling program to control

noxious weeds does not fully address the threat of noxious weeds to the butterfly. The USFS began the weed-pulling program in 2001, and the program is described in the Conservation Plan (Service *et al.* 2005, p. 34). In our 2004 withdrawal of the proposed listing (69 FR 76428), we found that nonnative vegetation and the application of herbicides are currently being managed, and we concluded that the nonnative vegetation is a not significant threat to the butterfly. The petitioners present no new information since our 2004 withdrawal that the threat of nonnative or noxious weeds has increased.

To support their claims of any threats to the species under Factor A, the petitioners provided no information or references beyond those available to us when we withdrew our proposal to list the butterfly in 2004. We find that the petition does not present substantial information, and we have no information in our files, indicating that the petitioned action may be warranted due to the present or threatened destruction, modification, or curtailment of the habitat or range of the butterfly due to development (including the explanation of the Otero County subdivision Ordinance in 2011), recreation, powerlines and associated roads and corridors, livestock grazing, fire suppression and wildfire, and noxious weeds.

B. Overutilization For Commercial, Recreational, Scientific, or Educational Purposes

The petition asserts that collection threatens the butterfly, reiterating our preliminary finding from the 2001 proposed rule that the butterfly's life history characteristics, attractiveness to collectors due to rarity, and newspaper publications promote collection (66 FR 46575). In our 2004 withdrawal, we concluded that the closure of USFS lands to butterfly collecting in 2000 had reduced the threat of collection and that overcollection was no longer a threat. The petition presents no new information or explanation as to why the butterfly is threatened by collection. We have no new information in our files since the 2004 withdrawal indicating that overutilization for commercial, recreational, scientific, or educational purposes is a threat to the butterfly. Therefore, we find that the petition does not present substantial information indication that the petitioned action may be warranted due to overutilization for commercial, recreational, scientific, or educational purposes.

C. Disease or Predation

The petitioners provide no information addressing this factor, and we have no information in our files indicating that the petitioned action may be warranted due to disease or predation. We agree that this issue is not applicable to the subspecies at this time.

D. Inadequacy of Existing Regulatory Mechanisms

The petition asserts that the subspecies' status as a Forest Sensitive Species does not provide the binding protections of listing under the Act. The butterfly has been designated by the Regional Forester as a Forest Sensitive Species. As a Forest Sensitive Species, the USFS is required to analyze the butterfly in all applicable National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et. seq.*) documents. In addition, the petitioners claim that new USFS regulations were recently passed that remove any species viability standard protections that were previously provided in 36 CFR 219.20, a regulation requiring the USFS to address ecological conditions necessary to maintain species viability. The petition also asserts that conservation measures resulting from section 7 (of the Act) conferencing no longer apply because the species is no longer proposed for listing. Additionally, the petitioners assert that the butterfly has no State protection, as New Mexico does not recognize insects as ''wildlife.''

On April 21, 2008, a new USFS planning rule (73 FR 21468) was made final. In that rule, species viability standard protections are removed and there is no requirement similar to section 7 consultation under the Act. However, as part of their multiple-use mandate, the National Forest Management Act (NFMA) requires the USFS to ''provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives'' (16 U.S.C. 1604(g)(3)(B)). The NFMA does not mandate a specific degree of diversity nor does it mandate viability. In practice, the USFS has taken actions to conserve and avoid impacts to the butterfly and its habitat (see USFS 2004a, 2004b, 2007a, 2007b, 2007c, 2007f). As a Forest Sensitive Species, the butterfly has been analyzed in all applicable NEPA documents (USFS 2004b). We do not know whether the butterfly would be designated a species of interest by the USFS under the new planning rule, which would be applied when the Lincoln National Forest Plan is revised in the coming years. Species of interest are those for which the responsible official determines that management actions may be necessary or desirable to achieve ecological or other multiple-use objectives (USFS planning rule; 73 FR 21468; April 21, 2008). The USFS's new planning rule indicated that once a USFS land and resource management plan has been revised, the sensitive species designation will no longer be needed because species of concern (listed, proposed, or candidate species under the Act) or species of interest will replace them. Although we have no information indicating when the plan might be revised, the USFS' new planning rule states that the responsible official would determine if the ecological conditions to support species of interest would be provided by the plan components for ecosystem diversity. If not, then additional species-specific plan components would be included (73 FR 21468; April 21, 2008). The Service's 2004 withdrawal of the proposed listing rule for the butterfly relied partly on the butterfly's inclusion in the Forest Sensitive Species designation for maintenance of certain protections for the butterfly through NEPA (69 FR 76428). Since these particular protections have been eliminated, and it is unclear whether the butterfly will be designated a species of interest under the new rule, it is unclear whether this change will be adequate to protect the butterfly.

The petitioners state that the butterfly has no State protection, because New Mexico does not recognize insects as ''wildlife.'' This information is correct. We presented this information in the October 7, 2004, draft Conservation Plan for which we invited public comment (69 FR 60178), and we considered this information when we withdrew the proposal to list the species. State statute does not address habitat protection, threats to the larval food plant, or other threats that are not directly related to taking (killing or otherwise harming) individual butterflies. The petition does not indicate how a lack of State regulations threatens the butterfly with extinction. New Mexico State status as an endangered species would only convey protection from collection or intentional harm. As noted above, we believe the USFS' butterfly closure order adequately protects the species from collection. Moreover, the petition and information in our files do not contain substantial information that the butterfly is faced with current and future threats that could be addressed by current State statute.

In summary, the petitioners provide substantial information on changes in

USFS regulations that remove the butterfly from the Forest Sensitive Species status, but the petitioners provide no new information since our 2004 withdrawal of the listing rule on the inadequacy of other existing regulatory mechanisms. In light of all of this information, we find that the petition presents substantial information that the petitioned action may be warranted due to the inadequacy of existing mechanisms.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The petition asserts that insect control, climate change, and extreme weather threaten the butterfly under Factor E. The petitioners state that insect control on private lands was conducted within the Village of Cloudcroft. Newspaper articles provided by the petitioners substantiate that spraying of Confirm 2F was used on an area of private land in June of 2007. In the proposed rule (66 FR 46575; September 6, 2001), we estimated that there were about 4 ha (10 ac) of potentially suitable butterfly habitat within a private development on the east side of the Village of Cloudcroft. From information in our files, we believe this private development is the same area sprayed with Confirm 2F. It is unknown how much of the potentially suitable butterfly habitat was sprayed, because no further information is available in our files or the petition. That all of the 4 ha (10 ac) of potentially suitable butterfly habitat was sprayed is unlikely, because insect control was targeting a fir looper (*Nepytia janetae*) within mixed conifer forests, whereas the butterfly is found within open meadow habitat. If we assume a worst case scenario (that drift from the spray affected all of the 4 ha (10 ac) of potentially suitable butterfly habitat within this area), a small fraction (4 of 1,096 ha (10 of 2,709 ac)) of the suitable butterfly habitat throughout the subspecies' range was affected, and that is not significant. As described below, the fir looper population has declined (USFS 2008), and we do not have any information to indicate that spraying for fir looper control will continue.

The petitioners requested emergency listing due to the perceived immediate threats to the species' continued existence from a proposed aerial spraying in the autumn of 2007 of the biological insecticide *Bacillus thuringiensis* var. *kurstaki* (Btk) to control the fir looper. Btk is activated by the alkaline condition of the mid-gut of larvae that ingest it. Consequently, larvae must ingest Btk for it to be toxic. During summer and autumn 2007, Otero County and the USFS requested, and we provided, technical assistance on appropriate measures to minimize or avoid impacts to the butterfly (USFS 2007a; Otero County 2007a, 2007b). We advised them that indirect effects to the butterfly from Btk could be significant if the insecticide were applied when larvae of the butterfly were actively feeding (Service 2007a, 2007b, 2007c, 2007d, 2007e, 2007f). The USFS conducted an environmental assessment under NEPA that analyzed the effects to private and Federal lands of Btk spraying on Federal lands (USFS 2007b, 2007c, 2007d). Following that environmental assessment, the USFS, Village of Cloudcroft, and Otero County waited until they and the Service determined from surveys that the larvae of the butterfly were in diapause (inactive and not feeding) to spray Btk to control the fir looper (USFS 2007e, 2007f; Service 2007g, 2007h). Surveys confirmed that larvae of the butterfly were in diapause prior to spraying Btk on November 5, 2007 (USFS 2007f, 2007g, Service 2007g). Btk is sensitive to sunlight, usually becoming inactive within 3 to 7 days after application (USFS 2007c). Therefore, Btk would have been inactive when larvae of the butterfly emerged from diapause in the spring of 2008, indicating that the spraying of Btk during November 2007 did not measurably impact the butterfly. Post-spraying monitoring in the autumn of 2007 determined that the fir looper population had declined to nearly undetectable levels on the Lincoln National Forest and adjacent lands (Anderson 2008). Therefore, the USFS concluded that no spraying was needed during March 2008 (Anderson 2008).

Similar to the spraying that occurred in November 2007, any future proposed insect control by the USFS would be analyzed under NEPA. However, because new USFS regulations remove the butterfly's Forest Sensitive Species status when the land management resource plan for the Lincoln National Forest is revised (see discussion under Factor D), we do not know whether the butterfly will be included in future NEPA analyses. A NEPA analysis is not required for non-Federal agency spraying on private lands, which comprise 49 percent of the butterfly's suitable habitat. We note that the Conservation Plan provided the framework under which the USFS and Otero County requested and received technical assistance on the avoidance of impacts to the butterfly. Through this framework and subsequent dialogue, we found that this process was successful in avoiding impacts to the butterfly in the autumn of 2007. One conservation action agreed to in the Conservation Plan was for the Service to provide technical assistance on management of the butterfly when requested by a party to the plan. We acknowledge that if Btk or chemical insecticides, such as Carbaryl or Confirm 2F, are applied when larvae of the butterfly are actively feeding, insect control would pose a threat to the butterfly. That such spraying actually occurred in 2007 during the butterfly's active feeding period, although admittedly on only 4 ha (10 ac), indicates that private landowner spraying on private lands may be a threat. The petition does not present references or substantial information regarding insect spraying beyond the autumn of 2007 and spring of 2008. However, insect control may be a threat in the future, based on the fact that spraying occurred in 2007; that the delay of additional spraying to a time when the butterfly was inactive took considerable time and effort by the Village of Cloudcroft, Otero County, USFS, and the Service; and there is uncertainty over how the USFS will address insect control and the butterfly under the new USFS regulations.

The petition asserts that climate change is likely a greater threat to the butterfly than was previously considered by the Service. The petitioners assert that scientific information not considered in, or published subsequent to, the 2004 withdrawal indicates that the impact of climate change will be especially severe in New Mexico and the southwestern United States. They cite a State of New Mexico website, which states that the impacts of climate change and climate variability on the environment include the potential for prolonged drought, severe forest fires, warmer temperatures, increased snowmelt, and reduced snow pack (*http://www.nmclimatechange.us/background-impacts.cfm*). The petitioners also note that harm from climate change to butterflies has been particularly well documented for other species of checkerspot butterflies.

The petitioners cite Parmesan (1996) to support their claim that the Sacramento Mountains checkerspot butterfly will be imperiled by climate change. Parmesan (1996, p. 765) documented a range shift due to population extinctions in the non-migratory Edith's checkerspot butterfly (*Euphydryas editha*) in western North America and presented arguments on why the shift was attributable to climate change. The petition correctly indicates that *Penstemon neomexicanus*, the only plant on which the butterfly is known

to lay eggs, is known within portions of the Capitan Mountains, which are adjacent to and north of the current range of the butterfly in the Sacramento Mountains. The petition asserts that a slight shift in either the butterfly's or *P. neomexicanus*' distribution, productivity, phenology, or other factors resulting from climate change could imperil the butterfly. The apparent northward range ''shift'' in the Edith's checkerspot butterfly was due to greater population extinctions at southern latitudes, not to a northward expansion of its range (Parmesan 1996, p. 765). Parmesan (1996, pp. 765-766) discussed why these extinctions were most likely attributable to climate change rather than habitat destruction. If the Sacramento Mountains checkerspot butterfly were to respond similarly, it may decline at the southern portion of its range, but not expand northward to the Capitan Mountains.

As noted under Species Information, the elevational range for the Sacramento Mountains checkerspot butterfly is 2,380 to 2,750 m (7,800 to 9,000 ft), and that of *Penstemon neomexicanus*, on which the butterfly lays its eggs, is 1,830 to 2,750 m (6,000 to 9,000 ft) (New Mexico Rare Plant Technical Council 2008, webpage). Thus, the butterfly is at the upper elevational range of the plant on which it depends, so it would be dependent on an upward elevational shift of *P. neomexicanus* for the butterfly to shift to higher elevations.

The petition asserts that extreme weather threatens the butterfly. However, other than reiterating our preliminary finding from the 2001 proposed listing rule (66 FR 46575; September 6, 2001) that this may be a threat to the species, the petition presents no information or explanation regarding why the butterfly is threatened as a result of extreme weather. In our 2004 proposed listing withdrawal, we found that the butterfly can survive and persist despite natural events such as drought (69 FR 76428; December 21, 2004). Since our finding in that 2004 withdrawal, we have no new information in our files indicating that there is any such threat from extreme weather currently or in the foreseeable future.

In summary, the petition and information readily available to us do not provide substantial information that extreme weather threatens the butterfly. The petition and information readily available to us provide substantial information that indicate that the petitioned action may be warranted because pesticide spraying and climate change are other natural or manmade factors that may threaten the butterfly.

Finding

We have reviewed the petition and the literature cited in the petition, and evaluated the information to determine whether the sources cited support the claims made in the petition. We also reviewed reliable information that was readily available in our files to clarify and verify information in the petition. Based on our evaluation of the information provided in the petition, and in accordance with recent applicable court decisions pertaining to 90–day findings, we find that the petition presents substantial scientific information indicating that listing the Sacramento Mountains checkerspot butterfly may be warranted. Our process for making this 90–day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents ''substantial scientific and commercial information,'' which is interpreted in our regulations as ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)).

The petitioners present substantial information indicating that the butterfly may be threatened by Factor D (inadequacy of existing USFS regulatory mechanisms) and Factor E (pesticide spraying and climate change) throughout the entire range of the butterfly. The petitioners do not present substantial information that Factors A, B, and C are currently, or in the future, considered a threat to the butterfly. Based on this review and evaluation, we find that the petition has presented substantial scientific or commercial information that listing the butterfly throughout all or a portion of its range may be warranted due to current and future threats under Factors D and E. As such, we are initiating a status review to determine whether listing the butterfly under the Act is warranted. We will issue a 12–month finding as to whether any of the petitioned actions are warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding the butterfly.

It is important to note that the ''substantial information'' standard for a 90–day finding is in contrast to the Act's ''best scientific and commercial data'' standard that applies to a 12–month finding as to whether a petitioned action is warranted. A 90–day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have completed a thorough status review of the species, which is conducted following a positive 90–day finding. Because the Act's standards for 90–day and 12–month findings are different, as described above, a positive 90–day finding does not mean that the 12–month finding also will be positive.

We encourage interested parties to continue gathering data that will assist with the conservation and monitoring of the butterfly. The petitioners requested that critical habitat be designated for this species. If we determine in our 12–month finding that listing the butterfly is warranted, we will address the designation of critical habitat at the time of the proposed rulemaking.

References Cited

A complete list of all references cited in this finding is available upon request from the New Mexico Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this rule are the New Mexico Ecological Services Office staff members (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 12, 2008.

Kenneth Stansell,

Acting Director, Fish and Wildlife Service

[FR Doc. E8–28119 Filed 12–4–08; 8:45 am]

BILLING CODE 4310-55-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

RIN 0648–AW97

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

Correction

In proposed rule document E8–28015 starting on page 71598 in the issue of Tuesday, November 25, 2008, make the following correction:

On page 71598, in the first column, under the **DATES** heading, in the second line ''November 25, 2008'' should read ''January 26, 2009''.

[FR Doc. E8–28015 Filed 12–4–08; 8:45 am]

BILLING CODE 1505–01–D

Notices

Federal Register
Vol. 73, No. 235
Friday, December 5, 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

Submission for OMB Review; Comment Request

December 1, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Organic Production Survey (OPS).

OMB Control Number: 0535–NEW.

Summary of Collection: National Agricultural Statistics Services (NASS) is authorized under the authority of 7 U.S.C. 2204(a) to collect these data. The 2008 Farm Bill appropriated $1 million to NASS for assimilating and disseminating information. This survey will be a follow-on survey to the 2007 Census of Agriculture Survey and will use as a sampling universe every respondent on the 2007 Census of Agriculture Survey who reported organic production for sale in 2007. Data collection will be in the spring of 2009.

Need and Use of the Information: Sales of organic products have been increasing at a rate of 20 percent annually according to the Organic Trade Association. This survey will provide organic information on acreage in production, commodity, expenses, marketing practices (handling, distribution, retail, and consumer purchasing patterns), and prices received by organic producers. Additionally, this survey will attempt to measure the contribution to the Organics industry from the operations currently transitioning to organic production and those producers that are exempt from the certification process due to not reaching the minimum sales threshold of $5,000.

Description of Respondents: Farmers, ranchers and farm managers self identified as organic producers.

Number of Respondents: 20,000.

Frequency of Responses: Reporting: One time.

Total Burden Hours: 9,975.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–28771 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS–ST–08–0102]

Plant Variety Protection Board; Open Teleconference Meeting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of teleconference meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming teleconference meeting of the Plant Variety Protection Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend the meeting.

DATES: December 15; 1 p.m.–3 p.m. Eastern Standard Time.

ADDRESSES: The meeting will be held in the United States Department of Agriculture, Agricultural Marketing Service Conference Room, Room 3074, South Building, 1400 Independence Avenue, SW., Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Janice M. Strachan, Plant Variety Protection Office (PVPO), Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture, telephone number (301) 504–5518, fax (301) 504–5291, or e-mail *PVPOmail@usda.gov*.

SUPPLEMENTARY INFORMATION:

The Plant Variety Protection (PVP) Board is authorized under section 7 of the Plant Variety Protection Act (7 U.S.C. 2327). The Board advises the Secretary of Agriculture on rules and regulations implementing the Act. On December 15, 2008, the Board will conduct a teleconference meeting to discuss improving the Plant Variety Protection Office Application Process and other related topics.

The tentative agenda for the teleconference meeting includes: (1) Welcome and opening remarks; (2) Action on general recommendations from Board minutes of September 9, 2008 teleconference meeting; (3) Financial status of the PVP Office; (4) PVP outreach activities; and (5) Adjournment.

The public may attend the teleconference at the following address: USDA's Agricultural Marketing Service

Conference Room, Room 3074, South Building, 1400 Independence Avenue, SW., Washington, DC 20250. All attendees are required to register with the PVP Office at 301–504–5518 before December 11, 2008. Identification will be required to be admitted to the USDA's South Building.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation should be directed to the person listed under **FOR FURTHER INFORMATION CONTACT**. Minutes of the teleconference will be posted on the Internet Web site *http://www.ams.usda.gov/PVPO*.

Dated: December 1, 2008.

William T. Sessions,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. E8–28767 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Solicitation of Nominations

Correction

In notice document 08–27724 appearing on page 70613 in the issue of Friday, November 21, 2008, make the following correction:

In the first column, the subject heading should read as set forth above.

[FR Doc. E8–27724 Filed 12–4–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0129]

Public Meetings; National Tuberculosis Program Listening Sessions; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of public meetings; correction.

SUMMARY: We are correcting an error in a notice advising the public that the Animal and Plant Health Inspection Service will host a series of public meetings to provide the public with an opportunity to offer comments regarding current challenges and new approaches for future tuberculosis control methods and eradication in view of budgetary constraints. The notice, which was published in the **Federal Register** on November 20, 2008 (73 FR 70310), provided an incorrect location for the meeting to be held in Washington, DC.

DATES: The Washington, DC, public meeting will be held on December 16, 2008, from 8 a.m. to 4:30 p.m., local time. Meeting registration will be from 7 a.m. to 8 a.m. prior to the public meeting.

ADDRESSES: The Washington, DC, public meeting will be held at the Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Dr. Alecia L. Naugle, Program Manager, National Tuberculosis Program, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737; (301) 734–6954.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** on November 20, 2008 (73 FR 70310), the Animal and Plant Health Inspection Service announced a series of meetings to discuss its National Tuberculosis (TB) Program. The meetings are designed to assemble a wide range of producers and other stakeholders to discuss current challenges and potential new approaches for TB control and eradication in view of budgetary constraints. The meetings will be held in various geographical locations to facilitate attendance. Participants will have the opportunity to pose questions and offer written and oral comments.

In that meeting notice, we provided the incorrect location for the December 16, 2008, public meeting in Washington, DC. The correct location is the Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

Done in Washington, DC, this 1st day of December 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–28884 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Grey Towers Visitor Comment Card

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the new information collection, Grey Towers Visitor Comment Card.

DATES: Comments must be received in writing on or before February 3, 2009 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Nicole Bernarsky, U.S. Forest Service, Grey Towers National Historical Site, P.O. Box 188, Milford, PA 18337.

Comments also may be submitted via facsimile to (570) 296–9675 or by e-mail to: *nbernarsky@fs.fed.us*.

The public may inspect comments received at Grey Towers National Historic Site during normal business hours. Visitors are encouraged to call ahead to (570) 296–9630 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Nicole Bernarsky, Grey Towers National Historic Site, (570) 296–9630. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Grey Towers Visitor Comment Card.

OMB Number: 0596–New.

Type of Request: New.

Abstract: The Forest Service is proposing a new information collection for a visitor comment card to be used at Grey Towers. Located in Milford, Pennsylvania, Grey Towers was originally the summer estate of the James Pinchot family and later the primary home of Gifford Pinchot, America's first forester and founder of the USDA Forest Service. In 1963, Gifford Bryce Pinchot, son of Gifford and Cornelia, donated Grey Towers and 102 acres to the U.S. Forest Service, the Federal agency founded by his father and which now administers the site.

The U.S. Forest Service works with numerous partners to carry on the Pinchot legacy by delivering public programs, interpretive tours, and conservation education programs. Embracing a philosophy of preservation through use, Grey Towers, in partnership with the Pinchot Institute, also functions as an active conference center for conservation and natural resource issues. Today, conferences and seminars at the estate bring together a diversity of leading conservation and environmental thinkers to help guide the future of natural resource conservation.

Grey Towers strives to provide quality-based programs and events; and participant input is vital to achieving this goal. The proposed comment card

provides a venue for those participating in meetings and educational activities at Grey Towers to provide feedback. The completion and subsequent evaluation of this form ensures that Grey Towers can continue to provide excellent service to all attendees. This information collection only covers the burden associated with responses collected from the public, though Federal employees also attend events held at the facility.

The information is collected on an 8.5 x 11 inch form provided to program and event participants at the conclusion of the activity. Forest Service employees overseeing Grey Towers programs and administration collect the information and use it to improve and enhance the programs and events. Information collected includes attendance, usage, and feedback from program attendees.

Without this information collection, the Forest Service would not have necessary information to enhance or improve offered programs. Programs or events would possibly have negative aspects of which the staff would be unaware, such as insufficient or unbeneficial delivery or content.

Estimate of Annual Burden: 10 minutes.

Type of Respondents: Individuals (event participants).

Estimated Annual Number of Respondents: 4,000.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 667 hours.

Comment is Invited

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: November 20, 2008.

Robin L. Thompson,

Associate Deputy Chief, State and Private Forestry.

[FR Doc. E8–28837 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Call for Nominations for Appointment of Primary and Alternate Representatives, Santa Rosa and San Jacinto Mountains National Monument Advisory Committee

AGENCIES: Bureau of Land Management, U.S. Department of the Interior; and Forest Service, U.S. Department of Agriculture.

ACTION: Notice of call for nominations for appointment or reappointment of primary representatives, and appointment or reappointment of alternate representatives to occupy various positions on the Santa Rosa and San Jacinto Mountains National Monument Advisory Committee.

SUMMARY: This notice constitutes an open call to the public to submit nomination applications for the following positions on the Santa Rosa and San Jacinto Mountains National Monument Advisory Committee:

Primary Representatives

- Representative of the City of Cathedral City; term will begin July 21, 2009 and expire July 21, 2012.
- Representative of the City of Indian Wells; term will begin July 21, 2009 and expire July 21, 2012.
- Representative of the Coachella Valley Mountains Conservancy; term will begin July 21, 2009 and expire July 21, 2012.
- Representative of the County of Riverside, California; term will begin July 21, 2009 and expire July 21, 2012.
- Representative of the Winter Park Authority; term will begin July 21, 2009 and expire July 21, 2012.
- Representative of the Agua Caliente Band of Cahuilla Indians; term will begin on the day of appointment and expire December 16, 2011.
- Representative of a local developer or builder organization; term will begin on date of appointment and expire March 16, 2010.

Alternate Representatives

- Alternate representative of the City of Cathedral City; term will begin July 21, 2009 and expire July 21, 2012.
- Alternate representative of the City of Indian Wells; term will begin July 21, 2009 and expire July 21, 2012.
- Alternate representative of the Coachella Valley Mountains Conservancy; term will begin July 21, 2009 and expire July 21, 2012.
- Alternate representative of the County of Riverside, California; term will begin July 21, 2009 and expire July 21, 2012.
- Alternate representative of the Winter Park Authority; term will begin July 21, 2009 and expire July 21, 2012.
- Alternate representative of the City of Rancho Mirage; term will begin on the day of appointment and expire December 16, 2011.
- Alternate representative of the City of Palm Desert; term will begin on the day of appointment and expire December 16, 2011.
- Alternate representative of the Pinyon Community Council; term will begin on the day of appointment and expire December 16, 2011.
- Alternate representative of a local developer or builder organization; term will begin on date of appointment and expire March 16, 2010.
- Alternate representative of the City of Palm Springs; term will begin on date of appointment and expire March 16, 2010.
- Alternate representative of the City of La Quinta; term will begin on date of appointment and expire March 16, 2010.
- Alternate representative of a local conservation organization; term will begin on date of appointment and expire March 16, 2010.

DATES: Nomination applications must be submitted to the address listed below no later than 90 days after the date of publication of this notice in the **Federal Register**.

ADDRESSES: Santa Rosa and San Jacinto Mountains National Monument Visitor Center, Attn: National Monument Manager, Advisory Committee Nomination Application, 51–500 Highway 74, Palm Desert, California 92260.

FOR FURTHER INFORMATION CONTACT: Jim Foote, Monument Manager, Santa Rosa and San Jacinto Mountains National Monument, telephone (760) 861–5771; e-mail *jfoote@ca.blm.gov*.

SUPPLEMENTARY INFORMATION: In accordance with the Santa Rosa and San Jacinto Mountains National Monument Act of 2000 (Pub. L. 106–351), the

Secretary of the Interior and the Secretary of Agriculture have jointly established an advisory committee for the Santa Rosa and San Jacinto Mountains National Monument under the provisions of the Federal Advisory Committee Act. The purpose of the National Monument Advisory Committee (MAC) is to advise the Secretaries with respect to preparation and implementation of the National Monument Management Plan.

The MAC holds public meetings at least once per year. The Designated Federal Official (DFO), or his/her designee, may convene additional meetings as necessary. All MAC members are volunteers serving without pay, but will be reimbursed for travel and per diem expenses at the current rates for government employees in accordance with 5 U.S.C. 5703, when appropriate. Members of the MAC may be reappointed upon expiration of the member's current term.

All applicants must be citizens of the United States. Members are appointed by the Secretary of the Interior with concurrence by the Secretary of Agriculture. Applicants must be qualified through education, training, knowledge, or experience to give informed advice regarding an industry, discipline, or interest to be represented.

There is no limit to the number of nomination applications which may be submitted for each open position. Current MAC appointees may submit an updated nomination application for reappointment. Any individual may nominate himself or herself for appointment. Completed nomination applications should include letters of reference and/or recommendations from the represented interests or organizations, and any other information explaining the nominee's qualifications (e.g., resume, curriculum vitae).

Nomination application packages are available at the Santa Rosa and San Jacinto Mountains National Monument Visitor Center, 51–500 Highway 74, Palm Desert, California; through the Santa Rosa and San Jacinto Mountains National Monument Web page at *http://www.blm.gov/ca/st/en/fo/palmsprings/santarosa/mac_nominations.html*; via telephone request at (760) 862–9984; by written request from the Santa Rosa and San Jacinto Mountains National Monument Manager at the following address: Santa Rosa and San Jacinto Mountains National Monument Visitor Center, Attn: National Monument Manager, Advisory Committee Nomination Application Request, 51–500 Highway 74, Palm Desert, California 92260; or through an e-mail request at *jfoote@ca.blm.gov*.

Each application package includes forms from the U.S. Department of the Interior and U.S. Department of Agriculture. All submitted nomination applications become the property of the Department of the Interior, Bureau of Land Management, Santa Rosa and San Jacinto Mountains National Monument, and will not be returned. Nomination applications are good only for the current open public call for nominations.

John R. Kalish,

Field Manager, Palm Springs-South Coast Field Office, California Desert District, Bureau of Land Management.

Laurie Rosenthal,

District Ranger, San Jacinto Ranger District, San Bernardino National Forest, U.S. Forest Service.

[FR Doc. E8–28838 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–11–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Funds Availability (NOFA): Cooperative Agreements for Heir Property

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBS) announces the availability of approximately $230,000 in funds for fiscal year (FY) 2009 for cooperative agreements to develop and implement pilot programs aimed at: (1) Preventing and alleviating the problems facing African Americans in rural areas that are involved with real estate with clouded title due to unresolved interests of generations of heirs (otherwise known as ''heir properties''); (2) establishing an outreach/educational program that will assist farmers and homeowners with heir property issues in expanding ownership; and (3) enabling farming heir property owners to develop economically viable agricultural operations and accrue homeownership.

The Agency proposes to enter into a maximum of four cooperative agreements with private non-profit community based organizations (CBO) to assist them in the development of proposals to be presented to the Agency that meet the purposes described above. The maximum amount of each of these initial agreements is $20,000.

After Agency review of the proposals, the Agency may offer no more than two CBOs initially awarded cooperative agreements a subsequent cooperative agreement to implement the proposals the CBOs developed. The maximum amount of each of these subsequent agreements is $75,000.

DATES: Please submit proposals and applications for the initial cooperative agreements no later than 30 days from the date of publication in the **Federal Register**. Late applications will not be eligible for FY 2009 funding.

The initial cooperative agreement awardees will be selected no later than February 18, 2009. Any subsequent cooperative agreements will be awarded no later than June 3, 2009, subject to availability of funds.

ADDRESSES: Applicants may obtain application information, guides, and materials for the cooperative agreement by contacting USDA Rural Development at (202) 720–8460, (TDD: (800) 877–8339, Federal Information Relay Service) and asking for cooperative research agreement application guidance.

Submit completed paper applications for a cooperative agreement to USDA Rural Development Cooperative Programs, Attn: Cooperative Research, Mail STOP 3250, Room 4016–South, 1400 Independence Avenue, SW., Washington, DC 20250–3250. The phone number that should be used for FedEx packages is (202) 720–7558.

Submit electronic applications at *http://www.grants.gov*, following the instructions found on this Web site.

FOR FURTHER INFORMATION CONTACT: USDA Rural Development at (202) 720–8460, (TDD (800) 877–8339), Federal Information Relay Services).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB must approve all ''collections of information'' by USDA Rural Development. The Act defines ''collection of information'' as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *.'' (44 U.S.C. 3502(3)(A)) Because the Notice is expected to receive less than 10 respondents, the Paperwork Reduction Act does not apply.

Overview

Federal Agency: Rural Business-Cooperative Programs.

Funding Opportunity Title: Rural Community Development Initiative.

Announcement Type: Initial Announcement.

Catalog of Federal Domestic Assistance Number: 10.446.

Dates: You may submit completed applications for the cooperative agreement on paper or electronically according to the following deadlines:

- Paper copies must be postmarked and mailed, shipped, or sent overnight no later than January 5, 2009 to be eligible for funding. Late applications are not eligible for funding.
- Electronic copies must be received no later than January 5, 2009, to be eligible for funding. Late applications are not eligible for funding.

Purpose of Notice

The United States Department of Agriculture Rural Development has created a Request for Proposals (RFP) structured to address the land title problems (heir property) of the rural African American community. Those needs were recognized after two years of extensive research and public expertise offered during the comment period of the USDA—Advanced Notice of Proposed Rule (ANPR) published on January 10, 2007 (72 FR 1190).

Broadly defined, heir property is property passed down from one generation to another. It may be transferred to one heir, subdivided among many heirs or transferred to many heirs with undivided interest. When a property owner dies without a will, state law determines property succession (intestate succession). Typically, title to properties passing under state intestate succession laws are inherited by heirs with undivided interests thereby creating fractional interests also known as tenancy in common. If this process happens for several generations, the land titles are divided into small fractional interests which become difficult to administer. The heir property issues that have elicited concern in the African American farming community arise from tenancy in common.

The ''heir property'' issue includes a cluster of problems arising when undivided interest in land is passed to multiple heirs. Problems range from land partition sales to reduced crop yields as a result of underutilization and the inability to obtain adequate financing secured by a fractional interest. The array of problems caused by heir property contributes to unsuccessful business models which results in land loss and the deterioration of rural African American communities. It should be noted, however, that while unclear title contributes to unsuccessful business models it is not the sole contributor to the land loss issue.

For historical reasons this issue is closely associated with African American farmers in the South. African American landholdings in the post-bellum South were generally very small. Access to capital and competent legal counsel were problematic and there was often distrust within the African American community regarding the dominant legal and lending institutions.

For all these reasons, heir property issues emerged as a special concern of the African American agrarian community and are a priority of African American farming and land loss prevention organizations today. A parallel issue, heir housing, also presents a significant concern. Although not as extensively studied, heir housing also appears to pose substantial threats to the well being of rural African American communities.

On January 10, 2007, Rural Development published the ANPR in the **Federal Register** for a 60-day comment period. It detailed a study conducted by Rural Development regarding the extent of heir property in the African American community, reviewed the role of heir property in exacerbating land loss among the African American farming community, and requested further comments and information. Seventy-six comments were received from twenty commenters in response to the ANPR which have been carefully analyzed.

In order for the African American community to increase land and home-ownership and expand farming operations, they must first establish clear title to land. The Agency understands that clearing titles is an important prerequisite to establishing sound assets, but the challenge of developing sustainable market-driven business models will remain.

I. Funding Opportunity Description

A. Basic Proposal Components and Objectives

The Agency realizes that a multidimensional approach is needed to achieve the goal of minimizing African American land loss and ensuring sustainable rural African American communities. Based on suggestions from the ANPR comments, the Agency requests proposals for a pilot program for a specific area such as a county. In addition, the proposals must include a description of how steps in this multidimensional approach will be enacted concurrently. This description should include, but is not limited to, the following: Project timeline, line-item budget (identifying matching funds), project activities, minimum size and cost for representative sampling, performance measures, and evaluation criteria.

The Agency seeks proposals with new, innovative ideas for not only clearing title, but for establishing an education/outreach program that will lay the foundation to grow African American land and home ownership. The Agency urges CBOs to submit proposals with effective techniques for clearing title and ensuring that the property is managed in a long term economically viable manner.

Proposals submitted need to identify a date that will serve as the ''cut-off date'' for clearing titles and the approach for obtaining information based on the ''cut-off date.'' Additionally, proposals submitted need to address both the legal and operational issues associated with farm and home ownership. The Agency does not wish to fund any proposal solely focused on preservation. Alone, a clear title initiative would not be enough; expanding land and home ownership within the African American community is the goal.

B. Outreach/Education

The first and most important step is to enhance current outreach programs and create new ones if needed. In addition to fixing heir property problems that already exist, the Agency is looking for proposals from CBOs that can enable property owners to prevent future heir property situations through proper estate planning. The outreach portion of the proposal should also be designed to teach heir property owners about their legal rights and limitations and their options for resolving heir property problems. Another fundamental component of the outreach/education portion is teaching property owners how to use leverage assets to generate income and expand ownership.

C. Legal Assistance To Clear Title

Proposals should outline how the CBO intends to provide legal assistance to clear title. Because each heir property is a unique case, there is no one legal remedy that will work for all. Mediation, for example, is the least costly way to consolidate properties. However, it is often difficult to reach agreement among the heirs about the most judicious way to divide or sell the property, so multiple legal remedies are needed.

CBOs will also be responsible for working with attorneys that will develop strategies and coalitions to address legal hurdles, such as State property or estate laws which hold back African American farmers and homeowners from establishing clear title. USDA does not believe a blanket

approach is in the best interest of heir property owners. These approaches must be flexible enough to fit the specific needs of the situation.

II. Award Information

Initial Cooperative Agreements

Type of Award: Cooperative Agreement.
Fiscal Year Funds: FY 2009.
Total Funding: $80,000.
Approximate Number of Awards: 4.
Average Award: $20,000.
Anticipated Award Date: No later than February 18, 2009.

Subsequent Cooperative Agreements

Type of Award: Cooperative Agreement.
Fiscal Year Funds: FY 2009.
Total Funding: $150,000.
Approximate Number of Awards: 2.
Average Award: $75,000.
Anticipated Award Date: No later than July 6, 2009.

III. Eligibility Information

A. Eligible Applicants: All private, non-profit, CBOs are eligible for assistance. CBOs can be secular or faith-based organizations.

B. Priority: The most important criteria for a CBO to be successful are: Locality and familiarity with heir property issues. Priority will be given to the CBOs with those strongest qualities. USDA will also pay special consideration to the CBOs that offer fresh ideas that have not been tried before but could be replicated across the Nation.

C. Project Eligibility: The project purpose is comprised of two components. First, the applicant must describe how the proposed project consists of activities needed to prevent and alleviate heir property, and to enable heir property owners to develop an economically viable agricultural operation. Second, the applicant must demonstrate that the combined activities are sufficient to prevent and alleviate heir property issues, and in the case of farmed heir property, to enable heir property owners to develop economically viable agricultural operations.

D. Completeness Eligibility: Applications without sufficient information to determine eligibility will not be considered for funding. Applications that are missing any required elements (in whole or in part) will not be considered for funding.

E. Matching Funds: Matching funds are not required but are highly encouraged. Matching funds must be provided by either the applicant or by a third party in the form of cash or in-kind contributions.

IV. Application and Submission Information

The purpose of this Notice is to seek the development of a variety of proposals that provide comprehensive solutions to address the heir property situation as described in the ANPR and above. You may submit your application in paper or in an electronic format.

If you submit your application in paper form, you must submit one signed original of your complete application along with two additional copies.

If you submit your application electronically, you must follow the instructions given at *http://www.grants.gov*. Applicants are advised to visit the site well in advance of the application deadline if they plan to apply electronically to ensure that they have obtained the proper authentication and have sufficient computer resources to complete the application.

Each submission shall include:

A. Form SF–424, ''Application for Federal Assistance.'' In order for this form to be considered complete, it must contain the legal name of the applicant, the applicant's Dun and Bradstreet Data Universal Numbering System (DUNS) number, the applicant's complete mailing address, the name and telephone number of a contact person, the employer identification number (EIN), the start and end dates of the project, the Federal funds requested, other funds that will be used as matching funds, an answer to the question, ''Is applicant delinquent on any Federal debt?'', the name and signature of an authorized representative, the telephone number of the authorized representative, and the date the form was signed. Other information requested on the form may be applicable, but the above-listed information is required for an application to be considered complete.

The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Applicants can receive a DUNS number at no cost by accessing *http://www.dnb.com/us/* or calling (866) 705–5711.

B. Form SF–424A, ''Budget Information—Non-Construction Programs.'' In order for this form to be considered complete, the applicant must fill out Sections A, B, C, and D. The applicant must include both Federal and any matching funds to be included.

C. Form SF–424B, ''Assurances—Non-Construction Programs.'' In order for this form to be considered complete, the form must be signed by an authorized official and include the title, name of applicant, and date.

D. Title Page. The title page must include the title of the project as well as any other relevant identifying information. The length should not exceed one page.

E. Table of Contents. For ease of locating information, each proposal must contain a detailed Table of Contents immediately following the title page.

F. Executive Summary. A summary of the proposal, not to exceed one page, must briefly describe the project, including goals, tasks to be completed, and other relevant information that provides a general overview of the project. In the event an applicant submits more than one page for this element, only the first page submitted will be considered.

G. Eligibility Discussion. The applicant must describe how it meets the definition of a CBO, and how the project meets the purposes, described in Eligibility Information Section paragraph C.

H. Proposal Narrative. The narrative must include the following information:

1. Project Title. The title of the proposed project must be brief, not to exceed 75 characters, yet describe the essentials of the project. The project title does not need to appear on a separate page. It can be included on the title page and/or on the information sheet.

2. Goals of the Project. A clear statement of the ultimate goals of the project must be included. There must be an explanation of how economic benefit will be measured.

3. Workplan. The narrative must:

(i) identify the location of the area to be served and an estimate of the scope of the heir property problems contained in such area,

(ii) contain a description of how the proposal would address these problems,

(iii) identify the types of resources that would be needed,

(iv) contain a description of how such resources would be secured,

(v) identify the role of the CBO in managing the activities described and resources and capabilities of the CBO to manage these activities.

4. Description of the CBO. The narrative must:

(i) describe the CBO, including its purposes and experience in managing activities of this type and knowledge of the heir property situation in the proposed area to be served,

(ii) identify resources and capabilities of the CBO to manage activities described in item 3, and

(iii) identify the local connections the CBO has to African-American

community affected by the heir property situation described in this Notice and the ANPR.

V. Application Review Information

All eligible and complete applications will be evaluated based on the following criteria and maximum point allowances. Failure to address any one of the following criteria by the application deadline will result in a determination of incompleteness and the application will not be considered for funding. The total points available for the set of criteria are 80.

1. Relevance of the project proposal (30 points). Proposals will be evaluated on how directly they address the stated objective of preventing and alleviating heir property.

2. Quality of Workplan (30 points). The quality evaluation criterion will be based on whether the proposal outlines a sound plan of work that will meet the objectives in a timely and cost-efficient manner. Factors to be weighed by evaluators in scoring a proposal's workplan will include:

- How well the steps for carrying out the work are defined;
- The logic of the sequence of proposed steps and the likelihood they will achieve their intended result;
- The establishment of clear benchmarks and timetables to measure the progress of the project; and
- The detail, accuracy, and reasonableness of the project's proposed budget.

3. Funding match and community support (5 points). Points will be awarded on the basis of the percentage match provided by the applicant and the level of support for the proposal from the community as evidenced by contribution of resources to the match and other indications of support.

- Up to 5 points will be awarded for matching funds provided by or arranged for by the applicant. Two points will be awarded for each 5 percent match, up to a maximum of 5 points for a 20 percent match.

4. CBO's locality and experience (15 points). Points will be awarded on the basis of the physical proximity of the CBO in relation to the location of the project and the CBO's experience with heir property issues in the proposed area to be served.

- Up to 15 points will be awarded for locality and experience. Five points will be awarded for locality, 5 points will be awarded for experience within the community, and 5 points experience with heir property issues.

VI. Review and Selection Process

Each application will be initially reviewed by Rural Development for eligibility and to determine whether all required elements are complete. Any incomplete or ineligible applications will not be further evaluated or considered for funding.

Once the proposals are scored, the scores will be used to rank the proposals. Final award recommendation will be sent to the Under Secretary for Rural Development for final selection concurrence.

After the award selection is made, all applicants will be notified of the status of their applications by mail. The awardee must meet all statutory and regulatory program requirements in order to receive their award. In the event that an awardee cannot meet the requirements, the award will be withdrawn. Selection will be made January 20, 2009. The Agency may have follow-up questions.

Awardees will be required to enter into a cooperative agreement with the Agency (RBS). The awardee under the terms of the agreement will be required to submit a more detailed proposal to address the heir property issues of the proposed service area.

Subsequent Agreement

Based on these submissions, the Agency may offer an awardee under this Notice the opportunity to enter into another cooperative agreement to implement the proposal submitted.

VII. Award Administration Information

A. Award Notices

The successful applicant will receive a notification of tentative selection for funding from USDA Rural Development. The applicant must sign a mutually agreed-to cooperative agreement and comply with all applicable statutes, regulations, and this notice before the award will receive final approval.

Unsuccessful applicants will receive notification, including mediation procedures and appeal rights, by mail.

B. Administrative and National Policy Requirements

This award is subject to 7 CFR parts 3015 and 3019. These regulations may be accessed at *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1.*

The following additional documentation requirements apply to the awardee selected for this program:

- Agency Approved Cooperative Agreement.
- Form RD 1940–1, ''Request for Obligation of Funds''.
- Form AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions''.
- Form AD–1048, ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions''.
- Form AD–1049, ''Certification Regarding a Drug-Free Workplace Requirements (Grants)''.
- Form RD 400–1, ''Equal Opportunity Agreement''.
- Form RD 400–4, ''Assurance Agreement''.

Additional information on these requirements can be found at *http://www.rurdev.usda.gov/rbs/coops/reic.htm.*

Reporting Requirements: You must provide USDA Rural Development with an original or an electronic copy that includes all required signatures of the following reports. The reports should be submitted to the Agency contact listed on your Cooperative Agreement. Failure to submit satisfactory reports on time may result in suspension or termination of your award.

1. Form SF–269 or SF–269A. A ''Financial Status Report,'' listing expenditures according to agreed upon budget categories, on a quarterly basis. Reporting periods end each December 31, March 31, June 30, and September 30. Reports are due 30 days after the reporting period ends.

2. Quarterly performance reports that compare accomplishments to the objectives stated in the proposal. Identify all tasks completed to date and provide documentation supporting the reported results. If the original schedule provided in the workplan is not being met, the report should discuss the problems or delays that may affect completion of the project. Objectives for the next reporting period should be listed. Compliance with any special condition on the use of award funds should be discussed. Reporting periods end each December 31, March 31, June 30, and September 30. Reports are due 30 days after the reporting period ends. Supporting documentation must also be submitted for completed tasks. The supporting documentation for completed tasks include, but are not limited to, questionnaire or interview guides, publications of research findings, summaries of data collected, and any other documentation related to how funds were spent.

3. Final Project performance reports that compare accomplishments to the objectives stated in the proposal. Identify all tasks completed and provide documentation supporting the reported results. If the original schedule provided

in the workplan was not met, the report must discuss the problems or delays that affected completion of the project. Compliance with any special condition on the use of award funds should be discussed. Supporting documentation for completed tasks must also be submitted. The supporting documentation for completed tasks include, but are not limited to, publications of research findings, summaries of data collected, documentation of data and software delivered to USDA Rural Development, and any other documentation related to how funds were spent. The final performance report is due within 90 days of the completion of the project.

VIII. Non-Discrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250–9410, or call (800) 795–3272 (voice), or (202) 720–6382 (TDD). ''USDA is an equal opportunity provider, employer, and lender.''

Dated: December 1, 2008.

Thomas C. Dorr,

Under Secretary for Rural Development.

[FR Doc. E8–28805 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service, an agency delivering the United States Department of Agriculture's (USDA) Rural Development Utilities Programs, hereinafter referred to as Rural Development or the Agency, invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

DATES: Comments on this notice must be received by February 3, 2009.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Avenue, SW., STOP 1522, Room 5162 South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Fax: (202) 720–8435. E-mail: *michele.brooks@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8{d}). This notice identifies an information collection that will be submitted to OMB for approval.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, U. S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1522, Room 5162 South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Fax: (202) 720–8435. E-mail: *michele.brooks@wdc.usda.gov.*

Title: Operating Reports for Telecommunications and Broadband Borrowers.

OMB Control Number: 0572–0031.

Type of Request: Revision of an existing information collection package.

Abstract: Rural Utilities Service, an agency delivering the U. S. Department of Agriculture (USDA) Rural Development Utilities Programs is a credit agency. It makes mortgage loans and loan guarantees to finance electric, broadband, telecommunications, and water and waste facilities in rural areas. In addition to providing loans and loan guarantees, one of the Agency's main objectives is to safeguard loan security until the loan is repaid.

This collection of information covers the Telecommunications operating Report, the Broadband Operating Report, and RUS Form 674, ''Certificate of Authority to Submit or Grant Access to Data.'' The data collected via the Telecommunications Operating Report is collected through the USDA Data Collection System. The data collected via the Broadband Operating Report is collected through the USDA Broadband Collection and Analysis System.

The data collected via the Telecommunications and Broadband Operating reports is required by the loan contract and provides Rural Development with vital financial information needed to ensure the maintenance of the security for the Government's loans; and statistical data which enables the Agency to ensure the provision of quality telecommunications and broadband service as mandated by the Rural Electrification act (RE Act) of 1936. The data collected via the operating reports provides financial information to ensure loan security consistent with due diligence. These functions are essential to protect loan security and to achieve objectives of the RE Act.

The data collected via RUS Form 674 provides information to the Agency which allows Rural Development Electric, Telecommunications, and Broadband program borrowers to file their electronic Operating Reports with the agency using the USDA Data Collection System. RUS Form 674, accompanies by a Board Resolution, will identify the name and USDA eAuthentication ID for a certifier and security administrator that will have access to the USDA Data Collection System for purposes of filing electronic Operating Reports.

Estimate of Burden: This collection of information is estimated to average 3.45 hours per response.

Respondents: Businesses or other for-profit and not-for-profit institutions.

Estimated Number of Respondents: 600.

Estimated Number of Responses per Respondent: 1.36.

Estimated Total Annual Burden on Respondents: 2,806.

Copies of this information collection can be obtained from Gale Richardson, Program Development and Regulatory Analysis, at (202) 720–0992. FAX: (202) 720–8435. E-mail: *gale.richardson@wdc.usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: December 1, 2008.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E8–28790 Filed 12–4–08; 8:45 am]

BILLING CODE 3410–15–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed addition to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must be Received On or Before: January 4, 2009.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or to Submit Comments Contact: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each service will be required to procure the service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. If approved, the action will result in authorizing small entities to furnish the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following service(s) are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Furniture Rehabilitation, Parris Island USMC Depot, USMC Recruit Depot, Parris Island, SC.

NPA: Beaufort Vocational Rehabilitation Center, Beaufort, SC.

Contracting Activity: Dept of the Navy, Commanding General.

Patricia Briscoe,

Acting Director, Program Operations.

[FR Doc. E8–28739 Filed 12–4–08; 8:45 am]

BILLING CODE 6353–01–P

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: Tuesday, December 9, 2008, 1 p.m.–2:15 p.m.

PLACE: Cohen Building, Room 3321, 330 Independence Ave., SW., Washington, DC 20237.

CLOSED MEETING: The members of the Broadcasting Board of Governors (BBG) will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b.(c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b.(c)(9)(B)) In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c)(2) and (6))

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact Timi Nickerson Kenealy at (202) 203–4545.

Dated: December 3, 2008.

Timi Nickerson Kenealy,

Acting Legal Counsel.

[FR Doc. E8–28997 Filed 12–3–08; 4:15 pm]

BILLING CODE 8610–01–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Senior Executive Service Performance Review Board

AGENCY: Chemical Safety and Hazard Investigation Board.

ACTION: Notice.

SUMMARY: This notice announces a change in the membership of the Senior Executive Service Performance Review Board for the Chemical Safety and Hazard Investigation Board (CSB).

DATES: Effective December 5, 2008.

FOR FURTHER INFORMATION CONTACT: Christopher Kirkpatrick, Office of General Counsel, (202) 261–7600.

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(c)(1) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, a performance review board (PRB). The PRB reviews initial performance ratings of members of the Senior Executive Service (SES) and makes recommendations as to final annual performance ratings for senior executives. Because the CSB is a small independent Federal agency, the SES members of the CSB's PRB are drawn from other Federal agencies.

The Chairperson of the CSB is appointing the following individual to the CSB Senior Executive Service Performance Review Board:

PRB Member—David Capozzi, Executive Director, United States Access Board.

Mr. Capozzi replaces Lawrence W. Roffee (formerly Executive Director, United States Access Board). The service of Mr. Roffee on the PRB has ended. His appointment was originally announced in the **Federal Register** of January 11, 2007 (72 FR 1317).

William B. Wark (CSB Board Member) continues to serve as the Chair of the PRB, as announced in the **Federal Register** of November 15, 2007 (72 FR 64192). Curtis Bowling (Director of Environmental Readiness and Safety, Office of the Secretary of Defense/ Chairman, Department of Defense Explosives Safety Board) continues to serve as a Member of the PRB, as announced in the **Federal Register** of November 15, 2007 (72 FR 64192).

This notice is published in the **Federal Register** pursuant to the requirement of 5 U.S.C. 4314(c)(4).

Dated: December 1, 2008.

Raymond C. Porfiri,

Deputy General Counsel.

[FR Doc. E8–28821 Filed 12–4–08; 8:45 am]

BILLING CODE 6350–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Scientific Research, Exempted Fishing, and Exempted Educational Activity Submissions.

OMB Control Number: 0648–0309.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 11,003.

Number of Respondents: 91.

Average Hours per Response: Scientific research plans, 113 hours; scientific research reports, 3 hours; exempted fishing requests, 95 hours; exempted fishing reports, 47 hours; exempted educational requests, 3 hours; and exempted educational reports, 2 hours.

Needs and Uses: Fishery regulations do not generally affect scientific research activities conducted by a scientific research vessel. Any persons planning to conduct research must submit a scientific research plan to ensure that the activities are considered research and not fishing. The researchers are required to submit reports of their scientific research activity after its completion. The National Marine Fisheries Service (NMFS) may also grant exemptions from fishery regulations for educational or other activities (e.g., the testing of fishing gear). Per instructions at 50 CFR 600.745, the applications for research or exemptions must be submitted, as well as reports on activities.

Affected Public: Not-for-profit institutions; business or other for-profit organizations; State, local or tribal government.

Frequency: Annually and on occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: December 2, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–28793 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: List of Gear by Fisheries and Fishery Management Council.

OMB Control Number: 0648–0346.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 30.

Number of Respondents: 20.

Average Hours per Response: One and one-half hours.

Needs and Uses: Under provisions of section 305(a)3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. *et seq.*) as amended in 2006, the Secretary of Commerce is required to publish a list of all fisheries under the authority of each Fishery Management Council and of all fishing gear to be used in such fisheries. Any person wishing to use gear not on the list, or engage in a fishery not on the list, must provide the appropriate Fishery Management Council (or in some cases the Secretary) with a 90 days' advance written notice. If the Secretary takes no action to prohibit such a fishery or use of such gear, the person may proceed.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: December 2, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–28794 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 0811071430–81434–01]

2008 Company Organization Survey

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of determination.

SUMMARY: The Bureau of the Census (U.S. Census Bureau) is conducting the 2008 Company Organization Survey. The survey's data are needed, in part, to update the multilocation companies in the Business Register. The survey, which has been conducted annually since 1974, is designed to collect information on the number of employees, payroll, geographic location, current operational status, and kind of business for the establishments of multilocation companies. We have determined that annual data collected from this survey are needed to aid the efficient performance of essential governmental functions and have significant application to the needs of the public and industry. The data

derived from this survey are not available from any other source.

ADDRESSES: The Census Bureau will furnish report forms to organizations included in the survey, and additional copies are available upon written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

FOR FURTHER INFORMATION CONTACT: Cynthia M. Wrenn-Yorker, Economic Planning and Coordination Division, U.S. Census Bureau, Room 8K319, Washington, DC 20233–6100; telephone (301) 763–1383.

SUPPLEMENTARY INFORMATION: Title 13, United States Code (U.S.C.), Sections 182, 195, 224, and 225, authorizes the Census Bureau to undertake surveys necessary to furnish current data on the subjects covered by the major censuses. This survey will provide continuing and timely national statistical data for the period between economic censuses. The next economic censuses will be conducted for the year 2012. The data collected in this survey will be within the general scope, type, and character of those that are covered in the economic censuses. Forms NC–99001 and NC–99007 (for single-location companies) will be used to collect the desired data.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current, valid Office of Management and Budget (OMB) control number. In accordance with the Paperwork Reduction Act, 44 U.S.C., Chapter 35, the OMB approved Forms NC–99001 and NC–99007 on December 21, 2004, under OMB Control Number 0607–0444. We will furnish report forms to organizations included in the survey, and additional copies are available on written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

I have therefore directed that the 2008 Company Organization Survey be conducted for the purpose of collecting these data.

Dated: December 2, 2008.

Steve H. Murdock,

Director, Bureau of the Census.

[FR Doc. E8–28849 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1588

Expansion of Foreign–Trade Zone 231

Stockton, California, Area

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the Stockton Port District, grantee of Foreign–Trade Zone 231, submitted an application to the Board for authority to expand its zone to include a site within the Opus Logistics Center–Stockton (Site 8 - 468 acres) in Stockton, California, within the Sacramento Customs and Border Protection port of entry (FTZ Docket 14–2008, filed 2/25/08);

WHEREAS, notice inviting public comment was given in the **Federal Register** (73 FR 12949, 3/11/08) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

NOW, THEREFORE, the Board hereby orders:

The application to expand FTZ 231 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, subject to the Board's standard 2,000–acre activation limit for the overall general–purpose zone project, and further subject to a sunset provision that would terminate authority on November 30, 2013, if no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 20th day of November 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration,

Alternate Chairman, Foreign–Trade Zones Board,

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–28859 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1589

Expansion of Foreign–Trade Zone 235

Lakewood, New Jersey

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the Township of Lakewood, New Jersey, grantee of Foreign–Trade Zone 235, submitted an application to the Board for authority to expand its zone to include four sites in Middlesex County at the Cranbury Business Park (Site 3 - 351 acres) in Cranbury, at the ProLogis Park–South Brunswick (Site 4 - 50 acres) in Jamesburg, at the Middlesex Center (Site 5 - 159 acres) in South Brunswick, and at EastPointe Property (Site 6 - 35 acres) in South Brunswick, New Jersey, adjacent to the Philadelphia Customs and Border Protection port of entry (FTZ Docket 43–2007, filed 8/24/07, amended 5/22/08);

WHEREAS, notice inviting public comment was given in the **Federal Register** (72 FR 51406, 9/7/07; 73 FR 31432, 6/2/08) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal, as amended, is in the public interest;

NOW, THEREFORE, the Board hereby orders:

The application, as amended, to expand FTZ 235 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, subject to the Board's standard 2,000–acre activation limit for the overall general–purpose zone project, and further subject to a sunset provision that would terminate authority on November 30, 2013, for Sites 3 - 6 where no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 20th day of November 2008.

David M. Spooner.

Assistant Secretary of Commerce for Import Administration.

Alternate Chairman, Foreign–Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–28877 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 53–2008]

Foreign-Trade Zone 242—Boundary County, ID; Application for Subzone; Hoku Materials, Inc.; Notice of Hearing and Extension of Comment Period

A public hearing will be held on the application for subzone status at the Hoku Materials, Inc., facility in Pocatello, Idaho, submitted by Boundary County, ID, grantee of FTZ 242 (73 FR 59597, 10/9/08). Because the specific date of the hearing has yet to be determined, the comment period (which would have otherwise closed on December 8, 2008) will be extended to 15 days following the hearing, in order to allow interested parties additional time in which to comment.

Further notice will be given once the dates of the hearing and the close of the comment period are set. For further information, contact Diane Finver at *Diane_Finver@ita.doc.gov* or (202) 482–1367.

Dated: December 2, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–28865 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–819]

Certain Pasta From Italy: Extension of Time Limit for the Final Results of the Eleventh (2006) Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 5, 2008.

FOR FURTHER INFORMATION CONTACT: Andrew McAllister or Brandon Farlander, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–1174 and (202) 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 6, 2008, the Department published the preliminary results of the 2006 administrative review of the countervailing duty order on certain pasta (''pasta'') from Italy. *See Certain Pasta from Italy: Preliminary Results of the 11th (2006) Countervailing Duty Administrative Review*, 73 FR 45721 (August 6, 2008). This review covers four manufacturers/exporters of the subject merchandise to the United States: De Matteis Agroalimentare S.p.A. (''De Matteis''), Pastificio Lucio Garofalo S.p.A. (''Garofalo''), F.lli De Cecco di Filippo Fara San Martino S.p.A. (''De Cecco''), and Pastificio Felicetti SrL (''Felicetti''). In the preliminary results, we stated that we would issue our final results for the countervailing duty administrative review no later than 120 days after the date of publication of the preliminary results (*i.e.*, December 4, 2008).

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the final results in an administrative review within 120 days of the publication date of the preliminary results. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the final results to a maximum of 180 days.

The Department has determined that completion of the final results of this review within the original time period is not practicable because the Department requires additional time to review a response to a supplemental questionnaire issued after the preliminary results. Thus, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for issuing the final results of review by an additional 60 days, until February 2, 2009.

This notice is published pursuant to sections 751(a)(2)(B)(iv) and 777(i)(1) of the Act.

Dated: December 01, 2008.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–28869 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–533–838

Carbazole Violet Pigment 23 From India: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 8, 2008, the Department of Commerce published the preliminary results of the administrative review of the antidumping duty order on carbazole violet pigment 23 from India. The review covers two manufacturers/exporters, Alpanil Industries and Pidilite Industries Limited. The period of review is December 1, 2006, through November 30, 2007. We gave interested parties an opportunity to comment on the preliminary results but no interested parties did so. We have made no changes in the margin calculations for the final results of review. The final weighted–average margins are listed below in the ''Final Results of the Review'' section of this notice.

EFFECTIVE DATE: December 5, 2008.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun or Hermes Pinilla, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5760 or (202) 482–3477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 8, 2008, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on carbazole violet pigment 23 (CVP 23) from India and invited interested parties to comment. See *Carbazole Violet Pigment 23 from India: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 52012 (September 8, 2008) (*Preliminary Results*). On October 7, 2008, the Department received a case brief from Alpanil Industries (Alpanil). Because

Alpanil's case brief did not meet several filing requirements as stated in 19 CFR 351.303 and 304, we rejected and returned Alpanil's case brief on October 14, 2008, and requested that Alpanil resubmit its case brief by October 17, 2008. Alpanil did not resubmit its case brief. No other party submitted a case brief.

Scope of the Order

The merchandise subject to the order is CVP 23 identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of diindolo [3,2–b:3′,2′-m] [1] triphenodioxazine, 8,18–dichloro–5, 15–diethyl–5, 15–dihydro-, and molecular formula of $C_{34}H_{22}Cl_2N_4O_2$. The subject merchandise includes the crude pigment in any form (*e.g.*, dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.*, pigment dispersed in oleoresins, flammable solvents, water) are not included within the scope of the order. The merchandise subject to the order is classifiable under subheading 3204.17.90.40 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Use of Adverse Facts Available

The Department found in the *Preliminary Results* that Alpanil and Pidilite Industries Limited (Pidilite) failed to cooperate to the best of their ability in responding to the Department's requests for information and thereby impeded the Department's proceeding. Therefore, in accordance with section 776(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.308(c), the Department preliminarily selected 66.59 percent as the adverse facts–available dumping margin. For the *Preliminary Results*, we also subtracted the portion of the applicable countervailing duty rate attributable to export subsidies (17.02 percent) from the final dumping margin of 66.59 percent in order to calculate the cash–deposit rate of 49.57 percent. See *Preliminary Results*.

The Department did not receive any comments regarding its preliminary application of the adverse facts–available dumping margin to Alpanil and Pidilite. Therefore, for the final results, the Department has not altered its analysis or decision to apply the adverse facts–available dumping margin to Alpanil and Pidilite.

Final Results of the Review

As a result of our review, we determine that the following weighted–average dumping margins on CVP 23 from India exist for the period December 1, 2006, through November 30, 2007:

Company	Margin (percent)	Cash–Deposit Rate Adjusted For Export Subsidies
Alpanil	66.59	49.57
Pidilite	66.59	49.57

Assessment of Duties

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. We will issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of review. We will instruct CBP to assess the antidumping liability for all shipments of CVP 23 from India produced and/or exported by Alpanil or Pidilite and entered, or withdrawn from warehouse, for consumption during the period of review. We will instruct CBP to assess antidumping duties at the adjusted rate of 49.57 percent if CBP has collected the appropriate countervailing duties on the same entry. We will instruct CBP to assess antidumping duties at the unadjusted rate of 66.59 percent if the appropriate countervailing duties are not collected by CBP.

Cash–Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of CVP 23 from India entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) The cash–deposit rates for Alpanil and Pidilite will be 49.57 percent; (2) if the exporter is not a firm covered in this review, a previous review, or the less–than-fair–value investigation but the manufacturer is, the cash–deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (3) if neither the exporter nor the manufacturer has its own rate, the cash–deposit rate will be 27.48 percent, the all–others rate published in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbazole Violet Pigment 23 from India*, 69 FR 77988, 77989 (December 29, 2004). These deposit requirements shall remain in effect until further notice.

Notification to Importer

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO as explained in the APO itself. See 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing these final results of administrative review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 1, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–28856 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–S

[1] The bracketed section of the product description, [3,2-b:3′,2′-m], is not business-proprietary information. In this case, the brackets are simply part of the chemical nomenclature. See *Preliminary Results*.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–849]

Certain Cut-To-Length Carbon Steel Plate From the People's Republic of China: Notice of Final Results of Expedited Sunset Review of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 5, 2008.

FOR FURTHER INFORMATION CONTACT: Demitri Kalogeropoulos, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–2623.

SUMMARY: On August 1, 2008, the Department of Commerce (''Department'') initiated a sunset review of the antidumping duty order on certain cut–to-length carbon steel plate (''CTL plate'') from the People's Republic of China (''PRC''). On the basis of a notice of intent to participate, and an adequate substantive response filed on behalf of domestic interested parties, as well as a lack of response from respondent interested parties, the Department conducted an expedited (120-day) sunset review. As a result of the sunset review, the Department finds that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping. The dumping margins are identified in the *Final Results of Review* section of this notice.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2008, the Department published the notice of initiation of the sunset review of the antidumping duty order on CTL plate from the PRC pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-year (''Sunset'') Review*, 73 FR 44968 (August 1, 2008). On August 5, 2008, the Department received a notice of intent to participate from a domestic interested party, Nucor Corporation (''Nucor''). On August 15, 2008, the Department received a notice of intent to participate from SSAB North America Division (''SSAB NAB''), Evraz NA Oregon Steel Mills (''OSM''), and Evraz NA Claymont (''Claymont''), domestic interested parties. The Department received a notice of intent to participate from ArcelorMittal USA, a domestic interested party, on August 18, 2008. Submissions of the notices of intent to participate filed by Nucor, SSAB NAB, OSM, Claymont, and ArcelorMittal (collectively ''domestic interested parties'') were within the deadline specified in section 351.218(d)(1)(i) of the Department's regulations. The domestic interested parties claimed interested party status under section 771(9)(C) of the Act as domestic producers of CTL plate in the United States. On August 29, 2008, the Department received a substantive response from the domestic interested parties within the deadline specified in section 351.218(d)(3)(i) of the Department's regulations. We did not receive responses from any respondent interested parties to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and section 351.218(e)(1)(ii)(C)(2) of the Department's regulations, the Department determined to conduct an expedited review of the order.

Scope of the Order

The products covered by the order include hot–rolled carbon steel universal mill plates (*i.e.*, flat–rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot–rolled carbon steel flat–rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') under item numbers 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in the order are flat–rolled products of non–rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling'') for example, products which have been beveled or rounded at the edges. Excluded from the order is grade X–70 plate. Also excluded from the order is certain carbon cut–to-length steel plate with a maximum thickness of 80 mm in steel grades BS 7191, 355 EM, and 355 EMZ, as amended by Sable Offshore Energy Project specification XB MOO Y 15 0001, types 1 and 2. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the ''Issues and Decision Memorandum'' (''Decision Memorandum'') from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated concurrently with this notice, and is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the order were revoked. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit in room 1117 of the main Commerce building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

Pursuant to section 752(c)(3) of the Act, we determine that revocation of the antidumping duty order on CTL plate from the PRC would be likely to lead to continuation or recurrence of dumping at the following weighted–average percentage margins:

Manufacturers/ Exporters/Producers	Weighted–Average Margin (percent)
Anshan (Anshan Iron and Steel Complex/ Anshan International Trade Corp./Sincerely Asia Ltd.)	30.68
Baoshan (Baoshan Iron and Steel Corp./ Baoshan International Trade Corp./Bao Steel Metals Trading Corp.)	30.51
China Metallurgical Import and Export Liaoning Co.	17.33
Shanghai Pudong Iron and Steel Co.	38.16

Manufacturers/ Exporters/Producers	Weighted–Average Margin (percent)
WISCO (Wuhan Iron and Steel Co./International Economic and Trading Corp./ Cheerwu Trader Ltd.)	128.59
PRC–Wide	128.59

This notice also serves as the only reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with section 351.305 of the Department's regulations. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: December 1, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–28863 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–580–839

Certain Polyester Staple Fiber From Korea: Final Results of the 2006–2007 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 30, 2008, the Department of Commerce published the preliminary results of the seventh administrative review of the antidumping duty order on certain polyester staple fiber from the Republic of Korea. The review covers the shipments of subject merchandise to the United States by Huvis Corporation. Based on our analysis of the comments received from interested parties, we have made certain changes for the final results. The final weighted–average dumping margins are listed below in the ''Final Results of the Review'' section of this notice.

EFFECTIVE DATE: December 5, 2008.

FOR FURTHER INFORMATION CONTACT: Andrew McAllister or Brandon Farlander, Office 1, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–1174 and (202) 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 30, 2008, the Department of Commerce (''the Department'') published *Certain Polyester Staple Fiber from Korea: Preliminary Results of the 2006/2007 Antidumping Duty Administrative Review*, 73 FR 31058 (May 30, 2008) (''*Preliminary Results*'') in the **Federal Register**. Prior to the publication of the *Preliminary Results*, on May 27, 2008, Wellman, Inc., Invista, S.a.r.L., and DAK Americas, LLC (collectively, ''the petitioners'') refiled their May 8, 2008, submission in accordance with the Department's May 22, 2008, letter allowing such refiling. On June 2, 2008, the petitioners submitted comments rebutting Huvis Corporation (''Huvis'')'s May 22, 2008, submission. On June 6, 2008, Huvis submitted additional comments regarding the petitioners' May 27, 2008, submission.

On June 30, 2008, the petitioners and Huvis filed case briefs. On July 14, 2008, the petitioners and Huvis filed rebuttal briefs.

On September 15, 2008, the Department published in the **Federal Register** an extension of the time limit for the completion of the final results of this review until no later than November 26, 2008, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.213(h)(2). S*ee Certain Polyester Staple Fiber From the Republic of Korea: Notice of Extension of Time Limit for the Final Results of the 2006–2007 Administrative Review*, 73 FR 53190 (Sept. 15, 2008).

Scope of the Order

For the purposes of this order, the product covered is certain polyester staple fiber (''PSF''). PSF is defined as synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). The merchandise subject to this order may be coated, usually with a silicon or other finish, or not coated. PSF is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture. Merchandise of less than 3.3 decitex (less than 3 denier) currently classifiable under the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 5503.20.00.25 is specifically excluded from this order. Also specifically excluded from this order are polyester staple fibers of 10 to 18 denier that are cut to lengths of 6 to 8 inches (fibers used in the manufacture of carpeting). In addition, low–melt PSF is excluded from this order. Low–melt PSF is defined as a bi–component fiber with an outer sheath that melts at a significantly lower temperature than its inner core.

The merchandise subject to this order is currently classifiable in the HTSUS at subheadings 5503.20.00.45 and 5503.20.00.65. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the order is dispositive.

Period of Review

The period of review (''POR'') is May 1, 2006, through April 30, 2007.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the November 26, 2008, Issues and Decision Memorandum for the Seventh Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from the Republic of Korea (''Decision Memorandum''), which is hereby adopted by this notice. Attached to this notice as an appendix is a list of the issues which parties have raised and to which we have responded in the Decision Memorandum. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Department's Central Records Unit, Room 1117 of the main Department building (''CRU''). In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the Decision Memorandum are identical in content.

Fair Value Comparisons

To determine whether sales of PSF from Korea to the United States were made at less than normal value (''NV''), we compared export price (''EP'') to the NV. We calculated EP, NV, constructed value (''CV''), and the cost of production (''COP''), based on the same methodologies used in the *Preliminary Results*, with the following exception:

- We have revised the comparison market and margin programs to

properly subtract credit expenses in U.S. dollars from the comparison market price. We have revised the comparison market program to properly include credit expenses in U.S. dollars when calculating CV. *See* Memorandum from the Team to the File, ''2006/2007 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea - Final Results Calculation Memorandum for Huvis Corporation,'' dated November 26, 2008 (''Huvis Final Calc Memo'').

- We have also revised the comparison market and margin programs to properly reflect the gross unit price of home market sales in the currency in which the sale was transacted (*i.e.*, Korean Won or U.S. dollars). *See* Huvis Final Calc Memo.
- Different from the Preliminary Results, we have not increased the affiliated supplier's COP of PTA and QTA because the supplier's purchase prices for paraxylene reasonably reflect market prices. *See* Decision Memorandum at Comment 11; *see also* Huvis Final Calc Memo.

Final Results of the Review

We find that the following percentage margin exists for the period May 1, 2006, through April 30, 2007:

Manufacturer	Weighted–average margin percentage
Huvis Corporation	2.92%

Assessment Rates

Huvis reported that it acted as the importer of record for certain POR shipments. Pursuant to 19 CFR 351.212(b)(1), for all sales where Huvis is the importer of record, Huvis submitted the reported entered value of the U.S. sales and we calculated importer–specific assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales.

Where Huvis was not the importer of record, Huvis did not report the entered value for the U.S. sales in question. Accordingly, we calculated importer–specific assessment rates for the merchandise in question by aggregating the dumping margins calculated for all U.S. sales to each importer and dividing this amount by the total quantity of those sales. To determine whether the duty assessment rates were *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer–specific *ad valorem* ratios based on this estimated entered value.

Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis (i.e.*, less than 0.50 percent). The Department will issue appropriate assessment instructions to CBP 15 days after publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. *Id*.

Cash Deposit Rates

The following antidumping duty deposits will be required on all shipments of certain PSF from Korea entered, or withdrawn from warehouse, for consumption, effective on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rates for the reviewed companies will be the rate listed above (except no cash deposit will be required if a company's weighted–average margin is *de minimis, i.e.*, less than 0.5 percent); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this review, a prior review, or the investigation, the cash deposit rate will be 7.91 percent, the all–others rate established in *Certain Polyester Staple Fiber from the Republic of Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision*, 68 FR 74552 (December 24, 2003). These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing these results and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 26, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

APPENDIX I

List of Comments in the Decision Memorandum

Comment 1: Huvis's Reporting of Affiliated Parties
Comment 2: Huvis's Submitted Costs by CONNUM
Comment 3: Costs of the Suwon Factory
Comment 4: Huvis's Financial Expenses Ratio
Comment 5: Huvis's Classification of Certain Home Market Sales
Comment 6: Loading Fees For Huvis's Sales
Comment 7: Korean Brokerage Expenses for Huvis's U.S. Sales
Comment 8: Huvis's Absorption of Antidumping Duties
Comment 9: Ministerial Error in Calculation of Huvis's Credit Expenses
Comment 10: Valuing PTA and QTA
Comment 11: Adjustment for the Cost of Paraxylene

[FR Doc. E8–28875 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

U.S.-European Union (EU) Safe Harbor Framework—Notice of Request for Public Comment

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of request for public comment.

SUMMARY: The Department of Commerce's International Trade Administration (ITA) is proposing implementation of a cost recovery program to support the operation of the U.S.-European Union (EU) Safe Harbor Framework. The Framework allows U.S. companies to satisfy the requirements of the EU's Directive on Data Protection when transferring personal information from the EU, thereby ensuring uninterrupted data transfers worth billions of dollars in trade between the EU and the United States. As the program has grown from 6 companies to nearly 1,700, so too have the requests from these U.S. companies for Safe Harbor-related services, including education, outreach, and counseling. ITA is responsible for managing the U.S.-EU Safe Harbor Framework for the Administration. In order to better serve ITA's clients, ITA is proposing to establish a two-tiered fee structure in which new clients would be required to pay a $200 registration (processing) fee and existing clients who renew their certification commitment to Safe Harbor would pay $100 each year following their initial certification.

DATES: Comments must be received by December 16, 2008.

ADDRESSES: Input on or inquiries about ITA's proposed cost recovery program for operation of the U.S.-EU Safe Harbor Framework should be addressed to the contact below, and received by close of business on December 16, 2008.

FOR FURTHER INFORMATION CONTACT: David A. Ritchie, U.S. Department of Commerce, Office of Technology and Electronic Commerce, 1401 Constitution Avenue, NW., Room 2003, Washington, DC 20230; *Telephone:* 202–482–4936.; e-mail: *david.ritchie@mail.doc.gov*.

Dated: December 2, 2008.

Robin Layton,

Director, Office of Technology and Electronic Commerce.

[FR Doc. E8–28906 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Docket No. 0811251525–81526–01

Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT): Closing Date

AGENCY: National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce

ACTION: Notice of Closing Date for Solicitation of Applications.

SUMMARY: Pursuant to the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law 110–329 (2008), the U.S. Department of Commerce announces the solicitation of applications for a grant for the Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT) Program. Projects funded pursuant to this Notice are intended to support the PEACESAT Program's acquisition of satellite communications to service Pacific Basin communities and to manage the operations of this network. Applications for the PEACESAT Program grant will compete for funds from the Public Broadcasting, Facilities, Planning and Construction Funds account.

DATES: Applications must be received on or before 5 p.m. Eastern Standard Time, January 15, 2009. Applications submitted by facsimile are not acceptable. NTIA will not accept applications received after the deadline. However, if an application is received after the Closing Date due to (1) carrier error, when the carrier accepted the package with a guarantee for delivery by the Closing Date and Time, or (2) significant weather delays or natural disasters, NTIA will, upon receipt of proper documentation, consider the application as having been received by the deadline.

ADDRESSES: To obtain a printed application package, submit completed applications, or send any other correspondence, write to: NTIA/PTFP, Room H–4812, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, DC 20230. Application materials may be obtained electronically via the Internet at www.grants.gov.

FOR FURTHER INFORMATION CONTACT: William Cooperman, Director, Public Broadcasting Division, telephone: (202) 482–5802; fax: (202) 482–2156.

SUPPLEMENTARY INFORMATION:

Electronic Access

The full funding opportunity announcement for the PEACESAT Fiscal Year (FY) 2009 grant cycle is available through www.grants.gov or by contacting the PTFP office at the address noted above. Application materials may be obtained electronically via the Internet www.grants.gov.

Funding Availability

Issuance of grants is subject to the availability of FY 2009 funds. At this time, the Congress has passed the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law No. 110–329 (2008), to fund operations from the Public Broadcasting, Facilities, Planning and Construction Funds account through March 6, 2009. Further notice will be made in the **Federal Register** about the final status of funding for this program at the appropriate time. Funding for the PEACESAT Program is authorized by Public Law 106–113, ''The Consolidated Appropriations Act, Fiscal Year 2000.'' Public Law 106–113 provides ''That, hereafter, notwithstanding any other provision of law, the Pan-Pacific Education and Communications Experiments by Satellite (PEACESAT) Program is eligible to compete for Public Broadcasting Facilities, Planning and Construction funds.''

NTIA anticipates making a single award for approximately $500,000 for the PEACESAT Program in FY 2009. For FY 2008, NTIA issued one award for the PEACESAT project in the amount of $499,677.

Statutory and Regulatory Authority

The PEACESAT Program was authorized under Public Law 100–584 (102 Stat. 2970) and also Public Law 101–555 (104 Stat. 2758) to acquire satellite communications services to provide educational, medical, and cultural needs of Pacific Basin communities. The PEACESAT Program has been operational since 1971 and has received funding from NTIA for support of the project since 1988.

Applications submitted in response to this solicitation for PEACESAT applications are not subject to the PTFP regulations at 15 CFR Part 2301.

Catalog of Federal Domestic Assistance

N/A

Eligibility

Eligible applicants will include any for-profit or non-profit organization, public or private entity, other than an agency or division of the Federal government. Individuals are not eligible

to apply for the PEACESAT Program funds.

Evaluation and Selection Process

Each eligible application is evaluated by three independent reviewers who have demonstrated expertise in the programmatic and technological aspects of the application. The reviewers will evaluate applications according to the criteria in the following section and provide individual written ratings of each application. No consensus advice will be provided by the reviewers.

State Single Point of Contact (SPOC) offices, per Executive Order 12372, may provide recommendations on applications under consideration.

The Public Broadcasting Division (PBD) administers the PEACESAT Program and places a summary of applications received on the Internet. Listing an application merely acknowledges receipt of an application to compete for funding with other applications. Listing does not preclude subsequent return of the application or disapproval of the application, nor does it assure that the application will be funded. The listing will also include a request for comments on the applications from any interested party.

The reviewer's ratings are provided to the PBD staff and a rank order is prepared according to score. The PBD program staff prepares summary recommendations for the Director of the Public Broadcasting Division. These recommendations incorporate the outside reviewers' ratings and incorporate analysis based on the degree to which a proposed project meets the PEACESAT Program purposes and cost eligibility. Staff recommendations also consider (1) project impact, (2) the cost/benefit of a project, and (3) whether the reviewers consistently applied the evaluation criteria. The analysis by program staff is provided to the Director of the Public Broadcasting Division in writing.

The Director considers the summary recommendations prepared by program staff in accord with the funding priorities and selection factors referenced in the next section and recommends the funding order of the applications for the PEACESAT Program in three categories: ''Recommended for Funding,'' ''Recommended for Funding If Funds Are Available,'' and ''Not Recommended for Funding.'' The Director presents recommendations to the Associate Administrator, Office of Telecommunications and Information Applications (OTIA), for review and approval.

Upon review and approval based on the funding priorities and selection factors referenced in the next section by the Associate Administrator of the Office of Telecommunications and Information Applications (OTIA), the Associate Administrator's and the Director's recommendations are presented to the Selecting Official, the Assistant Secretary for Communications and Information, who is the NTIA Administrator. The NTIA Administrator selects the applications to be negotiated for possible grant award, taking into consideration the outside reviewers' ratings, the Director's recommendations, and the degree to which the slate of applications, taken as a whole, satisfies the PEACESAT Program's stated purposes.

The selected applications are negotiated between NTIA staff and the applicant. The negotiations are intended to resolve whatever differences might exist between the applicant's original request and what NTIA is considering funding. Negotiation does not ensure that an award will be made. When the negotiations are completed, the Director recommends final selections to the NTIA Administrator, applying the same selection factors described above. The Administrator then makes the final award selections from the negotiated applications taking into consideration the Director's recommendations and the degree to which the slate of applications, taken as a whole, satisfies the stated purposes for the PEACESAT Program.

Funding Priorities and Selection Factors

The PBD Director will consider the summary evaluations prepared by program staff, rank the applications, and present recommendations to the OTIA Associate Administrator for review and approval. The Director's recommendations and the OTIA Associate Administrator's review and approval will take into account the following selection factors:

(1) The program staff evaluations, including the outside reviewers;

(2) Whether the applicant has any current NTIA grants;

(3) The geographic distribution of the proposed grant awards; and

(4) The availability of funds.

Upon approval by the OTIA Associate Administrator, the Director's recommendations will then be presented to the Selecting Official, the NTIA Administrator.

The Administrator makes final award selections taking into consideration the Director's recommendations and the degree to which the slate of applications, taken as a whole, satisfies the program's stated purposes.

No grant will be awarded until confirmation has been received from the Federal Communications Commission that any necessary authorization will be issued.

After final award selections have been made, the Agency will notify the applicant of one of the following actions:

(1) Selection of the application for funding, in whole or in part;

(2) Deferral of the application for subsequent consideration; or

(3) Rejection of the application with an explanation and the reason, if an applicant is not eligible or if the proposed project does not fall within the purposes of the PEACESAT program.

Evaluation Criteria

Each eligible application that is timely received, is materially complete, and proposes an eligible project will be considered under the evaluation criteria described here. The first three criteria 1. Meeting the Purposes of the PEACESAT Program, 2. Extent of Need for the Project, and 3. Plan of Operation for the Project are each worth 25 points. Criterion 4, Budget and Cost Effectiveness, is worth 20 points. Criterion 5, Quality of Key Personnel, is worth 5 points.

Criterion 1. Meeting the Purposes of the PEACESAT Program, including (i) how well the proposal meets the objectives of the PEACESAT Program and (ii) how the objectives of the proposal further the purposes of the PEACESAT Program.

Criterion 2. Extent of Need for the Project. The extent to which the project meets the needs of the PEACESAT Program, including consideration of: (i) the needs addressed by the project; (ii) how the applicant identifies those needs; (iii) how those needs will be met by the project; and (iv) the benefits to be gained by meeting those needs.

Criterion 3. Plan of Operation for the Project, including (i) the quality of the design of the project; (ii) the extent to which the plan of management is effective and ensures proper and efficient administration of the project; (iii) how well the objectives of the project relate to the purposes of the PEACESAT Program; (iv) the quality of the applicant's plan to use its resources and personnel to achieve each objective; and (v) how the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapped condition.

Criterion 4. Budget and Cost Effectiveness. The extent to which (i)

the budget is adequate to support the project; and (ii) costs are reasonable in relation to the objectives of the project.

Criterion 5. Quality of Key Personnel the applicant plans to use on the project, including (i) the qualifications of the project director if one is to be used; (ii) the qualifications of each of the other key personnel to be used in the project; (iii) the time that each person will commit to the project; and (iv) how the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapped condition. In this section, ''qualifications'' refers to experience and training in fields related to the objectives of the project, and any other qualifications that pertain to the quality of the project.

Cost Sharing Requirements

Grant recipients under this program will not be required to provide matching funds toward the total project cost.

The costs allowable under this Notice are not subject to the limitation on costs contained in the October 20, 2008, Notice regarding the PTFP Program, see 73 FR 62258 (2008).

Intergovernmental Review

PEACESAT applications are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' if the state in which the applicant organization is located participates in the process. Usually submission to the State Single Point of Contact (SPOC) needs to be only the first two pages of the Application Form, but applicants should contact their own SPOC offices to find out about and comply with its requirements. The names and addresses of the SPOC offices are listed on the PTFP website and at the Office of Management and Budget's home page at http://www.whitehouse.gov/ omb/grants/spoc.html.

Universal Identifier

All applicants (nonprofit, state, local government, universities, and tribal organizations) will be required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the application process. See the October 30, 2002 (67 FR 66177) and April 8, 2003 (68 FR 17090) **Federal Register** notices for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line 1–866–705–5711 or via the Internet at www.dnb.com/us/.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification of Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696), is applicable to this solicitation.

Limitation of Liability

In no event will the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other agency priorities. Publication of this announcement does not oblige the agency to award any specific project or to obligate any available funds.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection displays a currently valid Office of Management and Budget (OMB) control number. The PEACESAT application package requires the use of the following forms: SF–424, SF–424A, SF–424B, SF–LLL. These forms have been approved under OMB Control Nos. 4040–0004, 4040–0006, 4040–007, and 0348–0046.

Executive Order 13132

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning grants, benefits, and contracts (5 U.S.C. 553(a). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: December 1, 2008.

Dr. Bernadette McGuire-Rivera,

Associate Administrator, Office of Telecommunications and Information Applications.

[FR Doc. E8–28749 Filed 12–4–08; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF DEFENSE

Department of the Air Force

Implementation of 2005 Base Closure and Realignment (BRAC) Decision To Realign the Army 7th Special Forces Group (Airborne) to Eglin Air Force Base, FL

ACTION: Record of Decision (ROD).

SUMMARY: On November 20, 2008, the United States Air Force signed the ROD for the Implementation of 2005 Base Closure and Realignment (BRAC) Decision to Realign the Army 7th Special Forces Group (Airborne) to Eglin Air Force Base, Florida. The ROD states the Air Force decision to implement Cantonment Alternative 3 West of Duke Field (Preferred Alternative) and Range Alternative 3 East and West Side (Preferred Alternative). The decision was based on matters discussed in the Final Environmental Impact Statement (FEIS), inputs from the public and regulatory agencies, and other relevant factors. On October 17, 2008 the FEIS Notice of Availability was published in the **Federal Register** (Volume 73, Number 202, Page 61859) with a wait period ending November 17, 2008. The ROD documents only the decision of the Air Force with respect to the proposed Air Force actions for the Army 7th Special Forces Group realignment analyzed in the FEIS.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Spaits, Eglin AFB Public Affairs, 96 ABW/PA, Eglin AFB, FL 32542–5000 or call (850) 882–2878.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E8–28844 Filed 12–4–08; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Non-Exclusive, Exclusive, or Partially Exclusive Licensing of U.S. Provisional Patent Application Concerning Chest Tube Clamp

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Provisional Patent Application Serial No. 61/043,242 entitled ''Chest Tube Clamp,'' filed April 8, 2008. The United States Government, as represented by

the Secretary of the Army, has rights in this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research & Technology Assessment, (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to a single, surgical instrument suitable for use in the placement of a thoracostomy tube (chest tube) into a patient for evacuation of intrapleural air or fluids. The mechanical functions of three (3) separate, surgical instruments have been combined into a single, surgical instrument. This single, surgical instrument is the subject of the present invention. The invention provides a medical professional with the option of employing one surgical instrument, which serves the function of three.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–28820 Filed 12–4–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Non-Exclusive, Exclusive, or Partially Exclusive Licensing of U.S. Patent Application Concerning Foley Catheter Adaptor

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Patent Application No. 11/379,558 entitled ''Foley Catheter Adaptor,'' filed April 20, 2006—(Patent Application Publication No. U.S. 2008/0009793, published January 10, 2008). The United States Government, as represented by the Secretary of the Army, has rights in this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research & Technology Assessment, (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: A safety adaptor having attachment components and reservoir components for use with balloon anchored catheters such that if the catheter is forcibly removed the reservoir components will act as a safety valve and allow the anchoring balloon to deflate. The safety adaptor acts to minimize damage caused to a patient due to the removal of an inflated anchor balloon of a catheter. The safety adaptor attaches to any existing catheter having a fluid balloon and does not require re-engineering or re-tooling of the catheter or adaptor.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–28817 Filed 12–4–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Non-Exclusive, Exclusive, or Partially Exclusive Licensing of U.S. Provisional Patent Application Concerning Portable Trapeze System

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Provisional Patent Application Serial No. 61/045,184 entitled ''Portable Trapeze System,'' filed April 15, 2008. The United States Government, as represented by the Secretary of the Army, has rights in this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research & Technology Assessment, (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to a portable orthopedic trapeze system. In particular, the invention relates to portable trapeze bars and kits that may be assembled, disassembled, sized, and configured for use with hospital beds in non-fixed facilities. The invention consists of a plurality of aluminum poles connected or clamped to form a frame for suspending a tether.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–28811 Filed 12–4–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Non-Exclusive, Exclusive, or Partially Exclusive Licensing of U.S. Provisional Patent Application Concerning Therapeutic Trigger Device

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Provisional Patent Application Serial No. 61/041,958 entitled ''Therapeutic Trigger Simulator,'' filed April 3, 2008. The United States Government, as represented by the Secretary of the Army, has rights in this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research & Technology Assessment, (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The present invention relates generally to a method and apparatus for the rehabilitation of damaged fingers and in particular to a trigger device replicating that typically found in firearms.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E8–28815 Filed 12–4–08; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Intent To Prepare a Joint Environmental Impact Statement for Commercial Dredging of Construction Aggregate From the Missouri River in Missouri and Kansas

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (COE) is preparing an Environmental Impact Statement (EIS) to analyze the direct, indirect, and cumulative effects of continued commercial dredging of sand and gravel from the Missouri River in Missouri and Kansas. The proposed dredging will occur in a navigable waterway and the portion of dredged material that is too coarse or too fine to be used will be discharged back into the river, thereby requiring Department of the Army (DA) authorization under Section 10 of the River and Harbors Act and Section 404 of the Clean Water Act. Commercial dredging in the Missouri River has been ongoing for more than 50 years but has increased from approximately 1.3 million tons per year in 1974 to approximately 8 million tons in 2006. The current DA permits for six Missouri River commercial dredging operations will expire December 31, 2009 and those six operations and four proposed operations have applied for new DA permits to dredge up to 12.435 million tons per year beginning in 2010.

DATES: Scoping meetings will be held:

1. January 6, 2009, 4 to 8 p.m., Jefferson City, Missouri.
2. January 7, 2009, 4 to 8 p.m., Cottleville, Missouri (St. Louis area).
3. January 8, 2009, 4 to 8 p.m., Kansas City, Missouri.

ADDRESSES: The scoping meeting locations are:

1. January 6, 2009 in the Art Gallery at the Missouri River Regional Library, 214 Adams Street, Jefferson City, Missouri.
2. January 7, 2009 in the auditorium at the St. Charles Community College, 4601 Mid Rivers Mall Drive, Cottleville, Missouri.
3. January 8, 2009 in the Lobby Courtyard at the KCI-Expo Center, 11730 N. Ambassador Dr., Kansas City, Missouri.

FOR FURTHER INFORMATION CONTACT: Questions and comments regarding the proposed action and EIS should be addressed to Mr. Cody S. Wheeler, Regulatory Project Manager, U.S. Army Corps of Engineers, 601 East 12th Street, Room 706, Kansas City, MO 64106; (816) 389–3739; *cody.s.wheeler@usace.army.mil.* For special needs (visual or hearing impaired, Spanish translation, etc.) requests during the scoping meetings, please call Cody Wheeler by December 22, 2008.

SUPPLEMENTARY INFORMATION: The COE will be conducting public scoping meetings at three locations (see **DATES** and **ADDRESSES**) to describe the proposed activity, preliminary alternatives, the NEPA compliance process, and to solicit input on the issues and alternatives to be evaluated and other related matters. Written comments for scoping will be accepted until February 10, 2009. The COE has prepared a scoping announcement to familiarize agencies, the public and interested organizations with the proposed Project and potential environmental issues that may be involved. The scoping announcement includes a list of the dredgers' requested annual extraction tonnage and the requested dredging reaches. Copies of the scoping announcement will be available at the public scoping meetings or can be requested by mail.

The applicants include the following currently authorized dredgers: Holliday Sand and Gravel Company (St. Joseph and Kansas City, Missouri); Con-Agg of MO, LLC (Columbia, Missouri); Capital Sand Company, Inc. (Jefferson City, Missouri); Hermann Sand & Gravel, Inc. (Hermann, Missouri); J.T.R. Inc (Jotori Dredging, St. Louis, Missouri); and Limited Leasing Company (formerly St. Charles Sand Company, St. Louis, Missouri). Applicants not currently authorized to dredge include The Master's Dredging Company, Inc. (Kansas City, Missouri); Kaw Valley Sand and Gravel, Inc. (Kansas City, Missouri); Muenks Brothers Quarries, Inc. (Loose Creek, Missouri); and Edward N. Rau Contractor Company (Washington, Missouri). The final EIS will also apply to future applications for similar dredging operations on the Missouri River in Missouri and Kansas.

The COE has documented significant degradation or down-cutting of the river bed in areas where dredging has been concentrated. Bed degradation may disable water intake structures, initiate tributary head cuts, promote bank and levee instability, undermine pipelines and bridge piers, increase encroachment of the high bank, eliminate aquatic habitat and create navigation hazards. Some of these effects have already been observed in some areas. Reaches that are not obviously affected may have structures vulnerable to failure during floods or other catastrophic events.

The EIS will be prepared according to the COE's procedures for implementing the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4332(2)(c), and consistent with the COE's policy to facilitate public understanding and review of agency proposals. As part of the EIS process, a full range of reasonable alternatives including the proposed dredging and no dredging will be evaluated.

The COE has invited the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the U.S. Geologic Survey, the Missouri Department of Natural Resources, the Missouri Department of Conservation, the Kansas Department of Health and Environment, the Kansas Department of Wildlife and Parks, and the Kansas Geologic Survey to be contributing agencies in the formulation of the EIS.

Dated: November 26, 2008.

Cody S. Wheeler,

Regulatory Project Manager, Regulatory Branch.

[FR Doc. E8–28826 Filed 12–4–08; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for the West Shore-Lake Pontchartrain, Louisiana, Hurricane and Storm Damage Risk Reduction Feasibility Study

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: This notice of intent (NOI) supersedes the NOI published in the **Federal Register** June 23, 1998 (63 FR 34151). The U.S. Army Corps of Engineers, New Orleans District (USACE) intends to prepare an environmental impact statement (EIS) for the West Shore-Lake Pontchartrain, Louisiana, Hurricane and Storm Damage Risk Reduction Feasibility Study. This study will determine the feasibility and assess the environmental impacts of providing hurricane and storm damage risk reduction measures in the study area. The study area is bounded by the Bonnet Carre Spillway to the east, the Mississippi River to the south, Lakes Pontchartrain and Maurepas to the north, and St. James Parish/Ascension Parish line to the west.

DATES: See **SUPPLEMENTARY INFORMATION** section for scoping meeting dates.

FOR FURTHER INFORMATION CONTACT: Questions regarding the feasibility study should be directed to Mr. Durund Elzey, Sr., CEMVN–PM–W, P.O. Box 60267, New Orleans, LA, 70160–0267; telephone: (504) 862–1674; fax: (504) 862–2089; or by e-mail at: *durund.elzey@usace.army.mil.* Questions regarding the EIS should be directed to Dr. William P. Klein, Jr., CEMVN–PD–RS, P.O. Box 60267, New Orleans, LA, 70160–0267; telephone: (504) 862–2540; fax: (504) 862–1583; or by e-mail at: *william.p.klein.jr@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

1. *Authority*. This study is authorized by a resolution adopted on July 29, 1971, by the Committee on Public Works of the U.S. House of Representatives; and by a resolution adopted on September 20, 1974, by the Committee on Public Works of the U.S. Senate.

2. *Background*. On June 23, 1998, a NOI was published in the **Federal Register** (63 FR 34151) for preparing an EIS for the West Shore-Lake Pontchartrain, LA, Hurricane Protection Feasibility Study. Concurrently, the USACE and the project sponsor, the Pontchartrain Levee District (PLD), began evaluating various potential measures to reduce the risk of hurricane-induced flooding in the study area. In 2001, USACE advanced the study to a point where a federally-preferred alternative was tentatively identified. Discussions between USACE, PLD, and St. John the Baptist Parish from 2001 to 2003 evaluated the technical and environmental merits of this and other alternatives. Although USACE, PLD, and St. John the Baptist Parish agreed on the importance of providing protection for the area, a consensus could not be reached on how this objective should be achieved at that time. In 2006 and 2007 USACE and PLD renewed their discussion of providing hurricane and storm damage reduction measures in light of the critical lessons learned following Hurricanes Katrina and Rita. These discussions led to an agreement between USACE and PLD to re-initiate and complete the feasibility study and prepare a Feasibility Report and EIS for the project.

3. *Proposed Action*. The USACE proposes to investigate the feasibility of providing hurricane and storm damage risk reduction to residents living in the area west of the Bonnet Carre Spillway between the Mississippi River and Lakes Pontchartrain and Maurepas. The study area is located on the east bank of the Mississippi River and includes portions of St. Charles, St. John the Baptist, and St. James Parishes. Feasibility study evaluations performed since 1998 have identified four preliminary levee alignments. In general, each preliminary levee alignment system would extend protection from the west guide levee of the Bonnet Carre Spillway to the vicinity of the Hope Canal. One preliminary alignment would extend the levee into Ascension Parish to tie into an existing non-federal levee. The EIS will document the process of identifying and assessing the environmental impacts of the proposed action and reasonable alternatives, including the identification of measures that would avoid or minimize adverse effects on the quality of the natural and human environment. Specifically, the EIS will analyze the potential direct, indirect, and cumulative impacts of providing hurricane and storm damage risk reduction for portions of St. John the Baptist, St. James, and St. Charles Parishes. The Draft EIS will consider reasonable alternatives for providing hurricane and storm damage risk reduction, including alternatives developed under previous efforts, as well other recommendations from the public and interested parties.

4. *Public Involvement*. Public involvement, an essential part of the EIS process, is integral to assessing the environmental consequences of the proposed action and improving the quality of the environmental decision making. The public includes affected and interested Federal, state, and local agencies, Indian tribes, concerned citizens, stakeholders, and other interested parties. Public participation in the EIS process will be strongly encouraged, both formally and informally, to enhance the probability of a more technically accurate, economically feasible, and socially and politically acceptable EIS. Public involvement will include but is not limited to: information dissemination; identification of problems, needs and opportunities; idea generation; public education; problem solving; providing feedback on proposals; evaluation of alternatives; conflict resolution by consensus; public and scoping notices and meetings; public, stakeholder and advisory groups consultation and meetings; and making the EIS and supporting information readily available in conveniently located places, such as libraries and on the internet.

5. *Scoping*. Scoping, an early and open process for identifying the scope of significant issues related to the proposed action to be addressed in the EIS, will be used to: (a) Identify the affected public and agency concerns; (b) facilitate an efficient EIS preparation process; (c) define the issues and alternatives that will be examined in detail in the EIS; and (d) save time in the overall process by helping to ensure that the draft EIS adequately addresses relevant issues. A public scoping meeting will be held on Wednesday January 21, 2009, from 6 p.m. until 9 p.m. in LaPlace, LA. Announcements through local media as well as a scoping meeting public notice announcing the locations, dates and times of the scoping meeting will be mailed to all interested parties in December 2008. Interested parties are encouraged to express their views throughout the entire study process. Scoping comments will be welcomed at the public scoping meeting. In addition, written comments will also be accepted during the scoping comment period which will extend 30 days from the date of the scoping meeting public notice.

6. *Interagency Coordination and Cooperation*. The USACE and the U.S. Fish and Wildlife Service (USFWS) have formally committed to work together to conserve, protect, and restore fish and wildlife resources while ensuring environmental sustainability of our Nation's water resources under the January 22, 2003, Partnership Agreement for Water Resources and Fish and Wildlife. The USFWS will provide a Fish and Wildlife Coordination Act Report. Coordination will be maintained with the USFWS and the National Marine Fisheries Service (NMFS) regarding threatened and endangered species under their respective jurisdictional responsibilities. Coordination will be maintained with the NMFS regarding Essential Fish Habitat. Coordination will be maintained with the Natural Resources Conservation Service regarding prime and unique farmlands. The U.S. Department of Agriculture will be consulted regarding the ''Swampbuster'' provisions of the Food Security Act. Coordination will be maintained with the Advisory Counsel on Historic Preservation and the State Historic Preservation Officer. The Louisiana Department of Natural Resources will be consulted regarding consistency with the Coastal Zone Management Act. The Louisiana Department of Wildlife and Fisheries will be consulted concerning potential impacts to Natural and Scenic Streams. Coordination will be maintained with the U.S. Environmental Protection Agency concerning compliance with Executive Order 12898, ''Federal Action

to Address Environmental Justice in Minority Populations and Low-Income Populations.''

7. *Availability of EIS*. It is anticipated that the draft EIS will be available for public review during the spring of 2010. The draft EIS or a notice of availability will be provided during the 45-day review period to affected Federal, state and local agencies, Indian tribes, and other interested parties.

Dated: November 26, 2008.

Mark D. Jernigan,

Major (P), U.S. Army, Deputy District Commander.

[FR Doc. E8–28823 Filed 12–4–08; 8:45 am]

BILLING CODE 3720–58–P

DENALI COMMISSION

Fiscal Year 2009 Draft Work Plan

AGENCY: Denali Commission.

ACTION: Denali Commission Fiscal Year 2009 Draft Work Plan request for comments.

SUMMARY: The Denali Commission (Commission) is an independent Federal agency based on an innovative federal-state partnership designed to provide critical utilities, infrastructure and support for economic development and training in Alaska by delivering federal services in the most cost-effective manner possible. The Commission was created in 1998 with passage of the October 21, 1998 Denali Commission Act (Act) (Title III of Pub. L. 105–277, 42 U.S.C. 3121). The Denali Commission Act requires that the Commission develop proposed work plans for future spending and that the annual Work Plan be published in the **Federal Register**, providing an opportunity for a 30-day period of public review and written comment. This Federal Register notice serves to announce the 30-day opportunity for public comment on the Denali Commission Draft Work Plan for Federal Fiscal Year 2009.

DATES: Comments and related material must be received by January 15, 2009.

ADDRESSES: Submit comments to the Denali Commission, Attention: Tessa Rinner, 510 L Street, Suite 410, Anchorage, AK 99501.

FOR FURTHER INFORMATION CONTACT: Ms. Tessa Rinner, Denali Commission, 510 L Street, Suite 410, Anchorage, AK 99501. Telephone: (907) 271–1414. E-mail: *trinner@denali.gov*.

Introduction: Rural Alaska is an American treasure. Scattered across vast tundra, tucked away along rugged coastlines and forests and deep within Alaska's Interior, people living in over 300 communities raise families, educate their children, and work to provide opportunities for all. Alaska Native people rely heavily on subsistence hunting, fishing and gathering as a central part of both culture and economic sustenance. Values of sharing, love of family and country and traditional cultures run deep.

Rural Alaska still resembles the United States at the time of Lewis & Clark. Major rivers are undammed, unbridged and lack even basic navigational aids. Many health and social indicators still resemble those in developing countries.

No where else in our country can people live amidst wilderness, largely disconnected from highway and road connections and from regional power grids. Here, resilience and innovation are required both to survive and thrive. Reliance on air and river transportation is essential for everyday living. And where else in the country would women, in their third trimester of pregnancy, be required to fly into a regional center and wait to have their babies safely delivered, given the lack of local medical facilities?

The Denali Commission has now invested nearly a billion dollars in ten years on basic infrastructure projects at the local level. We know lives have been improved through greater access to primary health care, through safe and reliable energy projects, through job training programs, sanitation and landfill improvements and basic surface and water transportation improvements. We know the taxpayer benefits from an emphasis on coordinating the planning, construction and delivery of capital projects and through a focus on sustainability.

We see innovation everywhere. The regional corporations formed by the Alaska Native Claims Settlement Act, for example, are becoming economic powerhouses in their own rights. Major investments in private-sector anchors in each region complement the Commission's work in basic community infrastructure. Many regional non-profit corporations provide an array of effective health and social services. The Alaska Marketplace competition, now in its fourth year, proves again that local people have great ideas and with a small infusion of capital and technical assistance, have real potential for making positive and lasting change. The Community Development Quota program, for example, offers opportunities for residents in over 60 coastal communities to benefit directly from offshore fishing revenues.

We are buoyed by the sense of progress over the last ten years, at the resurgence of traditional culture, by the progress in celebrating diversity at all levels and by the awareness among leaders to reduce dependency on government and eliminate social ills that seem to come with long winters and isolation found in northern countries. We take delight in working with many progressive and innovative partners, grant recipients and local champions whose leadership and inspiration is critical for village survivability.

We are alarmed, however, at the recent convergence of several issues which threaten the survival of many Alaskan communities and provide urgent impetus for the Commission to improve our investment strategies. These issues include the impacts of climate change, unpredictable and unaffordable energy costs at the village level, the expectation of declining federal revenues to support rural investment in Alaska, evidence of out-migration from many small communities into larger regional centers and urban areas such as Anchorage, and the urgent need to find regional and systemic solutions to bolster long-term community viability. The global financial crisis will also strain an already thin social service delivery system and bring other consequences yet unseen.

The following are some of the critical issues which frame the debate over the Denali Commission's FY09 Work Plan:

Climate Change

Evidence is now overwhelming that climate change is impacting Alaska and the north faster than elsewhere in the nation. Temperatures have been rising, plant and animal species have been moving north, and permafrost is melting, resulting in major challenges for all infrastructure programs. Denali Commission funded wind turbines for example, are major engineering challenges for successfully placing a vertical wind tower in a permafrost setting. The Denali Commission is committed to participating fully with the State of Alaska, the U.S. Corps of Engineers and other partners in a coordinated approach to policy formulation and the execution of adaptation measures for climate change.

The most immediate challenge is the urgent need to protect and relocate many coastal communities impacted by the lack of sea ice, the repetition of major storm events, flooding and erosion of coastlines. While Congress provides no funds to the Commission to support relocation efforts, we coordinate closely with other agencies and tribes.

Our interagency Planning Work Group, for example, oversees relocation efforts in several communities, and the Commission funded a relocation community plan last year.

Unaffordable Energy at the Local Level

We recognize the urgent need to find breakthrough solutions to the widespread unaffordable energy costs in Alaska's rural communities. One study reveals that rural residents earning the lowest 20% of income spend almost half that income on home heating and electricity.

While the Commission's energy strategy remains a combination of completing bulk fuel and power system upgrades, an emphasis on conservation and energy efficiency projects and renewable energy, we continue to look for breakthrough solutions that can be replicated. We'll also focus on pursuing regional grids that can reduce the need for stand-alone generation in Alaska's small villages. We remain a strong partner as the State of Alaska prepares an overall Energy Plan for submission to the Alaska State Legislature this session.

Green Building Design and Construction Cost Containment

High construction costs in rural Alaska result from a combination of vast distances, harsh climates and the rising cost of construction materials. We are committed to carrying out innovative, cost-effective and creative design and construction solutions. This year we anticipate engaging in more diverse and experimental partnerships, and we'll be seeking more innovative design, construction and program and project management practices. We may enhance our normal project scopes to allow for greater energy efficiencies. We anticipate undertaking several pilot projects focusing on green design, cost containment and the combined use of facility activities.

A Focus on Community, Regional Planning and Government Coordination

The Commission is committed to a greater emphasis on community and regional planning to ensure long-term viability of our infrastructure investments. Last year, we worked with the State of Alaska, for example to help reopen a tribal clinic that had closed its doors for lack of capacity. This may be the first instance of a Denali Commission project which had suspended service. Through our efforts in government coordination, we work to ensure our projects fit within a framework of a local and regional plan, and are designed, sized and placed in the most optimum locations and setting for long-term success.

Background: The Commission's mission is to partner with tribal, federal, state, and local governments and collaborate with all Alaskans to improve the effectiveness and efficiency of government services, to develop a well-trained labor force employed in a diversified and sustainable economy, and to build and ensure the operation and maintenance of Alaska's basic infrastructure.

By creating the Commission, Congress mandated that all parties involved partner together to find new and innovative solutions to the unique infrastructure and economic development challenges in America's most remote communities.

Pursuant to the Denali Commission Act, as amended, the Commission determines its own basic operating principles and funding criteria on an annual federal fiscal year (October 1 to September 30) basis. The Commission outlines these priorities and funding recommendations in an annual Work Plan.

Pursuant to the Act, the Work Plan is first provided in draft by the Commission for publication in the **Federal Register** providing an opportunity for a 30-day period of public review and written comment. The Work Plan is also disseminated widely to Commission program partners including, but not limited to the Bureau of Indian Affairs (BIA), the Economic Development Administration (EDA), and the United States Department of Agriculture—Rural Development (USDA–RD). Commission staff are responsible for compiling written public comment and forwarding it to the Commission's Federal Co-Chair (Mr. George J. Cannelos).

The Federal Co-Chair then adopts a final version of the Work Plan, which includes, to the degree the Federal Co-Chair deems appropriate, modifications, additions and deletions based on the policy and program recommendations of the full Commission and public comment. The final version of the Work Plan is forwarded to the Secretary of Commerce for approval on behalf of the Federal Co-Chair.

The Work Plan authorizes the Federal Co-Chair to enter into grant agreements, award grants and contracts and obligate the federal funds identified by appropriation below.

FY 09 Appropriations Summary

Public Law 110–329, *Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009,* was signed by President Bush on September 30, 2008. The Continuing Resolution section of that law provides for Fiscal Year (FY) 2009 funding for named agencies at the same levels utilized in the first two quarters of FY 2008 (October 1, 2007 to March 31, 2008), through to March 6, 2009.

Since a new Administration will take office in January 2009, it is unknown at this time if there will be a new budget presented to Congress, or if this Continuing Resolution will be extended to September 2009 or modified in some other way. For the Commission, this may result in budgetary resources as high as $113,879,591 for FY 2009. If FY 2009 congressional appropriations are significantly different from the amounts in this Work Plan the Commission will develop an alternate Work Plan for FY 2009.

The Denali Commission has historically received several federal funding sources. These fund sources are governed by the following general principles:

- In FY 2008 no project specific earmarks were defined.
- Energy and Water Appropriations (commonly referred to as Commission ''Base'' funding) is eligible for use in all programs, but has historically been used substantively to fund the Energy Program.
- The Energy Policy Act of 2005 established new authorities for the Commission's Energy Program, with an emphasis on renewable and alternative energy projects. No new funding accompanied the Energy Policy Act, and prior fiscal year Congressional direction has indicated that the Commission should fund renewable and alternative Energy Program activities from the available ''Base'' appropriation.
- All other funds outlined below may be used only for the specific program area and may not be used across programs. For instance, Health Resources and Services Administration (HRSA) funding, which is appropriated for the Health Facilities Program, may not fund the Economic Development Program.

Final transportation funds received are typically slightly reduced due to agency modifications, reductions and fees determined by the U.S. Department of Transportation.

The figures appearing in the table below include an administrative deduction of 5%, which constitutes the Commission's 5% overhead. In instances where the overhead differs from the 5% it is due to the requirements related to that appropriation. For example, USDA-Rural Utilities Services (RUS) funding is limited to 4% overhead.

The table below provides the following information, by appropriation:

• *Total FY 09 Budgetary Resources provided in the Continuing Resolution:*

These are the figures that appear in the rows entitled ''FY 09 Appropriation'' and are the original appropriation amounts which do not include Commission overhead deductions. These appropriations are identified by their source name (i.e., ''Energy and Water Appropriation; USDA, Rural Utilities Service, etc.)

• *Total FY 09 Program Available Funding:*

These are the figures that appear in the rows entitled ''FY 09 Appropriations—Program Available'' and are the amounts of funding available for program(s) activities after Commission overhead has been deducted.

• *Program Funding:*

These are the figures that appear in the rows entitled with the specific Program and Sub-Program area, and are the amounts of funding the Draft FY09 Work Plan recommends, within each appropriation.

• *Subtotal of Program Funding:*

These are the figures that appear in the rows entitled ''subtotal'' and are the subtotals of all program funding within a given appropriation. The subtotal must always equal the Total FY 09 Program Available Funding.

DENALI COMMISSION FY 09 APPROPRIATIONS FUNDING TABLE

FY 09 Energy & Water Appropriation	$21,800,000
FY 09 Energy & Water Appropriations (''Base'')—Program Available (less 5% Commission overhead)	20,511,620
Energy Program: bulk fuel, RPSU, etc.	10,750,000
Energy Program: alternative & renewable energy	(up to) 4,261,620
Teacher Housing Program: design & construction	4,750,000
Economic Development Program: various	500,000
Recruitment and Retention of Health Workers	(up to) 250,000
sub-total	20,511,620
FY 09 USDA—Rural Utilities Service (RUS)	10,000,000
FY 09 USDA—Rural Utilities Service (RUS)—Program Available (less 4% overhead)	9,600,000
Energy Program: high energy cost communities	9,600,000
sub-total $	9,600,000
FY 09 Trans Alaska Pipeline Liability (TAPL) Trust	5,830,940
FY 09 Trans Alaska Pipeline Liability (TAPL)—Program Available (less 5% overhead)—Estimate	5,539,393
Energy Program: bulk fuel	5,539,393
sub-total $	5,539,393
FY 09 DHHS—Health Resources & Services Administration (HRSA)	38,596,726
FY 09 DHHS—Health Resources & Services Administration (HRSA)—Program Available (less 5% Commission overhead)	36,666,889
Health Program: Primary Care Clinic Design, Planning, and Construction	29,000,000
Health Program: Behavioral Health	2,000,000
Health Program: Primary Care in Hospitals	3,000,000
Health Program: Elder Housing/Assisted Living Facilities—Construction	2,666,889
sub-total $	36,666,889
FY 09 Department of Labor (DOL)	6,754,894
FY 09 Department of Labor (DOL)—Program Available (less 5% Commission overhead)	6,417,149
Training Program: Various	6,417,149
sub-total $	6,417,149
FY 09 Federal Transportation Administration (FTA)—Estimate	5,000,000
FY 09 Federal Highway Administration (FHWA)—Estimate	25,463,091
FY 09 Transportation (less 5% Commission overhead)—Estimate	28,939,936
Transportation Program: Docks & Harbors	8,804,686
Transportation Program: Roads	20,135,250
sub-total $	28,939,936
FY 09 USDA—Solid Waste	433,940
FY 09 USDA—Solid Waste—Program Available (less 5% Commission overhead)	412,243
Solid Waste Program: planning, design and construction	412,243
sub-total $	412,243
Total FY 09 Appropriations—Estimate	113,879,591
Total FY 09 Program Available—Estimate	107,987,230

FY 09 Program Details and General Information

The following section provides narrative discussion, by each of the Commission Programs identified for FY 08 funding in the table above, in the following categories:

- Program History and Approach
- Applicant/Grant Process
- Program Project Selection Process
- Program Policy Issues (as applicable)

In addition to the FY 09 funded program activities; the first section of the narrative provides an update on the Commission's Government Coordination Program. The Program is not funded by Commission appropriations, but is an integral component of the Commission's mission, the success of other programs, and the legacy of the Commission's work in Alaska.

The final section includes a general summary of other issues facing the Commission, statements of support by the Commission for the funding requests and activities of other program partners which the Commission works in partnership with, and detail regarding the Commission's evaluation and reporting efforts.

Government Coordination

The Commission is charged with the special role of increasing the effectiveness of government programs by acting as a catalyst to coordinate the many federal and state programs that serve Alaska. In FY09 the Commission will continue its role of coordinating State and Federal agencies and other partner organizations to accomplish its overall mission of developing Alaska's communities. Particular focus will be given to the collaborative efforts of the Commission's Federal and State Memorandum of Understanding (MOU) and the various workgroups and planning sessions and forums that occur as a result of the MOU meetings. The Commission intends to engage, along with MOU members, in at least two regional forums in FY09. These sessions will be regionally focused, and will provide regional partners and community members with an opportunity to discuss projects successes, failures and opportunities, and provide direct feedback to the Commission and other funding organizations regarding their policies and funding processes.

Additionally, the Commission continues to recognize the issues related to erosion, relocation and climate change which are effecting Alaskan communities and policy decisions. The Commission plays an active role in the Immediate Action Working Group and has also worked to build relationships with the Innovative Readiness Training (IRT) program which includes the various military branches.

Energy Program

The Energy Program is the Commission's oldest program and is often identified, along with the Health Program, as a ''legacy'' program. The Program focuses on bulk fuel facilities (BFU) and rural power system upgrades/power generation (RPSU) across Alaska. The purpose of this program is to provide code-compliant bulk fuel storage and electrification throughout rural Alaska, especially for communities ''off the grid'' and not accessible by road or rail.

The needs in the bulk fuel and power generation projects are presently estimated at $250 million and $135 million, respectively. The Commission has also funded a very successful program of competitively selected energy cost reduction and alternative energy projects. In three completed rounds of funding, approximately $6 million in grant funds have leveraged $8.1 million in participant funding, with estimated life-cycle cost savings (generally diesel fuel avoided over the life of the project) of $29 million.

The *Energy Policy Act of 2005* established new authorities for the Commissions Energy Program, with an emphasis on alternative and renewable energy projects, energy transmission, including interties, and fuel transportation systems. Although the 2005 Energy Policy Act did not include specific appropriations, the Commission is expected to carry out the intent of the Act through a portion of its ''Base'' funding. To date, the Commission has co-funded a number of renewable projects, including hydroelectric facilities, a geothermal power plant, a biomass boiler, and a number of diesel-wind power generation systems. The FY09 Work Plan outlines a strategy to balance the Energy Program in both legacy and renewable systems, providing up to $4,261,620 for alternative and renewable projects. About 94% of electricity in rural communities which receive Power Cost Equalization (PCE) payments is produced by diesel and about half the fuel storage in most villages is used for the power plants. Any alternative means of generating power can reduce the capacity needed for fuel storage. This reduces capital costs and operations and maintenance (O&M) and repair and renovation (R&R) costs for fuel storage facilities and may reduce the cost of power to the community.

The Energy Program has historically used a ''universe of need'' model to determine project and program funding. Specifically, the Program is focused on using the existing statewide deficiency lists of bulk fuel facilities and power generation/distribution systems to prioritize project funding decisions. A program partnership model is utilized for project management and partners are actively involved in the design and construction of projects. Partners coordinate project funding requests with the Commission to balance the relative priority or urgency of bulk fuel and power generation needs against available funding, readiness of individual communities and project participants for the project(s), and capacity of the partners to carry out the work. Communities are identified by partners and through the deficiency list process. Legacy program (RPSU, bulk fuel and intertie) projects are selected and reviewed by Commission staff and program partners. Thus, a renewable project sometimes is proposed in conjunction with a deficiency list project to reduce the dependence on diesel fuel, and the concomitant fuel storage requirements. So too, an intertie, can remove the need for a new power plant, and reduce fuel storage requirements in the intertied communities. Therefore, the legacy program may also include these types of energy infrastructure. Each community and project must be evaluated holistically. Program partners also perform initial due diligence and Denali Commission's Investment Guidance screenings, as well as assisting in development of the business plans for the participants as the designs are underway. The Program is dynamic: Priorities fluctuate throughout the year based on design decisions, due diligence and investment guidance considerations, site availability, the timing of funding decisions, etc.

In 2008 the Commission completed a study on intertie/transmission lines between communities, regions and statewide. The study summarized the vast amount of research, planning and studies that have occurred to date and identified the policy and economic considerations for investment in intertie infrastructure. The program will continue to support projects where connections via intertie are feasible. The program will also be further defining the role of the Denali Commission in intertie planning, development and execution statewide as recommended in the study.

Health Facilities Program

The Denali Commission Act was amended in 1999 to provide for the, ''planning, constructing and equipping of health facilities.'' Since 1999, the Health Facilities Program has been methodically investing in the planning, design and construction of primary care clinics across Alaska.

Primary care clinics have remained the ''legacy'' priority for the Program. However, in 2003 the ''Other Than'' primary care component of the Program was adopted in response to Congressional direction to fund a mix of other health and social service related facility needs. Over time, the Program has developed Program sub-areas such as Behavioral Health Facilities, Domestic Violence Facilities, Elder Housing, Primary Care in Hospitals, Emergency Medical Services Equipment and Hospital Designs. The FY09 Draft Work Plan emphasizes the priority of the Primary Care Clinic Program as the legacy program area, with the majority of funding dedicated to clinics. Under the scenario in which the Commission receives apportioned funds in advance of appropriations under a Continuing Resolution, staff recommends these funds be dedicated solely to the clinic program.

The Program utilizes a ''universe of need'' model for primary care and a competitive selection process for other sub-program areas. In 1999 the Program created a deficiency list for primary care clinics, which totaled 288 communities statewide in need of clinic replacement, expansion and/or renovation. Currently, 110 clinics have been completed or are in construction and approximately 40 are in design.

The Program is guided by the Health Steering Committee, an advisory body comprised of the following membership organizations: The State of Alaska, Alaska Primary Care Association, the Alaska Native Tribal Health Consortium, the Alaska Mental Health Trust Authority, the Alaska Native Health Board, the Indian Health Service, the Alaska State Hospital and Nursing Home Association, and the University of Alaska.

Projects are recommended for funding by Commission staff if they demonstrate project readiness, which includes the completion of all due diligence requirements. This includes an approved business plan, community plan, site plan checklist, completed 100% design, documentation of cost share match, and realistic ability to move the project forward in a given construction season.

In addition to construction challenges, the health program has indicated that a major sustainability risk to health projects is workforce recruitment and retention. Recommendations on this challenge are made in the ''Other Issues'' section of the Work Plan.

Additionally, the Health Program is committed to assisting in the discussion regarding access to primary care facilities and services for veterans. The Health Steering Committee will engage in discussions about this issue during FY 09.

Training Program

In a majority of rural communities unemployment rates exceed 50% and personal capita income rates are over 50% below the national average. When job opportunities in rural Alaska do become available, rural residents often lack the skills, licensing and certifications necessary to compete and often lose those jobs to people from outside the community, region or even state. With the limited number of jobs available, the Commission believes it is imperative to ensure that local residents have the skills and essential certifications necessary to work on the construction of projects funded by the Denali Commission. Through the Training Program, the Commission builds sustainability into their investments by providing training for the long term management, operations and maintenance of these facilities and thus increasing local capacity and employment.

The Training Program's mission is to build a community's capacity through training and increase the employment and wages of unemployed or underemployed Alaskans. The Training Program's primary purpose is to support the Commission's investment by providing training for the careers related to the Commission infrastructure programs (such as Energy and Health Facilities).

The Training Program is also guided by the following principles:

- Priority on training for Denali Commission infrastructure, projects and priorities
- Training will be tied to a job
- Training for construction, operations and maintenance for other public infrastructure
- Training will encourage careers not short term employment

Each year, the Commission dedicates training funds to careers associated with infrastructure development and long-term sustainability in rural Alaska. The Commission has funded construction, operations and maintenance training in communities statewide with large success.

The Commission anticipates that the general priority areas of construction, operations and maintenance of Commission Projects; management training for Commission Projects; youth initiatives that support employability skills; and construction, operations and maintenance training of ''other public infrastructure'' will continue to be funded in FY09. These projects are selected through a competitive Request for Grant Application (RGA) process with partners, and at the recommendation of Commission staff, and policy guidance and priority areas for funding are set by the Training Advisory Committee (TrAC).

In 2008, the TrAC recommended several new initiatives for the FY09 Work Plan. These new initiatives are explained in the following paragraphs.

The Commission and the TrAC recognize the threat of out migration due to high costs of living and joblessness in Alaska communities. For this reason, the Training Program recommends expanding its priorities to include ''Funding 'other' training that contributes to the survivability of a community''. However, funding for these projects will be facilitated through the RGA competitive process and funding will be substantially less than the other priority areas.

The Commission and TrAC support regional employment and training entities and recommend a shift of workforce development ownership and responsibility in that direction. These local training entities know first-hand the workforce needs and challenges and resources available. The TrAC recommended that funding be directed to Regional Training Centers/Campuses, Community Development Groups (CDQ), Regional Health Corporations and rural Job Centers for training related to Denali Commission investments.

Historically the Commission has provided funding directly to organizations that are able to deliver results in the priority areas as described above. These organizations have typically been selected by the Commission directly or through competitive requests for proposals managed by partner organizations. This process is recommended to continue in the FY09 Work Plan.

Transportation

Section 309 of the Denali Commission Act 1998 (amended), created the Commission's Transportation Program, including the Transportation Advisory Committee. The advisory committee is composed of nine members appointed

by the Governor of the State of Alaska including the Chairman of the Denali Commission; four members who represent existing regional native corporations, native nonprofit entities, or tribal governments, including one member who is a civil engineer; and four members who represent rural Alaska regions or villages, including one member who is a civil engineer.

The Transportation Program addresses two areas of rural Alaska transportation infrastructure, roads and waterfront development. There is a solid base of 114 projects underway, with the FY09 project nomination and selection process likely to add another 15 to 20 projects. Up to 10 projects currently in the design phase in the Commission program will also move to construction in FY09.

There is a consensus amongst agencies and communities that the Transportation Program is successfully addressing improvements to local and regional transportation systems. This is largely a function of the Transportation Advisory Committee's success at project selection and monitoring, and the success of the program's project development agencies.

The program is generally a competitively-bid contractor or materials-based system grounded in Title 23 CFR. These strict project development and construction rules have presented some challenges to the Denali Commission's ability to respond quickly to targets of opportunity, but they have also had the positive effect of ensuring project design and construction is executed at a professional level. The program operates under a reimbursable payment system that requires local and state sponsors pay close attention to accounting procedures prior to their payments to contractors and vendors. This system helps ensure project payments are eligible when submitted to the Commission.

Four important trends are emerging as the program enters its fourth year of operations:

- Fewer project partners, with fully developed project development capabilities
- Narrowing focus on core project types
- Commission's use of State of Alaska General Funds to match Title 23 CFR funds
- Preparation for federal highway reauthorization legislation

Project Partners

As the transportation program began its work in FY 2006, the Commission, responding to local and regional interests sought to encourage local sponsor project development through tribal governments and regional non profits, cities and boroughs, as well as traditional state and federal transportation agencies.

Through experience, the level of project management oversight needed for small cities and tribes to succeed in the Title 23 CFR environment is not sustainable under the limited personnel resources available to the Commission. Therefore, partnerships with state and federal transportation agencies will increasingly become the Commission's primary project development partners; they have the level of expertise and resources needed to successfully execute project development.

Core Project Types

As the transportation program got underway in FY06, a wide array of rural transportation projects was undertaken. As the road program has evolved under the guidance of the Transportation Advisory Committee, the original emphasis on local street improvements has been confirmed. Local street improvements in villages, including board roads in tundra communities are a necessary focus area. While a mix of projects is still likely, it is clear that local roads, sometimes including access between communities and/or access to local resources, including gravel and rock, will increasingly become the focus of the road program.

In the waterfront development program, there will continue to be limited contributions to major small boat harbor projects and regional port developments. In these cases, the Commission is often providing needed funds in the range of $500,000–1,000,000 for projects with other fund sources in the range of $4,000,000–12,000,000. There is currently an array of these successful projects underway and it is expected that there will continue to be a mix of these projects in the program.

However, the program will specifically increase its focus on barge landings at rural communities. These projects range from a couple of mooring piling to secure a barge, to small dock structures, depending on community size and barge operation characteristics. The value of these structures lies in improved fuel/freight transfer operations and improved worker and environmental safety. The Commission and U.S. Army Corps of Engineers have prepared a barge landing analysis that under review at this time, with the final report due in December 2008. This work has turned out to be an excellent analysis of barge operation needs and it is forming the basis of a design and construction program. The universe of need for the first generation of projects is in the range of $40,000,000.

For both road and waterfront development projects, a continuing planning effort, especially through regional tribal non-profits like Kawerak, Inc. and the Alaska Village Council Presidents, will provide valuable information on future program needs.

State General Fund Match

Federal Highway Authority (FHWA) and Federal Transit Administration (FTA) funds require a match of 9–20%. As the program got underway in FY 2006, it became apparent that the need to provide match funds severely limited the types of projects the Commission could undertake.

In FY 2007, the state legislature, with information from the Commission and guidance from Alaska Department of Transportation and Public Facilities (DOT&PF) leadership at that time, appropriated $4,500,000 to DOT&PF for the purpose of providing match funds to Commission projects. This appropriation has been critical to the success of the Commission's effort to address local street and barge landing projects where the need is great, but the community resources to provide sometimes substantial match is often limited.

Using a quarterly report/request method, the Commission provides a list of projects underway to DOT&PF. Upon approval, DOT&PF transfers funds to an account at the Commission, which is subsequently assigned to selected projects. Again, this single action by the State of Alaska has been critical to being able to provide transportation improvements to smaller communities.

There are currently informal discussions with DOT&PF regarding the potential for a separate appropriation to provide for joint funding between the Commission and DOT&PF for state-owned rural roads. This may be an opportunity to expand what has been a successful program of upgrading and surfacing DOT&PF roads in small communities like Cantwell, Eagle, Circle and Tanana.

Highway Legislation Reauthorization

The Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA–LU) expires at the end of FY 2009. Due to significant transportation policy and program discussions underway in Congress, it is likely that continuing resolutions will fund existing programs at FY08 or FY09 levels for at least FY10 and likely FY11.

In the meantime, the Commission is working with FHWA and FTA to provide information regarding the emerging focus on local roads and barge landing projects. Both agencies recognize that the Commission's transportation program is addressing these categories of projects in a systematic and statewide manner. There also appears to be a consensus that it is appropriate to try to address these program elements directly in new highway funding legislation. Other efforts to address more efficient funding transfers between the Commission and Western Federal Lands Highway Division (WFLHD) are also underway.

Solid Waste

The goal of the solid waste program at the Denali Commission is to provide funding to address deficiencies in solid waste disposal sites which threaten to contaminate rural drinking water supplies. Solid waste handling and disposal is one of the most under-served arenas in the context of rural Alaska's environmental and public health.

The program employs a competitive RFP process to select and identify projects, and has utilized a multidisciplinary review panel to ensure that projects meet all Denali Commission due diligence and policy requirements. The Commission intends to utilize this same process for selection of FY09 projects.

The Rural Alaska Community Action Program is a program partner with the Denali Commission Solid Waste Program. The program also coordinates with USDA Rural Development's Water and Environmental Program and the U.S. Environmental Protection Agency.

Teacher Housing

Teaching in rural Alaska can be one of the most rewarding and challenging professions. A critical issue for rural teachers is finding safe, affordable housing during the school year. Housing availability varies by community from newer adequate homes, to old housing units with multiple safety and structural problems, to a lack of enough available housing, requiring teachers to double-up or even live in the school.

Teacher turnover rates are high in rural Alaska, with many teachers citing unavailable or inadequate housing as a factor in their decision to move. The quality of education received by students is impacted by teacher retention. By improving the availability and quality of housing for teachers, the Commission strives to also increase the quality of education received by the next generation of Alaskans.

In FY04, Congress directed the Commission to address the teacher housing needs in rural Alaska. The Commission launched a statewide survey of 51 school districts and rural education attendance areas to identify and prioritize the teacher housing needs throughout the state. Urban districts in Anchorage, Fairbanks, Mat-Su and Juneau were not included in the survey.

The Commission utilizes a program partnership model to implement the teacher housing program. An annual RFP process identifies eligible projects and other funding sources, such as debt service, available to fill the gap between the project's capacity to carry debt and the total development cost of the project. Acquisition, rehabilitation, new construction, and multi-site rehabilitation are eligible development activities under this program.

In FY09 the Commission will expand its teacher housing program to include housing for health care professionals. This change will be administered through the Commission's program partner, the Alaska Housing Finance Corporation (AHFC), and its Greater Opportunity for Affordable Living (GOAL) process. This expansion shall include the following provider types: mid-level providers, nurses, mental and dental health specialists and health aides.

Economic Development

Since its earliest days as a territory of the United States, Alaska has contributed to the economy of America, largely through supply of raw materials or partially processed products. Now Alaska's abundant natural resources, from fossil fuel and mineral products to timber and fish, must compete in the global marketplace. Innovation and entrepreneurship have become critical to business success.

One of the purposes of the Commission is economic development. The Commission firmly believes that sustainable economic development for Alaska's rural communities, like that of the rest of America, will be generated in the private, commercial sector, not within government. To that end, the Commission supports the development of public infrastructure upon which the private sector creates jobs and wealth, and helps ensure that good businesses and business ideas have a chance to become long-term, self-sustaining enterprises.

Over the history of the Program, the Commission has supported and advanced a wide-array of economic development program activities ranging from community profile mapping to supporting innovative models for lending, and equity investment in Alaska.

The Program is guided by Commission staff and the Economic Development Advisory Committee, which provides general policy guidance and funding recommendations in broad categories.

Other Policy Issues

Multi-Use Facilities

At this time the Commission is not undertaking a stand-alone program for multi-use facilities. However, as opportunities arise in FY09 for the Commission to leverage federal funds for combined use facilities or to take advantage of placing community infrastructure, such as clinical facilities, within the confines of existing community buildings the Commission may utilize program funds for such efforts. Projects will be selected based on the opportunity for cost savings, construction readiness and correlation to existing Commission program activities. Funds will not be used to identify stand-alone multi use projects.

Pre-Development

The Commission intends to continue to engage in the Pre-Development program in FY09. Pre-Development is a joint collaboration between the Alaska Mental Health Trust Authority, the Denali Commission, The Foraker Group, and the Rasmuson Foundation to assist organizations with development of plans for successful capital projects.

The funding agencies are concerned that inadequate planning during the initial project development phase can result in projects that are not sustainable in the long term. The Pre-Development Program was created to provide guidance and technical assistance to ensure that proposed projects: meet documented need, are consistent with strategic and community plans, consider opportunities for collaboration, have appropriate facility and site plans and realistic project budgets, are financially sustainable and will not negatively impact the sustainability of the proposing organization. Through this partnership an agency's capital project is better equipped to proceed.

Strategic Planning and Agency Evaluation

In FY09 the Commission will be creating an on-going, agency-wide evaluation system to measure the outcomes of Commission programs. It is anticipated that this work will begin January of 2009, and would be designed to provide by empirical and qualitative data regarding Commission programs,

projects and overall goal accomplishments in a broad set of evaluation criteria. It is the Commission's intent to maintain high-level measures that are correlated to the Commission's goals related to improving access, reducing cost and improving the quality of services and facilities across Alaska. Program Advisory Committees, staff and Commissioners will play a critical role in shaping this evaluation methodology.

Specific evaluation and strategic planning undertakings include the following:

- Adoption and implementation of program missions and 2–3 key output and outcome measures for each program.
- Development, draft, and application of strategic plan in accordance with GPRA provisions and Denali Commission needs.
- Production of annual performance plan per OMB requirements.
- Establishment of processes to support performance measurement improvements.

Such processes include:

- Compilation and maintenance of projects by community,
- Mechanism to obtain feedback about impact of projects,
- Semi-annual assessment by key staff and management of long- and short-term performance by program, and
- In-depth and comprehensive evaluation of dedicated program annually.

Recruitment and Retention of Health Workers

Alaska Rural Human Resources Collaborative (ARHRC) provided presentations to both the Health Steering Committee and the Training Subcommittee in 2008. Both advisory committees support the concept which develops a system for recruitment and temporary staffing of health professionals. Seed funding in the amount of $250,000 is needed at this time, with startup funds in the amount of $1.2m over the next year. This Work Plan includes a challenge grant of up to $250,000 for this collaborative project. This funding will be provided to the project from the Energy and Water Appropriations (Base) and will include an incentive for Regional Health Corporation and other financial contributors to provide funding (challenge grant). In conclusion, this initiative cannot be funded through either the Training Program or the Health Program due to restricted funding requirements.

Dated: November 25, 2008.

George J. Cannelos,

Federal Co-Chair.

[FR Doc. E8–28810 Filed 12–4–08; 8:45 am]

BILLING CODE 3300–01–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 February 3, 2009.

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: December 1, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Civil Rights

Type of Review: Revision.

Title: Assurance of Compliance—Civil Rights Certificate, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Boy Scouts of America Equal Access Act of 2001.

Frequency: One time.

Affected Public: Not-for-profit institutions; businesses or other for-profit; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 50.
Burden Hours: 17.

Abstract: The Office for Civil Rights (OCR) has enforcement responsibilities under several civil rights laws, including Title VI, Title IX, Section 504, the Age Discrimination Act, and the Boy Scouts of America Equal Access Act. To meet these responsibilities, OCR collects assurances of compliance from applicants for Federal financial assistance from, and applicants for funds made available through, the Department of Education, as required by regulations. These entities include, for example, State educational agencies, local education agencies, and postsecondary education. If a recipient violates one or more of these civil rights laws, OCR and the Department of Justice can use the signed assurances of compliance in an enforcement proceeding.

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 3918. 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. E8–28765 Filed 12–4–08; 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 January 5, 2009.

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: December 1, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: New.

Title: Request for Title IV Reimbursement or Heightened Cash Monitoring 2 (HCM2).

Frequency: Monthly; annually.

Affected Public: Not-for-profit institutions; businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 3,180.

Burden Hours: 12,720.

Abstract: Participating Title IV (TIV) institutions must request, maintain, disburse and manage TIV funds promoting sound cash management. An institution seeks reimbursement by submitting a request for funds via the Standard 270 form and identifying students, amounts requested and providing documentation. The amount requested is compared with what is in the Common Origination and Disbursement (COD) system. The certifying official at the institution certifies statements on the President/Owner/CEO and the Financial Aid Director/TPS forms. The forms are signed by the institution official and submitted when requesting payment for Reimbursement of HCM2 claims.

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 3848. 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. E8–28770 Filed 12–4–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability of the Revised Draft Environmental Impact Statement for Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and Western New York Nuclear Service Center

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of the *Revised Draft Environmental Impact Statement for Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and Western New York Nuclear Service Center* (DOE/EIS–0226–D [Revised]) (referred to as the ''Draft Decommissioning and/or Long-Term Stewardship EIS'' or ''Draft EIS''). This Draft EIS revises the *Draft Environmental Impact Statement for Completion of the West Valley Demonstration Project and Closure or Long-Term Management of Facilities at the Western New York Nuclear Service Center* (DOE/EIS–0226–D) issued for public comment in January 1996 (referred to as the ''1996 Cleanup and Closure Draft EIS'').

This Draft EIS was prepared in accordance with the Council on Environmental Quality's National Environmental Policy Act (NEPA) Implementing Regulations (40 CFR parts 1500–1508) and the DOE NEPA Implementing Procedures (10 CFR part 1021). DOE and the New York State Energy Research and Development Authority (NYSERDA) are joint lead agencies for preparing the Draft EIS, while the U.S. Nuclear Regulatory Commission (NRC), the U.S. Environmental Protection Agency (EPA), and the New York State Department of Environmental Conservation (NYSDEC) are cooperating agencies. NYSDEC and the New York State Department of Health (NYSDOH) are involved agencies under the New York State Environmental Quality Review Act (SEQRA).

This Draft EIS analyzes alternatives for decommissioning the site and/or long-term stewardship, as well as a No Action Alternative as required by NEPA and SEQRA. The Proposed Action is the completion of the West Valley Demonstration Project (WVDP) and the decommissioning and/or long-term

management or stewardship of the Western New York Nuclear Service Center (WNYNSC). This includes the decontamination and decommissioning of the waste storage tanks and facilities used in the solidification of high-level radioactive waste, and any material and hardware used in connection with the WVDP. DOE needs to determine the manner in which facilities, materials, and hardware for which the Department is responsible will be managed or decommissioned in accordance with applicable Federal and State requirements. NYSERDA needs to determine what material or structures for which it is responsible will remain on site, and what institutional controls, engineered barriers, or stewardship provisions would be needed.

For the Proposed Action, the three action alternatives evaluated in the Draft EIS are *Sitewide Removal, Sitewide Close-In-Place,* and *Phased Decisionmaking.* A No Action Alternative is also evaluated in accordance with NEPA, which would continue management and oversight of the WNYNSC under the conditions that will exist at the Starting Point of this EIS in 2011.

DATES: The public is invited to comment on the Draft EIS, and all comments received which are postmarked no later than the end of the public comment period, June 8, 2009, will be addressed in preparing the Final EIS. Comments postmarked after this date will be considered to the extent practicable. Public hearings on the Draft EIS will be held at the following dates and locations in New York: Tuesday, March 31, 2009, Seneca Nation of Indians, William Seneca Building, 12837 Rte. 438, Irving, NY; Wednesday, April 1, 2009, Ashford Office Complex, 9030 Route 219, West Valley, NY; and Thursday, April 2, 2009, Clarion Hotel—McKinley's Banquet and Conference Center, S–3950 McKinley Parkway, Blasdell, NY. Information regarding these dates, times and locations will be announced via other means such as local press announcements. Oral and written comments will be accepted at the public hearings.

ADDRESSES: Copies of this Draft EIS are available for review at the Concord Public Library, 18 Chapel Street, Springville, NY 14141, (716) 592–7742, the Ashford Office Complex Reading Room, 9030 Route 219, West Valley, NY 14171, (716) 942–4555 and the U.S. Department of Energy, FOIA Reading Room, 1E–190, Forrestal Bldg., 1000 Independence Ave., SW., Washington, DC 20585, 202–586–3142.

This Draft EIS is also available at *http://www.westvalleyeis.com*.

Oral and written comments on the Draft EIS will be accepted at the public hearings, or written comments may be mailed to Catherine Bohan, EIS Document Manager, West Valley Demonstration Project, U.S. Department of Energy, P.O. Box 2368, Germantown, MD 20874. Comments or requests for information may also be submitted via e-mail at *http://www.westvalleyeis.com* or by faxing toll-free to 866–306–9094. Please mark all envelopes, faxes and e-mail: ''Draft Decommissioning and/or Long-Term Stewardship EIS Comments.'' All comments received or postmarked during the comment period will be considered during preparation of the Final EIS. Late comments will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: For information regarding the WVDP or this Draft EIS, contact Catherine Bohan at the above address. The following Web sites may also be accessed for additional information on the Draft EIS or the West Valley Site: *http://www.westvalleyeis.com* or *http://www.wv.doe.gov*.

For general information on DOE's NEPA process contact: Carol Borgstrom, Director, Office of NEPA Policy and Compliance (GC–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; e-mail *AskNEPA@hq.doe.gov*; telephone 202–586–4600; or leave a message at 800–472–2756. The Draft EIS will also be accessible through the Department's NEPA Web site at *http://www.gc.energy.gov./NEPA*.

For general questions and information about NYSERDA, contact Paul Bembia, Program Director, West Valley Site Management Program, New York State Energy Research and Development Authority, Ashford Office Complex, 9030 Route 219, West Valley, NY 14171; telephone 716–942–9960, extension 4900; fax 716–942–9961; or e-mail *pjb@nyserda.org.*

SUPPLEMENTARY INFORMATION: The WNYNSC is located south of Buffalo, NY, owned by NYSERDA, on behalf of New York State, and was the site of a commercial nuclear fuel reprocessing facility. Spent fuel reprocessing operations conducted from 1966 to 1972 resulted in the generation of 2,500,000 liters (660,000 gallons) of high-level radioactive waste, which were stored in two underground tanks. WVDP was authorized by Congress in 1980 to demonstrate the solidification of the high-level radioactive waste remaining in the underground tanks at the WNYNSC site. Through a Cooperative Agreement between DOE and NYSERDA, DOE assumed control, but not ownership, of the project premises portion of the site (the area in which the WVDP is located) in order to conduct the WVDP. Solidification of the high-level radioactive waste was completed in 2002, and the solidified high-level radioactive waste is currently stored at the site and will ultimately be transported to an appropriate Federal repository for permanent disposal.

A Draft EIS for cleanup and closure of the WNYNSC was issued for public comment in 1996 (1996 Cleanup and Closure Draft EIS), but a Preferred Alternative was not identified, and a Final EIS was not issued. Instead, DOE and NYSERDA believed it was important to defer selection of a Preferred Alternative until more studies and analyses were completed and the NRC policy statement, including decommissioning criteria for the WVDP, were issued. Since that time, additional data have been collected on structural geology, local fractures, and seismicity. Designs for potential engineering approaches for decommissioning have been evaluated. Disposal area and facility inventory reports have been updated; improved methods for analyzing erosion and groundwater flow and transport have been developed and refined; a citizen task force has been consulted on the nature of a Preferred Alternative; and workshops to refine methods for long-term performance assessment have been conducted. Assumptions and design features for specific alternatives were reviewed and revised.

This Draft Decommissioning and/or Long-Term Stewardship revises the 1996 clean-up and closure EIS, and was prepared in accordance with the Council on Environmental Quality's National Environmental Policy Act NEPA Implementing Regulations (40 CFR Parts 1500–1508) and DOE NEPA Implementing Procedures (10 CFR Part 1021). DOE and NYSERDA are joint lead agencies for preparing the Draft EIS, while NRC, EPA and NYSDEC are cooperating agencies. NYSDEC and NYSDOH are involved agencies under SEQRA. DOE needs to determine what material or structures for which it is responsible will remain on site, and what institutional controls, engineered barriers, or stewardship provisions would be needed. NYSERDA needs to determine the manner in which facilities and property for which NYSERDA is responsible, including the State-licensed Disposal Area, will be managed or decommissioned, in accordance with applicable Federal and State requirements. To this end,

NYSERDA needs to determine what material or structures for which it is responsible will remain on site, and what institutional controls, engineered barriers, or stewardship provisions would be needed.

This Draft EIS is intended to support DOE and NYSERDA decisions regarding the Proposed Action, which is the completion of the WVDP and the decommissioning and/or long-term management or stewardship of the WNYNSC. This would include the disposition of the high-level radioactive waste storage tanks, the former spent fuel reprocessing plant, the North Plateau Groundwater Plume, the Cesium Prong, the NRC-licensed Disposal Area (NDA), and the State-licensed Disposal Area (SDA). The three action alternatives evaluated for the Proposed Action are as follows:

Sitewide Removal: Under this alternative, all site facilities as outlined in this Draft EIS would be removed; all environmental media would be decontaminated; and all radioactive, hazardous, and mixed waste would be characterized, packaged as necessary, and shipped off site for disposal. Completion of these activities would allow unrestricted use of the site (i.e., the site could be made available for any public or private use). This alternative includes temporary onsite storage of vitrified high-level radioactive waste canisters pending the availability of a Federal repository.

Sitewide Close-In-Place: Under this alternative, most facilities would be closed in place. Residual radioactivity in facilities with larger inventories of long-lived radionuclides would be isolated by specially designed closure structures and engineered barriers. Major facilities and sources of contamination, such as the Waste Tank Farm and burial grounds, would be managed at their current locations. This would allow large areas of the site to be released for unrestricted use. The license for remaining portions of the WNYNSC could be terminated under restricted conditions, or those portions could remain under long-term NRC license or permit. Facilities that are closed in-place, and any buffer areas around them, would require long-term stewardship.

Phased Decisionmaking: Under this alternative, decommissioning would be completed in two phases. This alternative involves near-term removal actions where there is agency consensus and characterization studies to facilitate decisionmaking for the remaining facilities or areas.

Phase 1 would include removal of the Main Plant Process Building, the source of the North Plateau Groundwater Plume, and the lagoons on the WVDP premises. All facilities and the lagoons would be removed, except for the permeable treatment wall (an *in-situ* groundwater mitigation technology). Phase 1 decisions would also include removal of a number of other facilities on the WVDP premises. No decommissioning or long-term management activities would be conducted for the Waste Tank Farm and its support facilities, the construction and demolition debris landfill, the non-source area of the North Plateau Groundwater Plume, or the NDA. The SDA would continue under active management, consistent with its permit and license requirements. Phase 1 activities would make use of proven technologies and available waste disposal sites to reduce the potential near-term health and safety risks from residual radioactivity and hazardous contaminants at the site. Phase 1 would also include an ongoing assessment period during which DOE and NYSERDA would conduct additional studies, evaluations, and characterization of site contamination. The studies and evaluations would be conducted to clarify and possibly reduce technical uncertainties related to the decision on final decommissioning and long-term management of the site, particularly uncertainties associated with the long-term performance models, the performance of engineered barriers and other technologies for in-place containment, the viability and cost of technology for exhuming buried waste, and the availability of waste disposal sites. In consultation with NYSERDA and the cooperating and involved agencies on this Draft EIS, DOE would determine whether the new information warrants a new or supplemental EIS. NYSERDA also would assess the results of site-specific studies and other information during Phase 1 to determine the need for additional SEQRA documentation.

According to the approach determined most appropriate during the additional Phase 1 studies and evaluations, Phase 2 would complete decommissioning or long-term management decisionmaking. Under the Phased Decisionmaking Alternative, the Phase 2 decision would be made within 30 years.

No Action Alternative: Under this alternative, no actions toward decommissioning would be taken. This alternative would involve the continued management and oversight of all facilities located on the WNYNSC property as of the Starting Point for this EIS in 2011. The No Action Alternative does not meet the Purpose and Need for agency action, but analysis of the No Action Alternative is required under NEPA and SEQRA as a basis of comparison.

Preferred Alternative: The Phased Decisionmaking Alternative is DOE's and NYSERDA's Preferred Alternative.

Combination Alternatives: DOE and NYSERDA recognize that, after consideration of public comments, some combination of alternatives analyzed in the Draft EIS may be identified as the best way to meet agency goals and protect human health and safety and the environment. If a specific combination alternative is identified as preferred between the Draft and Final EISs, DOE would present the combination alternative and its potential impacts in the Final EIS. If a combination alternative is ultimately selected for implementation, the Record of Decision and Findings Statement (under SEQRA) would explain the reasons DOE and NYSERDA made that decision.

Following the end of the public comment period, DOE will consider and respond to the comments received, and issue the Final Decommissioning and/or Long-Term Stewardship EIS, including a Comment Response Document. DOE will issue a Record of Decision no sooner than 30 days after EPA issues a Notice of Availability of the final EIS in the **Federal Register**.

Signed in Washington, DC, November 25, 2008.

Ines R. Triay,

Acting Assistant Secretary for Environmental Management.

[FR Doc. E8–28806 Filed 12–4–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Phase 1 Decommissioning Plan for the West Valley Demonstration Project, West Valley, NY

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of the proposed Phase 1 Decommissioning Plan for the West Valley Demonstration Project (WVDP) at the Western New York Nuclear Service Center in West Valley, New York (WNYNSC). The proposed Phase 1 Decommissioning Plan is consistent with DOE's preferred alternative in the *Revised Draft Environmental Impact Statement for the Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and Western New York Nuclear Service*

Center (Draft EIS, DOE/EIS–02260). DOE intends, at a future date, to issue a Record of Decision pursuant to the Final EIS. The proposed Phase 1 Decommissioning Plan is being reviewed by the U.S. Nuclear Regulatory Commission (NRC). The Department will consider NRC comments prior to the initiation of decontamination and decommissioning operations, and should DOE during the course of the National Environmental Policy Act process or as a result of comments from the NRC ultimately decide upon an approach that differs from the current preferred alternative in the Draft Decommissioning EIS, or adopt changes that affect the proposed Phase 1 Decommissioning Plan, then DOE will revise the Phase 1 Decommissioning Plan as necessary to reflect the changes.

ADDRESSES: Copies of the proposed Phase 1 Decommissioning Plan for the West Valley Demonstration Project are available for public inspection at the following locations:

U.S. Department of Energy, FOIA Reading Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0001;

Hulbert Library, DOE–WVDP Public Reading Room, 18 Chapel St., Springville, NY 14141. 716–592–7742; and

Ashford Office Complex Public Reading Room, 9030 Route 219, West Valley, NY 14171–0191. (716) 942–4679.

The proposed Phase 1 Decommissioning Plan is also available at:

The U.S. Department of Energy West Valley Demonstration Project Web site, at *http://www.wv.doe.gov*; and

The U.S. Nuclear Regulatory Commission Electronic Reading Room Web site, at *http://www.nrc.gov/reading-rm/adams.html.*

FOR FURTHER INFORMATION CONTACT:

Ms. Moira N. Maloney, Decommissioning Plan Project Manager, West Valley Demonstration Project, U.S. Department of Energy, 10282 Rock Springs Road, West Valley, NY 14171–0191;

Mr. Bryan C. Bower, Director, West Valley Demonstration Project, U.S. Department of Energy, 10282 Rock Springs Road, West Valley, NY 14171–0191; and

Mr. Desi Crouther, Director, Office of Small Sites Projects, Office of Environmental Management, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0001.

SUPPLEMENTARY INFORMATION: The West Valley Demonstration Project Act (the Act), Public Law 96–368 of October 1, 1980, directed the Department of Energy to carry out a high-level radioactive waste management demonstration project at the WNYNSC. The purpose of the project was to demonstrate the solidification of high-level radioactive waste for disposal in a Federal repository. The Act also requires the Department to decontaminate and decommission the underground high-level waste storage tanks and other facilities where the solidified high-level radioactive waste was stored, the facilities used in the solidification of the waste, and any material and hardware used in connection with the project, in accordance with such requirements as the NRC may prescribe.

In accordance with the Act, DOE entered into an agreement with the NRC to establish arrangements for review and consultation by the NRC for the Project. The procedures for NRC review and consultation were established in the September 23, 1981 *Memorandum of Understanding* and section 2(c)(1) of the Act between DOE and NRC. Accordingly, DOE is to submit to NRC, for its review and comment, a Project Decommissioning Plan for the facilities that were used in solidifying the waste, which includes a description of engineering and operating activities to be performed. The plan is to be reviewed by the NRC and comments provided to DOE. DOE is to review and consider the comments provided prior to the initiation of decontamination and decommissioning operations.

The decommissioning activities described in the proposed Phase 1 Decommissioning Plan for the West Valley Demonstration Project are consistent with the Phased Decision-making Alternative, the preferred alternative described in the *Revised Draft Environmental Impact Statement for Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and Western New York Nuclear Service Center.* Under the Phased Decision-making Alternative, the decommissioning of the Project and WNYNSC would be completed in two phases. Phase 1 decommissioning activities within the Project premises, which are described in the proposed Phase 1 Decommissioning Plan, are near-term removal actions that include removal of the Main Plant Process Building, Vitrification Facility, source area of the North Plateau Groundwater Plume, wastewater treatment facility lagoons, and certain ancillary buildings, foundations, slabs, and pads on the WVDP premises. The Phase 2 decisions on the decommissioning of the remainder of the Project and WNYNSC, or its long-term management, would be made in the future and is not part of the proposed Phase 1 Decommissioning Plan.

DOE will issue a Record of Decision pursuant to section III.B.1 of the final EIS no sooner than 30 days after the U.S. Environmental Protection Agency has published its Notice of Availability in the **Federal Register**. DOE will revise the proposed Phase 1 Decommissioning Plan to be consistent with the Record of Decision as necessary.

Issued in Washington, DC, on December 1, 2008.

Cynthia Anderson,

Deputy Chief Operations Officer.

[FR Doc. E8–28807 Filed 12–4–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC09–567–000, FERC–567]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

November 28, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

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 in consideration of the collection of information are due January 30, 2009.

ADDRESSES: An example of this collection of information may be obtained from the Commission's Web site (at *http://www.ferc.gov/docs-filing/elibrary.asp*). Comments may be filed either electronically or in paper format, and should refer to Docket No. IC09–567–000. Documents must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines at *http://www.ferc.gov/help/submission-guide.asp*.

Comments may be filed electronically via the eFiling link on the Commission's Web site at *www.ferc.gov*. First time users will have to establish a user name and password (*http://www.ferc.gov/docs-filing/eregistration.asp*) before eFiling. The Commission will send an

automatic acknowledgement to the sender's e-mail address upon receipt of comments through eFiling.

Commenters filing electronically should not make a paper filing. Commenters that are not able to file electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

Users interested in receiving automatic notification of activity in this docket may do so through eSubscription (at *http://www.ferc.gov/docs-filing/esubscription.asp*). In addition, all comments and FERC issuances may be viewed, printed or downloaded remotely through FERC's Web site using the ''eLibrary'' link and searching on Docket Number IC09–567. For user assistance, contact FERC Online Support (e-mail at *ferconlinesupport@ferc.gov,* or call toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659).

FOR FURTHER INFORMATION CONTACT: Michael Miller 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 FERC is requesting comments on the FERC–567, Gas Pipeline Certificates: Annual Reports of System Flow Diagrams and System Capacity. FERC–567 is an existing data collection, (OMB Control No. 1902–0005), consisting of a set of filing requirements, as contained in 18 CFR Parts 260.8 and 284.13.

The information from the FERC–567 is used by the Commission staff to obtain accurate data on pipeline facilities and the peak capacity of these facilities and to validate the need for new facilities proposed by pipelines in certificate applications. In modeling a pipeline applicant's system, Commission staff utilizes the FERC–567 data to determine configuration and location of installed pipeline facilities; verify and determine the receipt and delivery points between shippers, producers and pipeline companies; determine the location of receipt and delivery points and emergency interconnections on a pipeline system; determine the location of pipeline segments, laterals and compressor stations on a pipeline system; verify pipeline segment lengths and pipeline diameters; justify the maximum allowable operating pressures and suction and discharge pressures at compressor stations; verify the installed horsepower and volumes compressed at each compressor station; determine the existing shippers and producers currently using each pipeline company; verify peak capacity on the system; and develop and evaluate alternatives to the proposed facilities as a means to mitigate environmental impact of new pipeline construction.

18 CFR 260.8 requires each major natural gas pipeline with a system delivery capacity exceeding 100,000 Mcf per day to file, to submit by June 1 of each year, diagrams reflecting operating conditions on the pipeline's main transmission system during the previous 12 months ended December 31. Section 284.13 of 18 CFR requires each interstate pipeline that provides transportation subject to the provisions of Subparts B and G of Part 284 to make an annual filing by March 1 of each year showing the estimated peak day capacity of the pipeline's system. These data are physical/engineering data which are not included as part of any other data collection requirement.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing reporting requirements.

Burden Statement: Public reporting burden for this collection is estimated as:

FERC data collection	Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) × (2) × (3)
FERC–567	100	1.714	81.28	13,931.39

For the FERC–567, the estimated cost burden to respondents is $846,492.80 (13,931.39 hours/2080 hours per year times $126,384 per year average per employee = $846,492.80). The estimated cost per respondent is $8,464.93.

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, and utilizing 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 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 estimate of cost 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 proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28773 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13271–000]

FFP Project 1, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On August 11, 2008, FFP Project 1, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Crescent City Project, to be located on the Mississippi River Jefferson, Orleans, St Bernard Parishes, Louisiana.

The proposed Crescent City Project consists of: (1) 4,850 proposed 20 kilowatt free flow generating units having a total installed capacity of 97 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The FFP Project 1, LLC, project would have an average annual generation of 420.86 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Dan Irvin, FFP Project 1, LLC, 33 Commercial Street, Gloucester, MA 01930, phone (978) 226–7361.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13271) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28776 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13312–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Rhode Island Ocean Energy Project, to be located on the Atlantic Ocean 12 to 25 miles offshore from Suffolk County, New York and Washington County, Rhode Island.

The proposed Rhode Island Ocean Energy Project consists of: (1) 100 proposed 1 megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's website under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13312) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28772 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13306–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the New Jersey Ocean Energy Project, to be located on the Atlantic Ocean 12 to 25 miles offshore from Atlantic County, New Jersey.

The proposed New Jersey Ocean Energy Project consists of: (1) 100 proposed 1 megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue, NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the

''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13306) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28780 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13307–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Hawaii Ocean Energy Project, to be located on the Pacific Ocean 12 to 25 miles offshore from Honolulu County, Hawaii.

The proposed Hawaii Ocean Energy Project consists of: (1) 100 proposed 1 megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue, NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13307) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28781 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13308–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the San Francisco Ocean Energy Project, to be located on the Pacific Ocean 20 to 25 mile offshore from San Francisco and Marin Counties, California.

The proposed San Francisco Ocean Energy Project consists of: (1) 100 proposed 1 megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue, NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13308) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28782 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13309–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Ventura Ocean Energy Project, to be located on the Pacific Ocean 12 to 25 mile offshore from Ventura and Santa Barbara Counties, Massachusetts.

The proposed Ventura Ocean Energy Project consists of: (1) 100 proposed 1

megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue, NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13309) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28783 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13310–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Cape Islands Ocean Energy Project, to be located on the Atlantic Ocean 12 to 25 miles offshore from Dukes and Nantucket Counties, Massachusetts.

The proposed Cape Island Ocean Energy Project consists of: (1) 100 proposed 1 megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue, NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13310) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28784 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13311–000]

Grays Harbor Ocean Energy Company, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On October 22, 2008, Grays Harbor Ocean Energy Company, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the New York Ocean Energy Project, to be located on the Atlantic Ocean 12 to 25 miles offshore from Suffolk County, New York.

The proposed New York Ocean Energy Project consists of: (1) 100 proposed 1 megawatt OceanLinx Wave Energy Converter generating units having a total installed capacity of 100 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 300 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. W. Burton Hamner, Grays Harbor Ocean Energy Company, LLC, 5534 30th Avenue NE., Seattle, WA 98105, phone (206) 491–0945.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13311) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28785 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13277–000]

Natural Currents Energy Services, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On August 11, 2008, Natural Currents Energy Services, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Ventura Ocean Energy Project, to be located on Long Island Sound and Shelter Island Sound in Suffolk County, New York.

The proposed Shelter Island Tidal Energy Project consists of: (1) 1 proposed Red Hawk TISEC generating units having a total installed capacity of 5 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Grays Harbor Ocean Energy Company, LLC, project would have an average annual generation of 14,000 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Roger Bason, Natural Currents Energy Services, 24 Roxanne Boulevard, Highland, New York 12561, phone (845) 691–4009.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13277) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28777 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13279–000]

Natural Currents Energy Services, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On August 11, 2008, Natural Currents Energy Services, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Ventura Ocean Energy Project, to be located on Long Island Sound and Shelter Island Sound in Suffolk County, New York.

The proposed Shelter Island Tidal Energy Project consists of: (1) 65 proposed Red Hawk TISEC generating units having a total installed capacity of 36.20 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Natural Currents Energy Services, LLC, project would have an average annual generation of 14,000 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Roger Bason, Natural Currents Energy Services, 24 Roxanne Boulevard, Highland, New York 12561, phone (845) 691–4009.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13279) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28778 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13253–000]

UEK Corporation and Prospect Energy, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On June 27, 2008, UEK Corporation and Prospect Energy, LLC, jointly filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Old River Outflow Channel Project, to be located on the Atchafalaya River Concordia, Avoyelles, Point Coupee, St. Landry, and West Feliciana Parishes, Louisiana.

The proposed Old River Outflow Channel Project consists of: (1) 23 proposed UEK current generating units having a total installed capacity of 10 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The UEK Corporation and Prospect Energy, LLC, project would have an average annual generation of 87.77 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Philippe Vauthier, UEK Corporation, Box 3124, Annapolis, MD 21403, phone (410) 267–6507. Mr. Howard Barousee, Prospect Energy, LLC, 5629 FM West # 354, Houston, TX 77069, Phone (713) 516–6507.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance

of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13253) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28775 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13280–000]

UEK Corporation and Prospect Energy, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

November 28, 2008.

On August 12, 2008, UEK Corporation and Prospect Energy, LLC jointly filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Atchafalaya River II Project, to be located on the Atchafalaya River Concordia, Avoyelles, Point Coupee, St Landry, and West Feliciana Parishes, Louisiana.

The proposed Atchafalaya River II Project consists of: (1) 23 proposed UEK current generating units having a total installed capacity of 10 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The UEK Corporation and Prospect Energy, LLC, project would have an average annual generation of 87.77 gigawatt-hours and be sold to a local utility.

Applicant Contact: Mr. Philippe Vauthier, UEK Corporation, Box 3124, Annapolis, MD 21403, phone (410) 267–6507. Mr. Howard Barousee, Prospect Energy, LLC, 5629 FM West # 354, Houston, TX 77069, Phone (713) 516–6507.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13280) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28779 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER08–633–002]

ISO New England, Inc.; Notice of Filing

November 28, 2008.

Take notice that on November 18, 2008, ISO New England, Inc. submitted an informational filing with proration results from the Forward Capacity Auction pursuant to the Commission's June 20, 2008 Order Accepting Filing, 123 FERC ¶ 61,290 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 9, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28786 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–5922–000]

Lankford, Kelly; Notice of Filing

November 28, 2008.

Take notice that on November 26, 2008, Kelly Lankford submitted for filing an application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d(b) (2008), Part 45 of Title 18 of the Code of Federal Regulations, 18 CFR Part 45 (2008), and Commission Order No. 664 (2005).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to

become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 17, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–28774 Filed 12–4–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8588–3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7146. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 6, 2008 (73 FR 19833).

Draft EISs

EIS No. 20080281, ERP No. D–NRC–A09836–00, GENERIC—In-Situ Leach Uranium Milling Facilities (NUREG–1910), Construction, Operation, Aquifer Restoration and Decommissioning, Potentially Location in Portions of WY, NE, SD, and NM.

Summary: EPA expressed environmental concerns about the potential for adverse impacts to surface and groundwater resources and air quality. We requested additional information regarding radon emissions data and recommended the development of a generic fugitive dust mitigation plan. We also recommended that the final GEIS analyze the potential costs of site clean ups and address adequate bonding requirements for site restorations in cases of company defaults. Rating EC2.

EIS No. 20080369, ERP No. D–FAA–E40822–FL, Palm Beach International Airport Project, Construction and Operation of Proposed Airfield Improvements, Funding, Palm Beach County, FL.

Summary: EPA expressed environmental concern about increases in aircraft noise exposures and air quality emissions. Rating EC2.

EIS No. 20080374, ERP No. D–FAA–D51023–PA, Philadelphia International Airport (PHL) Capacity Enhancement Program (CEP) To Accommodate Current and Future Aviation Demand, Funding and U.S. Army COE Section 404 Permit, Philadelphia, PA.

Summary: EPA expressed environmental concern about impacts to air quality, wetlands, waterways, the Enterprise Avenue Superfund Site, and local communities. Rating EC2.

EIS No. 20080407, ERP No. D–AFS–K61168–CA, Moonridge Animal Park Relocation Project, Application for a Special-Use-Permit to Construct and Operate a Wild Animal Park and Associated Facilities, Mountaintop Ranger District, San Bernardino National Forest, San Bernardino County, CA.

Summary: EPA expressed environmental concerns about insufficient air quality analysis, and narrow scope of the alternatives. EPA requested clarification of impacts to waters of the U.S. and that discussions of the traffic analysis and induced growth be improved. Rating EC2.

Final EISs

EIS No. 20080394, ERP No. F–BLM–K05064–NV, White Pine Energy Station Project, Construction and Operation, Coal-fired Electric Power Generating Plant, White Pine County, NV.

Summary: EPA continues to have environmental concerns about wetlands mitigation and climate change impacts. To compensate for the loss of wetlands, EPA recommended higher offset ratios, a longer monitoring period, and long-term protection for the mitigation site(s). In addition, EPA recommended that BLM consider additional voluntary measures to reduce greenhouse gas emissions.

EIS No. 20080428, ERP No. F–OSM–A26002–00, Excess Spoil Minimization Stream Buffer Zones, Proposed Revisions to the Permanent Program Regulations Implementing the Surface Mining Control and Reclamation Act of 1977 Concerning the Creation and Disposal of Excess Spoil and Coal Mine Waste and Stream Buffer Zones, Permit Application.

Summary: No formal comments were sent to the preparing agency. Under Section 501(B) of the Surface Mining Control and Reclamation Act, EPA will be taking action on the final Stream Buffer Zone Rule in the near future.

EIS No. 20080431, ERP No. F–NSA–A06182–00, PROGRAMMATIC—EIS—Complex Transformation, To Make the U.S. Nuclear Weapon Complex Smaller, and more Responsive, Efficient and Secure in Order to Meet National Security Requirements, CA, NV, NM, SC, TN and TX.

Summary: No formal comments were sent to the preparing agency.

EIS No. 20080446, ERP No. F–BLM–K09810–CA, Mountain View IV Wind Energy Project, Construction and Operation, Wind Turbine Generators on Public Lands in Section 22 and 28 and Private Land Section 27, Right-of-Way Grant and Conditional Use Permit in the City of Palm Springs, CA.

Summary: EPA does not object to the proposed project.

Dated: December 2, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8–28851 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8588–2]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements
Filed 11/24/2008 through 11/28/2008.
Pursuant to 40 CFR 1506.9.

EIS No. 20080484, Draft EIS, NOA, AK, Bering Sea Chinook Salmon Bycatch Management, Establish New Measures To Minimize Chinook Salmon Bycatch, To Amend the Fishery Management Plan, Implementation, Bering Sea Pollock Fishery, AK, Comment Period Ends: 02/03/2009, Contact: Gretchen Harrington 907–586–7228.

EIS No. 20080485, Draft EIS, SFW, NV, Southeastern Lincoln County Habitat Conservation Plan, Application Package for Three Incidental Take Permits, Authorize the Take of Desert Tortoise (Gopherus agassizii) and Southwestern Willow Flycatcher (Empidonax traillii extimus), Implementation, Lincoln County, NV, Comment Period Ends: 02/18/2009, Contact: Mary Grim 916–414–6464.

EIS No. 20080486, Draft EIS, AFS, AK, Logjam Timber Sale Project, Proposes Timber Harvesting From 4 Land Use Designations, Tongass Land and Resource Management Plan, Thorne Bay Ranger District, Tongass National Forest, Prince of Wales Island, AK, Comment Period Ends: 01/20/2009, Contact: Frank Roberts 907–828–3226.

EIS No. 20080487, Final EIS, AFS, WI, Cayuga Project, Proposed Vegetation and Transportation Management Activities northeast of Clam Lake, Preferred Alternative Selected Alternative 7, Great Divide Ranger District, Chequamegon-Nicolet National Forest, Ashland County, WI, Wait Period Ends: 01/05/2009, Contact: Patty Beyer 906–226–1499.

EIS No. 20080488, Final EIS, FHW, MI, Detroit River International Crossing Study, Propose Border Crossing System Between the International Border Cities of Detroit, Michigan, and Windsor, Ontario, Wayne County, MI, Wait Period Ends: 01/05/2009, Contact: David T. Williams 517–702–1820.

EIS No. 20080489, Revised Draft EIS, DOE, NY, West Valley Demonstration Project and Western New York Nuclear Service Center Decommissioning and/or Long-Term Stewardship, (DOE/EIS–0226–D Revised) City of Buffalo, Eric and Cattaraugus Counties, NY, Comment Period Ends: 06/08/2009, Contact: Catherine Bohan 716–942–4159.

EIS No. 20080490, Final EIS, BPA, WA, Lyle Falls Fish Passage Project, To Improve Fish Passage to Habitat in the Upper Part of the Watershed, Located on the Lower Klickitat River, Klickitat County, WA, Wait Period Ends: 01/05/2009, Contact: Carl Keller 503–230–7697.

EIS No. 20080491, Final EIS, SFW, ME, Lake Umbagog National Wildlife Refuge, Comprehensive Conservation Plan, 15 Year Guidance for Management of Refuge Operations, Habitat and Visitor Services, Implementation, Coos County, NH, and Oxford County, ME, Wait Period Ends: 01/05/2009, Contact: Nancy L. McGarigal 413–253–8562.

EIS No. 20080492, Final EIS, NPS, MI, Sleeping Bear Dunes National Lakeshore, General Management Plan and Wilderness Study, Implementation, Benzie and Leelanau Counties, MI, Wait Period Ends: 01/05/2009, Contact: Dusty Shultz 231–326–5134.

EIS No. 20080493, Final EIS, BLM, NM, Socorro Resource Management Plan Revision, Implementation, Socorro and Catron Counties, NM, Wait Period Ends: 01/05/2009, Contact: Mark Spencer 505–438–7402.

EIS No. 20080494, Draft EIS, AFS, AZ, Safford Recreation Residences Project, Proposes To Issue 88 New Special-Use-Permits for Occupancy and Use of Recreation Residence, Safford Ranger District, Coronado National Forest, Graham County, AZ, Comment Period Ends: 01/20/2009, Contact: Andrea Wargo Campbell 520–388–8352.

EIS No. 20080495, Final EIS, USN, CA, Southern California (SOCAL) Range Complex, To Organize, Train, Equip, and Maintain Combat-Ready Naval Forces, San Diego, Orange and Los Angeles Counties, CA, Wait Period Ends: 12/29/2008, EPA Approval of a Reduce Wait Period because of Compelling Reasons of National Policy Pursuant to 40 CFR Part 1506.10(c). Contact: Alexander Stone 619–545–8128.

EIS No. 20080496, Draft Supplement, EPA, AK, Red Dog Mine Extension—Aqqaluk Project, Reissuance Permit Applications for National Pollutant Discharge Elimination System (NPDES) Permit and New Information, Chukchi Sea, AK. Comment Period Ends: 02/03/2009, Contact: Patty McGrath 206–553–0979.

EIS No. 20080497, Draft EIS, STA, 00, Alberta Clipper Pipeline Project, Application for a Presidential Permit to Construction, Operation and Maintenance of Facilities in United States and Canada Borders, Comment Period Ends: 01/20/2008, Contact: Elizabeth Orlando, Esq, 202–647–4284.

EIS No. 20080498, Final Supplement, NOA, CA, Channel Islands National Marine Sanctuary Management Plan, Implementation, Santa Barbara and Ventura Counties, CA. Wait Period Ends: 01/05/2009, Contact: Chris Mobley 805–966–7107 ext.465.

Amended Notices

EIS No. 20080380, Draft EIS, AFS, CA, Tahoe National Forest Motorized Travel Management, Implementation, Sierra Nevada Mountains, Nevada, Placer, Plumas, Sierra and Yuba Counties, CA. Comment Period Ends: 12/26/2008. Contact: David Arrasmith 530–478–6220. Revision to FR Notice Published 11/03/2008: Extending Comment Period from 11/26/2008 to 12/26/2008.

EIS No. 20080476, Final EIS, COE, 00, White River Minimum Flow Study, To Provide an Improved Minimum Flow for the Benefit of the Tail Water Fishery, White River Basin Lakes: Bull Shoal Lakes on the White River; Norfork Lake on the North Fork White River, AR, Wait Period Ends: 12/29/2008. Contact: Mike Biggs 501–324–7342. Revision to FR Notice Published: Correction to Title.

EIS No. 20080481, Draft EIS, NOA, CA, Southwest Fisheries Science Center Replacement, Construction and Operation, located on University of California, San Diego Scripps Institute of Oceanography Campus, La Jolla, CA, Comment Period Ends: 01/12/2009. Contact: Mark Eberling 206–526–6477. Revision to FR Notice Published 11/28/2008: Correction to Title.

EIS No. 20080433, Final EIS, COE, 00, Programmatic—Port of New York and New Jersey Dredged Material Material Management Plan, Updated Information to 1999 Final EIS, Implementation, NY and NJ, Wait Period Ends: 02/01/2009. Contact: Christopher Ricciardi, PhD, 917–790–8630.

Dated: November 2, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8–28852 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8748–3]

Proposed Administrative Settlement Agreement Under Section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act for the Borden Chemicals Printing Site, Located in Camden, Camden County, NJ

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed administrative settlement and opportunity for public comment.

SUMMARY: The United States Environmental Protection Agency (''EPA'') is proposing to enter into an administrative settlement agreement (''Settlement Agreement'') with Hexion Specialty Chemicals, Inc. (''Settling Party'') pursuant to section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9622(h). The Settlement Agreement provides for Respondent's payment of certain past costs incurred at the Borden Chemicals Printing Site located within the City of Camden, Camden County, New Jersey (''Site'').

In accordance with section 122(i) of CERCLA, 42 U.S.C. 9622(i), this notice is being published to inform the public of the proposed Settlement Agreement and of the opportunity to comment. For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the proposed Settlement Agreement. EPA will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations that indicate that the proposed settlement is inappropriate, improper or inadequate. EPA's response to any comments received will be available for public inspection at EPA Region 2, 290 Broadway, 17th floor, New York, New York 10007–1866.

DATES: Comments must be provided by January 5, 2009.

ADDRESSES: Comments should reference the Borden Chemicals Printing Site, EPA Docket No. CERCLA–02–2008–2030, and should be sent to the U.S. Environmental Protection Agency, Office of Regional Counsel, New Jersey Superfund Branch, 290 Broadway—17th Floor, New York, NY 10007.

FOR FURTHER INFORMATION CONTACT: Frank X. Cardiello, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 17th Floor, 290 Broadway, New York, New York 10007–1866. Telephone: 212–637–3148.

SUPPLEMENTARY INFORMATION: A copy of the proposed administrative settlement, as well as background information relating to the settlement, may be obtained from Frank X. Cardiello, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 17th Floor, 290 Broadway, New York, New York 10007–1866, Telephone: 212–637–3148.

Dated: November 14, 2008.

Walter Mugdan,

Director, Emergency and Remedial Response Division.

[FR Doc. E8–28839 Filed 12–4–08; 8:45 am]

BILLING CODE 6560–50–P

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 Web site 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 January 2, 2009.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. Midland States Bancorp, Inc., Effingham, Illinois, to merge with Waterloo Bancshares, Inc., and thereby indirectly acquire Commercial State Bank of Waterloo, both of Waterloo, Illinois.

B. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. Anchor Bancorp, Inc., Lacey, Washington, to become a bank holding company by acquiring 100 percent of the voting shares of Anchor Mutual Savings Bank, Aberdeen, Washington, upon conversion from a mutual savings bank to a stock savings bank.

Board of Governors of the Federal Reserve System, December 2, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E8–28831 Filed 12–4–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The Commission is seeking public comments on its proposal to conduct consumer research on parental use of the Motion Picture Association of America (''MPAA'') movie rating information as it appears on DVD packaging for home video releases of rated motion pictures. The Commission is also seeking comment on a related proposal to conduct consumer research on parental attitudes toward the marketing of unrated DVD versions of rated motion pictures. To examine both issues, the Commission intends to conduct surveys of parents who have one or more children ages 7 to 16, and who have bought or rented a movie on DVD within the past year.

DATES: Comments must be filed by January 5, 2009.

ADDRESSES: Interested parties are invited to submit written comments.

Comments should refer to ''DVD Rating Symbol Study: FTC Matter No. P994511,'' to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*)—and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-DVDRatingStudy*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink : (*https://secure.commentworks.com/ftc-DVDRatingStudy*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the reference ''DVD Rating Symbol Study: FTC Matter No. P994511'' both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

All comments should additionally be submitted to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments will be considered by the Commission and will be available to the public on the FTC website, to the extent practicable, at *www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Michelle K. Rusk (202) 326–3148, or Keith R. Fentonmiller (202) 326–2775, Attorneys, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: On June 5, 2008, the Commission sought comment on the information collection requirements associated with the instant study.[2] No comments were received. Pursuant to the OMB regulations, 5 CFR Part 1320, that implement the PRA, 44 U.S.C. 3501–3521, the Commission is providing this second opportunity for public comment. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before **January 5, 2009**.

In September 2000, the Commission issued a report requested by the President and the Congress entitled, ''Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries'' (hereafter ''2000 Report'').[3] That report found that the entertainment industry had engaged in widespread marketing of violent movies, video games, and music to children in a manner that was inconsistent with the industry's own rating systems and that undermined parents' attempts to make informed decisions about their children's exposure to violent content. Beginning with its 2000 Report, the Commission has made a series of specific recommendations to the industry regarding the disclosure of rating information, placement of advertising in media popular with children, and other aspects of marketing violent entertainment to children. The Commission has now issued five follow-up reports on the industry's progress toward implementing those recommendations.[4]

As one aspect of its ongoing monitoring, the Commission has examined the disclosure of MPAA ratings and rating reasons on DVD packaging for home video releases of MPAA-rated motion pictures. The MPAA Advertising Handbook requires that ''all packaging of rated home video releases must carry the rating of the motion picture and the rating reasons,'' and that ''the rating symbol and specific rating reasons must be clearly and legibly displayed.''[5] The MPAA Advertising Handbook does not specify the location, size, or other aspects of how the rating information must be displayed. To assess compliance with MPAA requirements, the Commission looked at a sample of packaging for 12 movies on DVD as part of its June 2002 Report. The Commission found that all of the DVDs displayed the ratings and rating reasons, but that the small size, inconsistent positioning on the back of the package, and poor contrast made the

[1] FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[2] 73 FR 32026.

[3] Available at (*http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm*).

[4] The follow-up reports were issued in April 2001, December 2001, June 2002, July 2004, and April 2007. They are available at (*http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm*).

[5] 2006 MPAA Advertising Handbook at 38 (on file with Federal Trade Commission staff).

rating information less noticeable.[6] The Commission recommended that the industry improve the disclosure of rating information to ensure that it was effectively and clearly communicated on product packaging.[7] Subsequently, in its July 2004 Report, the Commission again noted that the movie industry typically places the movie's rating and rating reasons on the back of the DVD packaging and recommended that all of the rating information be placed prominently on the front of the packaging to make it more visible for parents and children and to assist retail store clerks in enforcing policies against selling R-rated DVDs to children.[8] The Commission renewed this recommendation in its April 2007 Report.[9]

In the April 2007 Report, the Commission also reviewed, for the first time, the movie industry's practice of releasing unrated DVD versions of movies that were rated R when they were first released in theaters.[10] The Commission expressed concern that these unrated, or so-called ''Director's Cut,'' home video releases sometimes contain additional footage that would result in a more restrictive rating if resubmitted for review by the MPAA. The agency cited examples of DVD movie packaging where studios exploited the lack of an MPAA rating to promote the movie. The Commission questioned whether the marketing of these unrated DVDs undermines the self-regulatory system. The agency suggested that the MPAA and DVD retailers establish policies on the advertising and sale of these DVDs to children.[11]

The Commission is again seeking public comments on its proposal to examine, through consumer research, two issues relating to MPAA ratings and DVD home video releases: (1) how the placement and size of MPAA rating information on DVD packaging for rated movies affects parental use of the rating; and (2) parental awareness and attitudes about the marketing of unrated DVDs. The Commission will seek OMB clearance under the PRA before engaging in the proposed consumer research.[12] All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before **January 5, 2009**.

1. Description of the Collection of Information and Proposed Use

The FTC proposes to conduct a mall intercept survey, using an experimental design with two treatment conditions, to assess how the placement and size of MPAA rating information on DVD packaging affects parental use of the rating. The FTC proposes to conduct a telephone survey to assess parental awareness and attitudes about the marketing of unrated DVDs. The methodologies for both consumer research proposals are detailed below. Subject to OMB approval for the collection of information, the Commission plans to contract with a consumer research firm that will identify respondents, conduct a pretest, refine the questionnaire, and conduct the surveys.

a. The Mall Intercept Survey on DVD Rating Prominence

A mall intercept survey is the most appropriate methodology for assessing differences in the effect of placement and size of the MPAA rating because it allows respondents to physically examine samples of DVD packaging. The survey will have an experimental design with respondents randomly assigned to one of two treatment conditions. The study will analyze differences in response between the two groups.

The FTC proposes to conduct the survey in multiple locations across the country using a random sample of 400 adult respondents who are parents of one or more children ages 7 to 16, and who have bought or rented a DVD movie for their children within the past year. The survey will be divided into two groups of 200. Each group will be given the opportunity to examine a DVD package for a movie that has been rated either PG–13 or R due in part to violent content.[13] One group will be exposed to DVD packaging that displays the rating information as it actually appears on the back cover. The other group will be exposed to the same DVD packaging, with the exception that the rating information will be graphically altered to appear on the front panel and in a larger size. After exposure to the package, respondents will be asked a series of questions related to what respondents noticed about the package, whether they noticed the rating information, and whether or not they would allow their child to watch the movie.

The information from the questionnaires will be collected on a voluntary basis, and the identities of the respondents will remain confidential. The results will assist the Commission in determining how easy or difficult it is for parents to find and use MPAA rating information on DVD packaging and whether changes in presentation of the rating information will significantly improve the ease of use.

b. The Telephone Survey

To assess parental awareness and attitudes about the marketing of unrated DVDs, the FTC plans to conduct a national telephone survey of 1,000 adult respondents who are parents of one or more children ages 7 to 16, and who have bought or rented a DVD movie for their children within the past year. This approach will allow the agency to have a sufficiently large and representative sample of the population to accurately assess parents' awareness and attitudes. Respondents will be asked a combination of open-ended and closed-ended questions. The questions will measure the level of parents' awareness of the marketing of unrated DVDs and assess whether parents understand that unrated DVD movies may contain content that could result in a more restrictive rating than the rating assigned to the theater version of the same movie. Additional questions will be designed to assess parents' attitudes about the marketing of unrated DVDs, including how the absence of a rating affects their decision whether to allow their children to watch the movie. As with the mall intercept survey, the information from the telephone survey questionnaires will be collected on a voluntary basis, and the identities of the respondents will remain confidential.

The results of the telephone survey will assist the Commission in assessing how the marketing of unrated DVDs impacts parents' decisions about what movies they will allow their children to watch. It will also help the Commission in forming recommendations about retail policies for the sale of unrated DVDs directly to children.

[6] June 2002 Report at 10–11, available at (*http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm*).

[7] *Id.*

[8] July 2004 Report at 29, available at (*http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm*).

[9] April 2007 Report at 32, available at (*http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm*).

[10] *Id.* at 8–11.

[11] *Id.* at 33.

[12] Under the PRA, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[13] Parents of children ages 7 to 11 will be shown DVD packaging for a PG–13-rated movie and parents of children ages 12 to 16 will be shown packaging for an R-rated movie. Parents with children in both age groups will be randomly assigned to either the PG–13 or R group.

2. Estimated Hours Burden

For the mall intercept survey and related pretest, the FTC's contractor will screen respondents to identify parents with children ages 7 to 16 who have bought or rented a DVD movie for their child within the past year. Allowing for non-response, FTC staff estimates that the screening questions will be asked of approximately 2,000 respondents in order to obtain a large enough sample for the survey and the pretest. The FTC staff estimates that screening will require no more than two minutes per person for a maximum hour burden of 67 hours (2,000 respondents × 2 minutes for each).

The FTC intends to pretest the questionnaire on up to15 parents to ensure that all questions are easily understood, and expects that the pretest will require no more than 10 minutes per person. The hours burden imposed by the pretest will be approximately 2.5 hours (15 respondents × 10 minutes for each).

The FTC staff additionally estimates that the survey of 400 respondents also will require no more than 10 minutes per person or, cumulatively, approximately 67 hours (400 respondents × 10 minutes for each).

Thus, the estimated total hours burden attributable to the mall intercept survey is approximately 136 hours (67 + 2.5 + 67).

For the telephone survey and a pretest of the survey, the FTC's contractor will apply the same screening threshold, identifying respondents who are parents with children ages 7 to 16 who have bought or rented a DVD movie for their child within the past year. Allowing for non-response, the FTC staff estimates that the screening questions will be asked of approximately 9,000 respondents in order to obtain a large enough sample for the survey and the pretest. The FTC staff estimates that screening will require no more than one minute per person for a maximum hour burden of 150 hours (9,000 respondents × 1 minute for each).

The FTC intends to pretest the questionnaire on up to 15 parents to ensure that all questions are easily understood. The FTC expects that the pretest will require no more than 5 minutes per person. The hours burden imposed by the pretest will be approximately 1.3 hours (15 respondents × 5 minutes for each).

The FTC staff estimates that the survey of 1,000 respondents also will require no more than 5 minutes per person or 83.3 hours (1,000 respondents × 5 minutes for each).

Thus, the estimated total hours burden attributable to the telephone survey research is approximately 235 hours (150 + 1.3 + 83.3).

The combined total hours burden attributable to both research projects is 371 hours (235 + 136).

3. Estimated Cost Burden

The cost per respondent should be negligible. Participation is voluntary and will not require any labor expenditures by respondents nor capital, start-up, operation, maintenance, or other similar costs.

William Blumenthal,

General Counsel.

[FR Doc. E8–28848 Filed 12–4–08; 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Marketing (BSC, NCHM)

Correction: This notice was published in the **Federal Register** on November 12, 2008, Volume 73, Number 219, pages 66900–66901. The meeting location was originally announced as CDC, 1600 Clifton Road, NE., Tom Harkin Global Communication Center, Building 21, Room 1204 A&B, Atlanta, Georgia 30333. The correct address for the meeting location is CDC, 1600 Clifton Road, NE., Tom Harkin Global Communication Center, Building 19, Auditorium B1/B2, Atlanta, Georgia 30333.

Times and Dates:

9 a.m.–5 p.m., December 8, 2008.

8:30 a.m.–12:30 p.m., December 9, 2008.

Contact Person for More Information: Dionne R. Mason, Committee Management Specialist, NCHM, 1600 Clifton Road, NE., Mail Stop E–21, Atlanta, Georgia 30333; Telephone (404) 498–2314, Fax (404) 498–2221.

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: November 26, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–28813 Filed 12–4–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No.: 0970–0353]

Submission for OMB Review; Comment Request

Title: Regional Partnership Grant (RPG) Program Data Collection.

Description: On September 30, 2007, the Administration for Children and Families (ACF), Children's Bureau, awarded multi-year grants to 53 regional partnership grantees (RPGs) to improve the safety, permanency and well-being of children affected by methamphetamine or other substance abuse who have been removed or are at risk of removal from their homes. The Child and Family Services Improvement Act of 2006, the authorizing legislation for the RPG program, required that a set of performance indicators be established to periodically assess the grantees' progress on achieving outcomes. The legislation mandated that these performance indicators be developed through a consultative process involving ACF, the Substance Abuse and Mental Health Services Administration (SAMHSA), and representatives of the State or Tribal agencies who are members of the regional partnerships.

The final set of RPG performance indicators was approved by ACF and disseminated to the funded grantees in January 2008. It includes a total of 23 indicators across four outcome domains: child/youth (9 indicators), adult (7 indicators), family/relationship (5 indicators), and regional partnership/service capacity (2 indicators). It also includes a core set of child and adult demographic elements that will provide important context needed to properly analyze, explain and understand the outcomes. No other national data collection measures these critical child, adult, family, and RPG outcomes specifically for these children and families. The data also will have significant implications for policy and program development for child well-being programs nationwide.

To minimize reporting burden, many of the data elements are already being collected by counties and States in order to report Federally mandated data for the Adoption and Foster Care Analysis and Reporting System (AFCARS), the Treatment Episode Data Set (TEDS) and the National Outcome Measures (NOMs); in addition, all States voluntarily submit data for the Federal National Child Abuse and Neglect Data System (NCANDS). Therefore, most

child welfare data elements included in the RPG performance measures can be found in a State's automated case management system, which is often a Federally funded Statewide Automated Child Welfare Information System (SACWIS). If the State elects to implement a SACWIS, the system is expected to be a comprehensive automated case management tool that meets the needs of all staff involved in foster care and adoption case management. A SACWIS is required to support reporting of data to AFCARS semi-annually, and annually to NCANDS. AFCARS reports information on all children in foster care, while NCANDS reports information on State child maltreatment reports. TEDS admission and discharge data are collected by State substance abuse agencies according to their own information systems for monitoring substance abuse treatment admissions and transmitted monthly or quarterly to the SAMHSA contractor.

As a result of prior Federal government reporting requirements, States are already collecting several data elements needed by the RPGs. The RPGs can download information from these existing systems to obtain data to monitor their program outcomes, thereby reducing the amount of primary data collection needed.

Beginning in year two, grantees will submit a data file with their required indicator data, according to their final set of indicators, every six months.

Respondents: RPG Grantees.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State, local, or Tribal Government	31	2	175.50	10,881
Private Sector	22	2	175.50	7,722

Estimated Total Annual Burden Hours: 18,603.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–6974, *Attn:* Desk Officer for the Administration for Children and Families.

Dated: December 1, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–28736 Filed 12–4–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0612]

Sentinel Initiative: Structure, Function, and Scope; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

The Food and Drug Administration (FDA) is announcing a public workshop entitled Sentinel Initiative: Structure, Function, and Scope. The workshop is co-sponsored by the Food and Drug Administration and the eHealth Initiative Foundation, and convened by the Engelberg Center for Health Care Reform at the Brookings Institution. The workshop is intended to bring together academia; government; patient, consumer, and provider groups; health care data owners; industry; and other interested organizations for an update on the current status of the Sentinel Initiative and to allow for comment from all interested stakeholders. Specific topics for discussion include potential governance models and their implications, and approaches for ensuring continued involvement of all stakeholders as the Initiative evolves.

Date and Time: The public workshop will be held on December 16, 2008, from 9 a.m. to 3:30 p.m.

Location: The public workshop will be held at the Omni Shoreham Hotel, 2500 Calvert Street NW., Washington, DC 20008.

Contact Person: Melissa Robb, Office of Critical Path Programs (HF–18), Food and Drug Administration, 5600 Fishers Lane, Rockville MD 20857, 301–827–1516, or e-mail: *Melissa.Robb@fda.hhs.gov*.

Registration: To register, please visit: *http://guest.cvent.com/* and insert ''7SN5MQKXSVQ'' for the event code. For questions regarding registration, e-mail: *engelbergevents@brookings.edu*.

If you need special accommodations due to a disability, please contact Keviar Warner, 202–624–3271, or e-mail: *Keviar.Warner@ehealthinitiative.org* at least 7 days in advance.

Comments: FDA is holding this public workshop to provide an update on the current status of the Sentinel Initiative. The deadline for submitting comments regarding this topic is January 16, 2009.

Regardless of attendance at the public workshop, interested persons may submit written or electronic comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management

System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.fda.gov/oc/initiatives/advance/sentinel/*. It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

Dated: December 1, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–28797 Filed 12–4–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are 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.

Proposed Project: Evaluation of SAMHSA's Minority Fellowship Program (MFP)—NEW

The Substance Abuse and Mental Health Services Administration's Center for Mental Health Services (CMHS) will conduct an independent evaluation of the Minority Fellowship Program (MFP).

In 1973, in response to a substantial lack of ethnic and racial minorities in the mental health professions, the Center for Minority Health at the National Institute of Mental Health established the Minority Fellowship Program (MFP). Since its move to SAMHSA in 1992, the MFP has continued to facilitate the entry of minority graduate students and psychiatric residents into mental health careers and has increased the number of psychology, psychiatry, nursing, and social work professionals trained to provide mental health and substance abuse services to minority groups. Up until FY 2007, grantees have been limited to the American Nurses Association (ANA), the American Psychiatric Association (ApA), the American Psychological Association (APA), and the Council on Social Work Education (CSWE). The MFP is supported by funds from all three SAMHSA centers, the Center for Mental Health Services (CMHS), the Center for Substance Abuse Treatment (CSAT), and the Center for Substance Abuse Prevention (CSAP).

With input from SAMHSA staff, the four pre-2007 grantee organizations, and two advisory panels (of independent experts in the MFP and/or culturally competent behavioral health care, as well as consumer and family representatives), a logic model was designed and a set of data collection instruments have been developed for this evaluation. SAMHSA will employ information that is routinely collected under existing program requirements and also will be collecting additional data that also are necessary for the conduct of the evaluation. At the end of each grant year, the grantee organizations (the ANA, ApA, APA, and CSWE) will document their activities, accomplishments, and expenditures and assessment measures for the most recently completed fiscal year. In addition, each grantee will maintain a database with information on current and former Fellows. None of the data collection activities proposed for this evaluation will be redundant with these existing reporting requirements and data sources. The evaluation plan includes gathering information about the MFP from persons with different experiences and perspectives on the MFP. Accordingly, SAMHSA proposes to conduct the following new data collection activities:

On-line (Internet-based) surveys:

1. Current SAMHSA MFP Fellows in each of the four academic disciplines;
2. MFP Alumni who were in the four programs during the time the program was administered by SAMHSA; and
3. Current and former members of Selection and Advisory Committees in each of the four grantee programs.

Telephone Interviews:

1. Current and former SAMHSA MFP Staff and other SAMHSA officials involved in the MFP;
2. Current and former MFP Program Directors or Senior Staff in each of the four grantee programs; and
3. Staff in each of the grantee's host organizations (i.e. staff in the ANA, APA, ApA, and CSWE).

The surveys and interview protocols have been developed to include questions relevant to each of the respective stakeholder groups named above, with similar core questions asked across all groups.

The resulting data will identify (1) The historical context in which the MFP has operated; (2) the processes and activities established by SAMHSA and by the grantees to implement the MFP; (3) the perceptions about how well the SAMHSA MFP is performing; and (4) the ability of the program to achieve particular goals under its purview.

Each new cohort of Fellows will develop and support the following goals:

1. Training/mentoring ethnic/racial minority students and professionals in mental health/substance abuse treatment;
2. Increasing the number of ethnic/racial minority professionals in mental health/substance abuse treatment;
3. Increasing diversity in mental health/substance abuse leadership;
4. Increasing professional contributions in mental health/substance abuse treatment for minority populations;
5. Increasing institutional involvement of ethnic/racial minority professionals in the areas of mental health and substance abuse treatment; and
6. Increasing mental health and substance abuse services to minority communities.

The burden estimate for conducting the surveys and interviews under the evaluation plan for the MFP is as follows:

Surveys	Number of respondents	Responses per respondent	Burden per response (hrs.)	Total burden (hrs.)
Current SAMHSA MFP Fellows Survey	100	1	1.5	150
SAMHSA MFP Alumni Survey	850	1	2	1,700
MFP Selection and Advisory Committees Survey	40	1	1.5	60
Current and former SAMHSA MFP Program Staff and other SAMHSA officials Interview Protocol	8	1	2	16
Current and former MFP Program Directors or Senior Staff (from the grantee organizations) Interview Protocol	8	1	2	16
Grantee host organization Interview Protocol	8	1	1	8
Totals	1,015			1,950

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 7–1044, One Choke Cherry Road, Rockville, MD 20857 and e-mail her a copy at *summer.king@samhsa.hhs.gov*. Written comments should be received within 60 days of this notice.

Dated: November 28, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–28814 Filed 12–4–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1810–DR]

California; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of California (FEMA–1810–DR), dated November 18, 2008, and related determinations.

DATES: *Effective Date:* November 18, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated November 18, 2008, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of California resulting from wildfires beginning on November 13, 2008, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of California.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Direct Federal assistance is authorized. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Mark A. Neveau, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of California have been designated as adversely affected by this major disaster:

Los Angeles, Orange, Riverside, and Santa Barbara Counties for Individual Assistance.

Los Angeles, Orange, Riverside, and Santa Barbara Counties for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program.

All counties within the State of California are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant).

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–28880 Filed 12–4–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1804–DR]

Arkansas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–1804–DR), dated October 22, 2008, and related determinations.

DATES: *Effective Date:* November 28, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 22, 2008.

Clark, Montgomery, Nevada, and Pike Counties for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–28871 Filed 12–4–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1810–DR]

California; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–1810–DR), dated November 18, 2008, and related determinations.

DATES: *Effective Date:* November 28, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 18, 2008.

Los Angeles, Orange, and Santa Barbara Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–28870 Filed 12–4–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5186–N–49]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: *Effective Date: December 5, 2008.*

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988, court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: November 26, 2008.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. E8–28629 Filed 12–4–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5260–N–01]

Notice of Fiscal Year (FY) 2009 Opportunity To Register Early and Other Important Information for Electronic Application Submission Via Grants.gov

AGENCY: Office of Assistant Secretary for Administration, HUD.

ACTION: Notice.

SUMMARY: This notice provides instructions to potential applicants applying for funding under HUD's Fiscal Year (FY) 2009 grant programs available through Grants.gov, including changes to the Grants.gov registration process scheduled for January 2009. This notice does not pertain to applicants who will be applying in FY2009 for Continuum of Care funds. HUD will publish a separate notice to address the receipt of Continuum of Care applications in FY2009. Today's **Federal Register** notice provides information to help applicants better understand the registration and electronic submission process for HUD applications made available through Grants.gov. Grants.gov is the federal portal for applicants to electronically find and apply for over 1,000 funding opportunities made available by 26 federal grant-making agencies. Grants.gov offers the applicant community a common Web site where applicants can apply for a variety of federal assistance programs. To date, all 26 Federal grant-making agencies have posted their funding opportunities and electronic application packages to Grants.gov.

HUD believes that by facilitating a better understanding of the electronic submission process, applicants will be

able to more easily make the transition to electronic application submission. HUD advises potential applicants to carefully read this notice and immediately begin the registration process or renew their registration from prior years.

FOR FURTHER INFORMATION CONTACT: The Office of Departmental Grants Management and Oversight, Office of Administration, Department of Housing and Urban Development, 451 7th Street, SW., Room 3156, Washington, DC 20410–5000; telephone number 202–708–0667. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

Full Text of Announcement

With today's **Federal Register** notice, HUD is encouraging applicants to complete or update their registration in advance of HUD posting its FY2009 grant opportunities. HUD found that publishing an Early Registration Notice eliminates many last minute registration issues, and allows applicants time to ensure that all steps in the registration process have been correctly completed. Today's **Federal Register** Notice also provides time for applicants to have questions addressed regarding the registration and submission processes. HUD strongly encourages prospective applicants for FY2009 HUD grants to register or update/renew their registration for application submission via Grants.gov as soon as possible by following the instructions in this notice.

Applicants should note that Grants.gov requires, to apply on-line electronically, an electronically authorized signature, known as e-Authentication. This requirement for an authenticated electronic signature serves to protect the applicant and the applicant's information, and to assure federal agencies that they are interacting with officials authorized to submit applications on behalf of applicant entities.

Applicants should also note that HUD, in FY2009, will utilize Adobe forms in the application packages posted to *www.Grants.gov.* The Adobe forms are compatible with the Microsoft Windows Vista operating systems, Apply Macintosh computers, and Microsoft Office 2007. Grants.gov is currently using Adobe Reader versions: 8.1.2, 8.1.3 and 9.0. While Grants.gov supports all three versions of Adobe Reader, HUD applicants must download Adobe Reader 8.1.3 available on the Grants.gov Web site. For information on compatibility or to download the Adobe Reader, go to the Grants.gov Web site at *http://www.grants.gov/help/download_software.jsp.*

Today's **Federal Register** Notice is divided into three sections. Section I defines key terms used as part of the registration process. Section II describes the registration process, including steps to renew/update an existing registration. Section III describes the process for downloading an application package and the application applications instructions package from Grants.gov. Information regarding signing up for Grants.gov RSS Feed services is also provided.

As already noted, for FY2009, HUD will continue to require applicants to submit their applications electronically via Grants.gov.

I. Key Terms Used as Part of the Registration Process

1. Applicant Organization. The applicant organization is an entity that is identified as the legal applicant for funding in box 8a on the SF–424, Application for Federal Financial Assistance and is the organization that HUD will hold accountable to fulfill the requirements of the award, should the applicant be selected for funding. Grant writers or persons authorized to submit an application for funding by the applicant organization E-Biz POC (See E-Business Point of Contact definition below), must not enter their organization or their organization's DUNS number in the SF–424, Application for Federal Assistance. Grant writers who wish to submit an application on behalf of an applicant organization must become an AOR to submit the application. (See definition of Authorized Organization Representative below, and registration instructions for AORs later in this Notice).

2. Authorized Organization Representative (AOR). The applicant organization (applicant Legal Name on box 8a of the SF–424) E-Biz POC, must grant permission for a person to become an AOR and submit an application on behalf of the applicant organization through the Grants.gov system. Authorizing an AOR safeguards the applicant organization from unauthorized individuals who may attempt to submit a grant application without permission. To check the AOR status, go to *https://apply07.grants.gov/apply/ApplicantLoginGetID.* Then, using the username and password (obtained from the Credential Provider) check to see if the E-Biz POC has granted approval or if the request to be an AOR is noted as ''Request Sent''. If the information says ''Request Sent'', the approval has not been granted. AORs are advised to contact the E-Biz POC to determine the basis for the lack of approval. A proposed AOR cannot submit the application to Grants.gov without AOR status noted as ''Approved''.

3. eBusiness Point of Contact (E-Biz POC). The E-Biz POC is identified during the Central Contractor Registration Process (Step 2 of the Registration Process). The E-Biz POC must grant authority for a person to be the AOR. An E-Biz POC may serve as an AOR as well as an E-Biz POC. The E-Biz POC becomes the sole Grants.gov authority for the organization and has the capability of designating or revoking an AOR's ability to submit a grant application on behalf of the organization using the Grants.gov system.

4. Marketing Partner ID Number (MPIN). As part of the CCR Registration Process, the E-Biz POC will be asked to create an MPIN. The MPIN is a nine character (alpha numeric) password that is used to access other systems and should be well guarded. For organizations wishing to apply for Federal grants using the Grants.gov system, the MPIN is required for the E-Biz POC to log into to the Grants.gov system and grant the person requesting permission to be an AOR, the permission to submit the grant on behalf of the applicant organization.

5. Trading Partner Identification Number (TPIN). A TPIN is a password that is used to access the applicant organization's Central Contractor Registration (CCR) data. Organizations that become active in CCR are issued a TPIN (password) to access their record in order to make, or request, any changes or updates to their CCR registration. Because of the sensitivity of this data, CCR recommends that CCR registrants not disclose their TPIN to anyone under any circumstances.

II. Instructions on Completing the Registration Process for New Applicants or Applicants Updating or Renewing Registration

A. The Need To Register With Grants.gov

HUD provides funding to only to organizations. This information, therefore, is directed to HUD applicants that are organizational entities.

Before an applicant can apply for a grant opportunity, the applicant must first register with Grants.gov to provide and obtain certain identifying information. Please note that registration is a multi-step process. The registration process also requires the applicant organization to provide information at Web sites other than

Grants.gov. Registration protects both HUD and the applicant. Specifically, registration confirms that the applicant organization E-Biz POC has designated and authorized a certain individual or entity to submit an application on its behalf and assures HUD that it is interacting with a designated representative of the applicant who has been authorized to submit the application.

B. Steps To Register

HUD's notice of funding availability (NOFA) process requires applicants to submit applications electronically through Grants.gov. Before being able to do so, applicants must complete several important steps to register or update/renew their registration to be able to submit the application. The registration process can take approximately 2 to 4 weeks to complete.

1. Step One: Obtain a Dun and Bradstreet Data Universal Numbering System (DUNS)

Step One of the registration process requires an applicant organization to obtain a DUNS number for the organizational entity for which an application for federal assistance will be submitted. All organizations seeking funding directly from HUD must have a DUNS number and include the number on the form SF–424, Application for Federal Financial Assistance, which is part of the application package. The DUNS number is also a required as part of the registration process. If the applicant organizational entity identified in box 8a on the SF–424, already has a DUNS number, it must use that number. The number must be registered for the organizational entity legal name. Failure to provide a DUNS number or the correct DUNS number associated to the applicant organization legal name as entered on the SF 424 form, box 8a and CCR can prevent you from submitting a grant application or obtaining an award, regardless of whether it is a new award or renewal of an existing one. This policy is pursuant to OMB policy issued in the **Federal Register** on June 27, 2003 (68 FR 38402). HUD codified the DUNS number requirement on November 9, 2004 (69 FR 65024). A copy of the OMB **Federal Register** notice and HUD's regulation codifying the DUNS number requirement can be found at *http://www.hud.gov/offices/adm/grants/duns.cfm*. Applicants cannot submit an electronic application without a DUNS number. An incorrect DUNS number in an application package will result in Grants.gov rejecting your application because the DUNS number entered in the application will not be consistent with the DUNS number associated to the applicant legal name as entered in box 8a of the SF 424, CCR, and Internal Revenue Service (IRS) records. The applicant legal name and DUNS number used on the application must match the DUNS number and Organization Name used in the CCR. Applicants must note that information entered and used to obtain the DUNS number will be used to pre-populate the CCR, which is Step Two of the registration process. Applicants should, therefore, carefully review information entered when obtaining a DUNS number. When registering with Dun and Bradstreet (D&B), please be sure to use the organizational entity's legal name used when filing a return or making a payment to the Internal Revenue Service (IRS). Organizations should also provide the zip code using the zip code plus four code (Zip+4).

Applicants can obtain a DUNS number by calling 866–705–5711 option 4 for grant applicants. (This is a toll-free number.) Applicants in Alaska and Puerto Rico can call 800–234–3867. The approximate time to get a DUNS number is 10 to 15 minutes, and there is no charge. Applicants may also obtain a DUNS number by accessing the Dun & Bradstreet Web site at *http://fedgov.dnb.com/webform* to obtain a number. The approximate time to create the number online is 1 business day. After obtaining your DUNS number, applicants should wait 24 to 48 hours to register with the CCR so that its DUNS number has time to become activated in the D&B records database.

2. Step Two: Register with the CCR

The second step of the registration process is registering with the CCR. The CCR is the primary registrant database for the federal government. An organization planning to submit a grant application for the first time must register, using its legal business name and name used with the IRS. CCR allows you to establish roles and Usernames for representatives that will use Grants.gov to submit electronic grant applications. Applicant organizations must annually update or renew their registration at *http://www.ccr.gov*, clicking on the link entitled ''Update or Renew Registration.'' If you need assistance with the CCR registration process, you can contact the CCR Assistance Center, 24 hours a day, 7 days a week at 888–277–2423 or 269–961–5757. Applicants can also obtain assistance online at *http://www.ccr.gov*. A CCR Handbook that guides applicants through the registration process is available on the CCR Web site by clicking on ''Help.'' If an applicant organization fails to update/renew its CCR registration, the Grants.gov registration will lapse prohibiting the application from being accepted by Grants.gov due to failure to have a complete registration. Registration, including update/renewal, can take several weeks as CCR compares its records to those maintained by D&B and IRS. The records in D&B, CCR and IRS must match. If discrepancies arise, Step Two cannot be completed until the discrepancies are resolved. For this reason, HUD urges applicants to complete the CCR registration, or update/renew its existing registration, immediately. Otherwise, the CCR check with D&B and IRS records may delay completing the registration process and adversely affect the ability to submit a grant application.

The CCR registration process consists of completing a Trading Partner Profile (TTP), which contains general, corporate, and financial information about your organization. When completing the TTP, you will be required to identify an E–Biz POC, responsible for maintaining the information in the TTP and granting authorization to individuals to serve as AORs. An AOR is the individual who will submit the application through Grants.gov for the applicant organization. Applicants can check the CCR registration and E-Biz POC by going to *http://www.ccr.gov* and searching by clicking on ''Search CCR.''

a. CCR Use of D&B Information. In July 2006, CCR implemented a policy change. Under this policy change, instead of obtaining name and address information directly from the registrant, CCR obtains the following data fields from D&B: Legal Business Name; Doing Business as Name (DBA); Physical Address; and Postal Code (Zip+4). Registrants will not be able to enter or modify these fields in CCR as they will be pre-populated using previously registered Dun and Bradstreet Data Universal Numbering System (DUNS) records data. During a new registration, or when updating a record, the registrant has a choice to accept or reject the information provided from the D&B records. If the registrant agrees with the D&B supplied information, the D&B data will be accepted into the CCR registrant record. If the registrant disagrees with the D&B supplied data, the registrant must go to the D&B Web site at *http://fedgov.dnb.com/webform* to modify the information contained in D&B's records before proceeding with its CCR registration. Once D&B confirms the updated information, the registrant must revisit the CCR Web site and

''accept'' D&B's changes. Only at this point will the D&B data be accepted into the CCR record. This process can take up to 2 business days for D&B to send modified data to CCR, and that time frame may be longer if data is sent from abroad.

b. CCR EIN/TIN Validation. To complete the CCR registration and qualify as a vendor eligible to bid for federal government contracts or apply for federal grants, the EIN/TIN and Employer/Taxpayer Name combination you provide in the IRS Consent Form must match exactly to the EIN/TIN and Employer/Taxpayer Name used in federal tax matters. It will take one to two business days to validate new and updated records prior to becoming active in CCR. Please be sure that the data items provided to D&B match information provided to the IRS. If the registration in D&B and the CCR do not match the IRS information, an error message will result. Until the discrepancies have been resolved, the registration will not be completed. HUD recommends that applicant organizations carefully review their D&B and CCR registration information for accuracy immediately upon publication of this notice. If you have questions about your EIN/TIN, call 800–829–4933.

c. Detailed Steps for NEW applicant organizations to register with CCR. The following is a step-by-step guide to help an applicant organization register with CCR. As noted, additional assistance is available online at *http://www.ccr.gov*. Before beginning the CCR registration process, organizations should designate an individual who will be responsible for completing the CCR registration and managing the information entered into CCR. The listing below identifies the steps in the CCR registration process.

(1) Go to *http://ccr.gov/*. Once on the site, on the left side of the screen, click ''Start New Registration.'' At the ''Start a New Registration'' screen, of the three choices, please select ''I am not a U.S. Federal Government entity.'' Click ''Continue.''

Note: CCR registration is NOT required for individuals; however, HUD does not directly fund individuals through its NOFA process.

(2) The next screen provides review items that must be completed before continuing in CCR. After reviewing the information and all items have been completed, click ''Continue with Registration.''

(3) To begin registration with CCR, enter the organization entity's DUNS number and click ''Next.''

(4) At the next screen, ''New Registration,'' enter the organization's DUNS number. Then click ''Next.'' The next ''New Registration'' screen displays the DUNS number. The registrant will be prompted to enter the organization information, *e.g.*, name address, etc. If the information inputted does not match that contained in the D&B record for the DUNS number provided, the system will state: ''Try again by correcting your input below'' or ''Contact D&B to make a change to your D&B DUNS record.''

(5) The next page of ''New Registration'' is ''Verify Your Results with D&B.'' Here the registrant will be asked, ''Is this information correct?'' After ensuring the accuracy of the information, click on ''Accept/Continue or Cancel.''

(6) If you ''Accept/Continue,'' the confirmation number will be displayed. This is a temporary number that allows the registrant to save the registration as a work in progress. Print this page. A temporary number along with the organization DUNS number will let the registrant access CCR to complete the registration at a later date.

(7) Continuing registration from the Confirmation page, click ''Continue.''

(8) ''How to Complete your Registration'' is the next page. Once the information has been reviewed and found correct, click ''Continue.''

(9) The ''General Information'' page is the next screen. On this page the registrant will need to complete all the required information.

(10) Creating a Marketing Partner ID Number (MPIN). The final step in creating the organization's TTP requires the registrant to create a MPIN. The MPIN is a self-defined nine character password that the E-Biz POC will need to access Grants.gov to authorize an AOR to be able to submit a grant application.

(11) Registration Notification. If the registration was submitted successfully, the registrant will receive two letters through the U.S. Mail or e-mail. The first welcomes the registrant to CCR and includes a copy of the registration. The second contains the confidential TPIN. Receipt of the TPIN confirms successful registration in CCR and serves as the registrant's confidential password to change CCR information.

d. Detailed Steps for Updating/Renewing Current Registrations.

(1) The E-Biz POC for the organization that is identified in box 8a of the SF–424 should go to *http://ccr.gov/*. Once on the site, on the left side of the screen, click ''Update or Renew Registration.'' At the ''Update Renew Registration'' screen, of the three choices, please select ''I am not a U.S. Federal Government entity.'' Click ''Continue.''

Note: CCR registration is NOT required for individuals. HUD does not directly fund individuals through its NOFA process.

(2) The next screen asks the E-Biz POC to enter the organization's DUNS number and TPIN Number sent to the E-Biz POC at the time of the last update; click ''Log In'' to continue.

Note: If the E-Biz POC can't remember the TPIN, the site provides a link to request the TPIN.

(3) The next screen ''General Information'' displays the organization information. This site allows the E-Biz POC to update information contained in with CCR. Once information has been reviewed and, as needed updated, click on ''validate/save data.''

Note: The E-Biz POC will validate and save data contained within CCR for Corporate Information, Goods/Services, Financial, Points of Contact, and IRS content. Once the information has been validated and saved in each required each section, the last screen will indicate ''Registration Complete.''

e. Current Registrants without an MPIN. If you currently have an active registration in CCR and you do not have an MPIN, you will need to do the following:

(1) Access the CCR Web site at *http://www.ccr.gov*. At the left margin, click on ''Update or Renew Registration.''

(2) Select ''I am not a U.S. Federal Government entity.'' Click ''Continue.''

(3) Enter the organization's DUNS number and TPIN.

(4) On the next page click on the link ''Points of Contact.'' Complete all fields for the E-Biz POC and the alternate E-Biz POC. Scroll down to the bottom of the Points of Contact page, and create your own MPIN. Once completed, click on the ''Validate/Save'' button.''

Notice: To Active Registrants in CCR: A TPIN is a password that is used to access your CCR data. Organizations that become active in CCR are issued a TPIN (password) to access and maintain their data. Because of the sensitivity of this data, CCR recommends that you do not disclose your TPIN to anyone under any circumstances.

3. Step Three: Register with the Credential Provider

a. Registering with Credential Provider. To safeguard the security of electronic information, Grants.gov utilizes a Credential Provider to determine with a degree of assurance that someone is really who he or she claims to be. Once the organization requesting funding has identified who will be submitting the Application for Federal Financial Assistance on their behalf, the person to submit the application must register with a

Credential Provider to create his/her user name and password. The User Name and Password created through the credential provider will be registered with Grants.gov as part of the next step in the registration process. To register with a credential provider, the designated person must have the organization's DUNS number that will be entered in box 8a of the form SF 424, Application for Federal Assistance. The organization's DUNS number used must be identical to the DUNS number for the organization found in the CCR registration.

Since August 30, 2007, organizations have three federally approved credential providers available from which to choose their authentication services—the Agriculture Department; the Office of Personnel Management's Employee Express; and Operational Research Consultants (ORC), Inc., which also provided authentication services prior to August 30, 2007. Until January 11, 2009, or shortly thereafter, users who already hold a Grants.gov user name and password through ORC will not experience much change. New Users will be able to choose from any of the three credential providers available.

- To register with a credential Provider go to *http://apply07.grants.gov/apply/ORCRegister*. Once you have accessed the site, scroll down the page and enter the DUNS number, and click on ''Register''.
- At the next screen scroll down and select ''Get Your Credentials''.
- On the ''eAuthentication User Information'' screen, complete and submit all information.
- On the next screen confirm your information and create your own Username and PASSWORD. Then click ''Submit.'' If all the information has been entered correctly, you will receive a notice of Registration Success.

b. Obtaining Credentials through Grants.gov. In January, 2009, Grants.gov will be teminating service with the current Grants.gov credential provider, Operational Research Consultants (ORC). As a result of this change, Grants.gov will be providing credentials (username and password) to Grants.gov registrants.

(1) *New Grants.gov Registrants.* After January 2009, or when Grants.gov begins providing credential services, when clicking on the ''For Applicants'' link, new Grants.gov registrants will get a pop-up screen asking them to update their user profile. The information requested is similar to the information that was previously provided to ORC or one of the other credential providers. In addition to updating their user profile, registrants will be asked to enter a Secret Question and Secret Answer. The Secret Question and Secret Answer portion of the information provides for increased security for future inquiries about the registrants account and allows registrants to reset their own password. Once created users will be able to reset their password on their own. Previously users needed to call the Grants.gov Help desk to get a password or username reset or go back to the credential provider to get a password they forgot.

(2) *Existing/Legacy Registrants.* Grants.gov will retain the username and password for existing/legacy registrants. However, existing/legacy registrants will have to update their profile by clicking on the ''For Applicants'' link, update their profile, and establish a Secret Question and Answer. If a registered user wants to be able to use the automated change password feature, they must update their profile and establish the Secret Question and Answer. The automated username and password feature will not work if the registrant has not updated their profile and created the Secret Question and Answer.

(3) *Forgot My Username and Forgot My Password Links.* New and legacy applicants that updated their profile and created a Secret Question and Answer will be able to use the Forgot My Username and Forgot My Password links on the Applicant Login Screen to have their username and password sent to them via e-mail. To do so, they will have to know the DUNS number and e-mail address to retrieve and reset their username and password.

Note: Your registration to use Grants.gov to submit a funding application on behalf of an organization is not complete until Steps Four and five below are completed.

c. Steps for Checking your Credentials.

(1) Prior to January 11, 2009, or when Grants.gov begins to offer credential provider services, if you want to check your credentials prior to submitting an application, you may go to *http://e-auth.orc.com/*. Once you are on the E-Authentication site, scroll down the page and click on the link ''Check your Credentials''. Enter your Username and Password. If you enter the correct information you will receive a message that states, ''You have successfully verified your registration''. If you have forgotten your password, click on the link ''User Administration'' and select ''forgotten password'' located in the left margin. On the next screen enter your Username and click, submit. The next screen displays your secret question, follow instructions on this site and click submit. Your password has been reset.

(2) After January 11, 2009, or when Grants.gov offers credential provider services, AORs who have updated their profile and created the Secret Question and Answer as a Grants.gov registrant, can log into Grants.gov and obtain or reset their registered username and password or reset their username and password through the Grants.gov automated service. If an applicant organization has multiple users, each registered Grants.gov user will have to update their Grants.gov user profile and create a Secret Question and Answer. Questions about changes to the Grants.gov registration process, provision of credentials by Grants.gov, and use of the automated service should be directed to the Grants.gov Help Desk at 800–518–GRANTS.

4. Step Four: Register with Grants.gov

a. Prior to January 11, 2009 or prior to when Grants.gov offers credential provider services, after completing Step 3, creating a User Name and Password with the credential provider, the person(s) named by the applicant organization to submit an application for funding on behalf of the organization and registered with a Credential Provider, application must open an account with Grants.gov. Opening the account with Grants.gov identifies the person as an AOR for the organization seeking funding who is requesting permission to submit the application. The final step in the registration process is when the E-Biz POC for the applicant organization identified in Box 8a of the SF–424 Application for Federal Assistance, actually grants authorization to the person identified as an AOR. (See Step Five below). To register with Grants.gov go to *https://apply07.grants.gov/apply/GrantsgovRegister.* After the proposed AOR registers their registering your Username and Password with Grants.gov, the organization's E-Biz POC will be sent an e-mail indicating that someone has requested authority to submit an application for the organization and has registered as an AOR.

b. After January 11, 2009, or when Grants.gov offers credential provider services, the person(s) named by the applicant organization to submit an application for funding on behalf of the organization, must open an account with Grants.gov, or update their existing account. Opening the account with Grants.gov identifies the person as a proposed AOR seeking funding for the organization named in box 8a of the SF–424, Application for Federal Financial Assistance, and who is requesting permission to submit the application. To open an account, the proposed AOR

must complete the profile information and create a Secret Question and Answer at Grants.gov. An existing or legacy AOR can log into Grants.gov using their username and password, update their profile, and create a Secret Question and Answer.

To register with Grants.gov go to *https://apply07.grants.gov/apply/GrantsgovRegister.* After the proposed AOR registers their Username and Password with Grants.gov, the organization's E-Biz POC will be sent an e-mail indicating that someone has requested authority to submit an application for the organization and has registered as an AOR.

The final step in the registration process is when the E-Biz POC for the applicant organization identified in Box 8a of the SF–424 Application for Federal Assistance, actually grants authorization to the person identified as an AOR. (See Step Five below).

5. Step Five: Granting Approval of an AOR to Submit an Application on Behalf of the Organization. The E-Biz POC must log into the Grants.gov Web site and give the registered AOR approval to submit an application to Grants.gov. By authorizing the AOR to submit on behalf of the applicant organization, the E-Biz POC is stating that the person has the legal authority to submit the electronic application on behalf of the applicant organization and can make a legally binding commitment for the applicant organization.

a. The E-Biz POC must approve the designated AOR(s). If the E-Biz POC does not grant authorization, Grants.gov will not accept the application. The E-Biz POC can designate the AOR to submit applications on behalf of the organization at *https://apply07.grants.gov/apply/AorMgrGetID.* The registration is complete when an AOR has been approved to submit an application on behalf of the applicant organization by the E-Biz POC.

HUD urges applicants to check with their E-Biz POC to make sure that they have been authorized to make a legally binding commitment for the applicant organization when submitting the application to Grants.gov. This is particularly important if during the CCR registration renewal process the E-Biz POC for the applicant organization has been changed. The new E-Biz POC will have to grant authorization to all AORs. You can search the CCR registration for the E-Biz POC by going to *https://www.bpn.gov/CCRSearch/Search.aspx.*

b. AORs can track their AOR status at any time on Grants.gov by going to the Applicant home page at Grants.gov. In ''Quick Links'' log in as an applicant and enter your Username and Password. If you have not been granted AOR status by the E-Biz POC, you should contact the E-Biz POC directly.

III. Instructions on How to Download an Application Package and Application Instructions at Grants.gov

This Section provides information regarding how to download the application package and the application instructions package from Grants.gov. Applicants do not need to be registered with Grants.gov to download an application or the instructions, but all the steps in the registration process must be complete to successfully submit an application for funding consideration through Grants.gov. Applicants should carefully read the instructions before completing the application. The instructions download will contain the General Section and the Program Section. Together, these documents provide details of what will be required in your application submission as well at what rules and requirements you will be expected to comply with if you get awarded funds. The General Section explains that HUD is using Adobe forms, what version of Adobe Reader to download from the Grants.gov site, and how to set Adobe Reader default settings on your computer. The instructions download will also contain any additional forms that are not part of the application package but are required to have a complete application.

Grants.gov now offers RSS Feed services. Applicants are advised to sign up for one of the RSS feed services which will allow an applicant to be notified of new funding opportunities or modifications to an existing funding opportunity. Information on RSS Feed options can be found at *http://www07.grants.gov/help/rss.jsp.* Applicants familiar with this technology may select any feed service listed on the Grants.gov site. However, to assist applicants with making a selection, HUD is offering these suggestions for the most popular services:

• *e-mail with Microsoft Outlook Directions:*

—Open your web browser and go to *http://www.Grants.gov.*
—In the upper right corner of the screen, select RSS.
—In the middle of the page, click on the hyperlink in (Get an RSS Reader).
—From the list of categories, select Windows.
—Select blogbot for Outlook.
—Select Download. (A File Download dialog box will appear).
—Select Run. (If you see a Security Warning dialog box, select Run.)
—Run Setup Wizard accepting the default settings.
—When the Setup Wizard is finished, open Outlook.
—Look to see if a blogbot icon is visible in the tool bar area of Outlook. If not,
—Select View in the menu. Select Toolbars. Click on blogbot.
—The blogbot icon should now be visible in your toolbars.
—To subscribe to Grants.gov direct your browser back to the Grants.gov RSS page.
—Right click on the orange icon next to *New/Modified Opportunities by Agency* or *New/Modified Opportunities by Category.*
—Select Add to blogbot for Outlook. For each subscription blogbot adds a subfolder in Inbox blogbot.
—If the add blogbot for Outlook option does not appear, Select the feed you to which you want to subscribe and copy the URL from the address box.
—From the blogbot toolbar icon, select Subscriptions.
—Paste the URL from Grants.gov into the RSS/Atom URL textbox.
—Create a name in the Name textbox.

• *Windows Environment Directions:*

—Direct your web browser to *http://www.jetbrains.com.*
—Select Downloads at the top of the page.
—Select Omea Reader.
—A File Download dialog box will appear.
—Select Run. (If you see a Security Warning dialog box, select Run.)
—Accept the default settings in the Setup Wizard. Note, Omea installation may ask to reboot your computer. Accept the choice.
—When the reboot is complete Omea Startup Wizard should open. (If the Startup Wizard does not start automatically, double-click on the Omea icon on your desktop to start it).
—Accept all defaults in the Wizard.
—When the wizard is finished, OMEA Reader will start.
—To view messages in groups, from the View menu, select Show Items in Groups.
—After you have turned this option on, all items in the Items List will be displayed in groups and sorted according to which resource column is selected.
—You can group your items by any column of the Items List.

• *MAC Users Directions:*

—Direct Safari to *www.Grants.gov.*
—In the upper right corner of the screen, select RSS.
—To view announcements in Safari, simply select one of the feed options, *e.g., New/Modified Opportunities by Agency* or *New/Modified Opportunities by Category.* (The list of opportunities appears in Safari).

—In the column on the right side of the page, select Subscribe in Mail.
—Open Mail.
—You should now have a folder under RSS named, ''Grants Modified Opportunities List''.
—Filter the list by typing the Agency acronym or other term into the search box in the upper right corner.

Applicants should sign up for the RSS Feed to be notified when HUD places a funding opportunity on Grants.gov or does a technical correction or an amendment to an opportunity on Grants.gov.

Applicants that have not signed up for the RSS Feed notification service can search for a funding opportunity on Grants.gov by going to *http://www.grants.gov/applicants/find_grant_opportunities.jsp*. On this page you can do a basic search, browse by category, or browse by agency. If you are interested in HUD Grants, click on browse by agency and then scroll down the page until you see U.S. Department of Housing and Urban Development on the right column. When you click on the HUD agency name, you will come to a page with all the funding opportunities that are posted by HUD at that point in time. When you click on an opportunity, you will come to a page that provides a synopsis of the opportunity and which also identifies the Catalog of Federal Domestic Assistance (CFDA) Number for the Program, the Funding Opportunity Number and further down the page, a link to the full announcement. To download the application and instructions, follow the directions below, but first you must be sure you have the compatible Adobe Reader installed. HUD's FY2009 applications use Adobe Reader. HUD uses the Adobe forms application packages because they are compatible with the broadest array of computer hardware and software technology currently in use by HUD's applicant/grantee community. To open and complete the application package you must have installed Adobe Reader 8.1.3. Adobe Reader 8.1.3 is available free and can be found on the Grants.gov Web site at *http://www.grants.gov/help/download_software.jsp*. Adobe Reader 8.1.3 was designed by Adobe to address the Broken Pipe error messages that occurred during FY2008 submissions. Please make anyone that will be working on the Adobe forms portion of the application aware that they must download the new 8.1.3 Adobe Reader. This does not impact forms that you may save as PDF forms to your application as attachments. Adobe Reader 8.1.3 is compatible with Adobe Professional versions 6.0 and higher. However, for the newest Adobe Reader to work, you must be sure that your Adobe default setting for the Reader is set to the Adobe 8.1.3 version. Grants.gov has posted instructions Frequently Asked Questions (FAQs) at *http://grants.gov/applicants/applicant_faqs.jsp*. Applicants should review these FAQs as it will assist them in making sure that they are properly set up to successfully submit an application. Applicants need to make sure that the default setting on their Adobe Reader is set to the new 8.1.3 version of Adobe Reader software downloaded from Grants.gov. Adobe Reader 8.1.3 is compatible with Adobe Professional 6.0 or higher. Applicants that need assistance can contact the Grants.gov Contact Center by phone at 800–518–GRANTS or via e-mail at *Support@Grants.gov*.

Critical Notice: Applicants must be aware that all persons working on the Adobe forms in the application package must work using the same Adobe Reader version available from Grants.gov. Please alert your staff and those working on your application that failure to download and use the correct Adobe Reader 8.1.3 or to update the Reader on Adobe Professional to 8.1.3 and meet the Grants.gov compatibility requirements contained in this General Section, will result in your not being able to create or submit the application package to Grants.gov or in your application being rejected by Grants.gov. Using incompatible versions of Adobe Reader will result in files being corrupted.

Applicants are urged to review the Adobe Reader 8.1.3 information and get the new reader installed on their computer when this Notice is published so that they are prepared for the FY2009 NOFAs when they are published.

A. Application Package and Application Instructions Download. Once you have installed Adobe Reader 8.1.3 you can download the Application Package and instructions. To download the application and instructions go to *https://apply07.grants.gov/apply/forms_apps_idx.html* and enter the CFDA Number, Funding Opportunity Number, or Funding Competition ID for the opportunity you are interested in do not enter more than one criterion. If you enter more than one criterion, you will get a message that states the opportunity cannot be found. Only enter one of the above numbers.

On the next page ''Selected Grant Applications for Download,'' you will find the funding opportunity link to Download Instructions and Application. Additional resource information is also on this page, including a reminder to sign up for e-mail notification for changes to the funding opportunity, a download link to the Adobe Reader, as well as a Help link.

Click on the Download link to get to the Download page. Then proceed to download the instructions and the application. If you get an error message in opening the downloaded application, you have not properly installed the Adobe Reader 8.1.3. Contact your IT help desk or the Grants.gov support desk at *Support@Grants.gov* by e-mail or by calling 800–518-GRANTS.

B. Download Instructions Link. The instructions download is a compressed file (ZIP) containing the General Section and Program Sections for the funding opportunity. It also contains forms and copies of the General Section and Program Section of HUD's NOFAs, information that you will need to submit a complete application to Grants.gov for HUD funding consideration. Each program NOFA provides a checklist which you can use to ensure that you have completed all elements of your application. HUD's General Section provides helpful information and tips to ensure that you complete your application correctly and what to do to ensure that all your information is attached to the application. When attaching files to your application, HUD suggests that you open each attachment file and scroll down to make sure it is the complete file that you want to submit.

Questions regarding the Grants.gov Registration process or the installation of Adobe Reader 8.1.3 should be directed to the Grants.gov help desk during operating hours Monday–Friday (except Federal holidays) from 7 a.m. to 9 p.m. eastern time at 800–518–GRANTS.

Dated: December 1, 2008.

Keith A. Nelson,

Assistant Secretary for Administration.

[FR Doc. E8–28868 Filed 12–4–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–2008–N0277; 1112–0000–80221–F2]

Southeastern Lincoln County Habitat Conservation Plan, Lincoln County, NV

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of applications.

SUMMARY: This notice announces the availability of the draft Southeastern Lincoln County Habitat Conservation Plan (HCP), draft Implementing Agreement (IA), and draft Environmental Impact Statement (EIS) for public review and comment. The Fish and Wildlife Service (Service) is considering the issuance of three 30-year incidental take permits for two species in response to receipt of three applications prepared, pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The applicants are Lincoln County, Nevada; the City of Caliente, Nevada; and the Union Pacific Railroad. The proposed permits would authorize incidental take of species listed under the Act. The permits are needed because take of species could occur during proposed urban development activities and construction of associated infrastructure; road and railroad construction, operation, and maintenance; flood control projects; and agricultural practices (covered activities). The covered activities would occur on approximately 31,000 acres of non-Federal property in southeastern Lincoln County, Nevada.

DATES: Written comments must be received by 5 p.m. on February 18, 2009.

ADDRESSES: Comments should be addressed to Robert D. Williams, Field Supervisor, Nevada Fish and Wildlife Office, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130, fax number (702) 515–5231 (for further information and instruction on the reviewing and commenting process, see Public Review and Comment section below).

FOR FURTHER INFORMATION CONTACT: Jeri Krueger, Habitat Conservation Planning Coordinator, Nevada Fish and Wildlife Office, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130, or telephone (702) 515–5230.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Individuals wishing copies of the application, draft HCP, draft EIS, and draft IA, should contact the Service by telephone (see **FOR FURTHER INFORMATION CONTACT**). Copies of the subject documents are also available for public inspection during regular business hours at the Nevada Fish and Wildlife Office in Las Vegas (see **FOR FURTHER INFORMATION CONTACT**), and may be downloaded from the Nevada Fish and Wildlife Office Web site at: *http://www.fws.gov/nevada*.

In addition, copies of all documents are available at the following library locations: (1) Clark County Library, 1401 E. Flamingo Road, Las Vegas, Nevada 89119, (702) 507–3400; (2) Washoe County Library, Downtown Main Branch, 301 South Center Street, Reno, Nevada 89501, (775) 327–8300; (3) Mesquite Library, 121 West First North Street, Mesquite, Nevada 89027, (702) 346–5224; (4) Alamo Branch Library, 100 N. First Street, Alamo, Nevada 89001, (775) 725–3343; (5) Lincoln County Library, 100 Depot Avenue, Caliente, Nevada 89008, (775) 726–3104; and (6) Lincoln County Library, 63 Main Street, Pioche, Nevada 89043, (775) 962–5244.

Background Information

Section 9 of the Act (16 U.S.C. 1531 *et seq.*) and Federal regulations prohibit the take of fish and wildlife species listed as endangered or threatened. Take of federally listed fish or wildlife is defined under section 3 of the Act as including to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct'' (16 U.S.C. 1532). Harm includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering (50 CFR 17.3(c)). Under limited circumstances, the Service may issue permits to authorize incidental take of listed fish or wildlife; i.e., take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for threatened species and endangered species are at 50 CFR 17.32 and 17.22, respectively.

The Service has received three incidental take permit applications for implementation of the HCP. The applications have been prepared and submitted by Lincoln County, Nevada; the City of Caliente, Nevada; and the Union Pacific Railroad (collectively, the applicants). The applicants have prepared the HCP to satisfy the application requirements for permits issued under section 10(a)(1)(B) of the Act.

The applicants are seeking permits for the incidental take of desert tortoise (*Gopherus agassizii*) and southwestern willow flycatcher (*Empidonax traillii extimus*) for a term of 30 years. Incidental take of these species may occur on approximately 31,000 acres of habitat for the tortoise and the flycatcher within the planning area for the HCP (covered area). The covered activities may result in the loss of up to 20,000 acres of desert tortoise habitat, and up to 85 acres of southwestern willow flycatcher habitat during the term of the permit. The covered area includes the non-Federal lands on which the covered activities would occur, and Federal lands administered by the Bureau of Land Management (BLM), on which most of the mitigation is contemplated to occur. The BLM, acting as a participant in the HCP, will be responsible for reviewing and if considered appropriate, authorizing and assisting in the implementation of mitigation measures on BLM-administered land.

The covered area is situated in the southeastern corner of Lincoln County, and is approximately defined as the area north of the Clark County line, west of the Utah-Nevada border, south of Township 3 South, and east of Range 62 East, Mount Diablo Meridian. The covered area also includes approximately 4,000 acres of land west of Range 62 East identified for disposal by the BLM in the vicinity of the towns of Alamo and Hiko, and excludes private and leased lands in the Coyote Spring Valley. The Meadow Valley Wash and Clover Creek are two intermittently flowing streams that support riparian vegetation within the covered area. Clover Creek flows from the Nevada/Utah border east to its confluence with Meadow Valley Wash at Caliente, and the Meadow Valley Wash flows south through Caliente, crossing the Lincoln/Clark County line, and terminating at the confluence with the Muddy River in Glendale, Nevada.

The majority of development activity will be focused in three locations within the covered area: (1) The 13,500-acre Lincoln County Land Act (LCLA) lands located in the extreme southeastern corner of the covered area; (2) approximately 4,000 acres of land identified for disposal by the BLM in the vicinity of the towns of Alamo and Hiko; and (3) the 103-acre Meadow Valley Industrial Park site located on the eastern edge of Caliente. A per-acre mitigation fee will be collected by Lincoln County for disturbance of desert tortoise habitat prior to the commencement of construction activities, which will be used to fund implementation of the HCP. Other planned activities that may result in take of the proposed covered species include flood control projects in the portion of the Meadow Valley Wash that flows through Caliente, operation and maintenance activities conducted by Union Pacific Railroad, and existing agricultural practices conducted by private landowners along the Meadow Valley Wash and Clover Creek. The City of Caliente and Union Pacific Railroad will provide the funding necessary to create additional suitable flycatcher habitat or enhance the functional value

of existing potentially suitable flycatcher habitat at a ratio of 2 acres for every one acre of native habitat removed, or at a ratio of one acre for every one acre of non-native habitat removed, as a result of the covered activities. Private landowners with property located along these two waterways may volunteer to participate in the HCP by signing a Participation Agreement provided by Lincoln County, which would extend take authorization under Lincoln County's permit to the participating landowner provided the landowner agrees to implement the minimization and mitigation measures in the HCP.

In order to comply with the ESA, the proposed HCP addresses a number of required elements, including: Species and habitat goals and objectives; evaluation of the direct and indirect effects of covered activities on covered species; a conservation strategy; a monitoring and adaptive management program; descriptions of changed circumstances and remedial measures; identification of funding sources; and an assessment of alternatives to take of listed species.

The proposed conservation strategy provides for the restoration and enhancement of desert tortoise habitat on land administered by the BLM within the Mormon Mesa and Beaver Dam Slope Critical Habitat Units. Over 30,000 acres of desert tortoise critical habitat impacted by wildfires and other disturbances could benefit from restoration projects and research funded and implemented under the HCP by improving the functional value of desert tortoise critical habitat above existing conditions. The applicants are also proposing to replace and manage in perpetuity all suitable flycatcher habitat lost as a result of the covered activities at a ratio of 2 acres of native habitat for every one acre of native habitat lost, and at a ratio of one acre of native habitat for every one acre of non-native habitat lost.

The proposed HCP is intended to be a comprehensive and multi-jurisdictional document, providing for regional species conservation and habitat planning, while allowing the applicants to better manage anticipated growth and development, and to maintain the safety of roads and railroads within the covered area. The proposed HCP also intends to provide a coordinated process for permitting and mitigating the take of covered species as an alternative to a project-by-project approach.

National Environmental Policy Act Compliance

Proposed permit issuance triggers the need for compliance with the National Environmental Policy Act (NEPA). Accordingly, a NEPA document has been prepared by the Service as the Federal agency responsible for compliance under NEPA. The Service is providing notice of the availability of the draft EIS, which evaluates the impacts of proposed issuance of the permit and implementation of the HCP, as well as evaluating the impacts of a reasonable range of alternatives.

The draft EIS analyzes two alternatives in addition to the proposed HCP, described above. The proposed HCP is considered the Preferred Alternative. Additional alternatives are described below.

The No Action Alternative: Under the No Action Alternative, the Service would not issue an incidental take permit to the applicants and the HCP would not be implemented. Under this scenario, private land development or other activities on non-Federal land that may adversely affect listed species would require individual incidental take permits. As such, Lincoln County would lose the ability to plan for coordinated, controlled urban growth, and species conservation would be implemented on a project-by-project basis, rather than at a regional landscape-scale.

Alternative A—Additional Lands for Development: Alternative A would increase the acreage on which the covered activities would occur, thereby increasing the acreage of habitat that may be disturbed within the term of the permit. Covered activities would remain the same as those under the Preferred Alternative. Alternative A would require consideration of adding to the permit and HCP additional federally listed species that occur in the Pahranagat Valley. The general conservation strategy would remain the same as described for the Preferred Alternative.

Public Comments

If you wish to comment on the permit application, draft HCP, draft EIS, or draft IA, you may submit your comments to the address listed in the **ADDRESSES** section of this document. 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 may 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 Service will evaluate the application, associated documents, and comments submitted to them to prepare a final EIS. A permit decision will be made no sooner than 30 days after the publication of the final EIS and completion of the Record of Decision.

This notice is provided pursuant to section 10(a) of the Act and pursuant to implementing regulations for NEPA (40 CFR 1506.6).

Dated: November 20, 2008.

Richard E. Sayers, Jr.,

Acting Deputy Regional Director, California and Nevada Region, Sacramento, California.

[FR Doc. E8–28704 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Shingle Springs Band of Miwok Indians Liquor Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Liquor Ordinance of the Shingle Springs Band of Miwok Indians. The Ordinance regulates and controls the possession, sale and consumption of liquor within the Shingle Springs Indian Rancheria tribal land. The tribal land is located on trust land and this Ordinance allows for the possession and sale of alcoholic beverages. This Ordinance will increase the ability of the tribal government to control the distribution and possession of liquor within their tribal land, and at the same time will provide an important source of revenue and strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Ordinance is effective December 5, 2008.

FOR FURTHER INFORMATION CONTACT: Fred Doka Jr., Tribal Operations Officer, Pacific Regional Office, 2800 Cottage Way, Sacramento, CA 95825, Telephone (916) 978–6067; or Elizabeth Colliflower, Office of Tribal Services, 1849 C Street, NW., Mail Stop 4513–MIB, Washington, DC 20240; Telephone (202) 513–7627; Fax (202) 501–0679.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal**

Register notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Tribal Council for the Shingle Springs Band of Miwok Indians adopted this Liquor Ordinance on May 17, 2008. The purpose of this Ordinance is to govern the sale, possession and distribution of alcohol within the Shingle Springs Band of Miwok Indians tribal land. This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary-Indian Affairs. I certify that this Liquor Control Ordinance of the Shingle Springs Band of Miwok Indians was duly adopted by the Tribal Council on May 17, 2008.

Dated: November 24, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development.

The Liquor Ordinance for the Shingle Springs Band of Miwok Indians reads as follows:

Shingle Springs Liquor Ordinance

Article 1. Declaration of Findings and Purpose

§ 1. Title. This ordinance shall be known as the Shingle Springs Liquor Ordinance.

§ 2. Findings and Purpose.

(a) The introduction, possession, and sale of liquor on the Tribal Lands of the Shingle Springs Band of Miwok Indians (''Tribe'') are matters of special concern to the Tribe.

(b) The Tribe is the beneficial owner of the Shingle Springs Rancheria, upon which it plans to construct and operate a casino and related entertainment and lodging facilities, which will be an integral and indispensable part of the Tribe's economy, providing income to the Tribe and training and employment to its members.

(c) Federal law currently prohibits the introduction of liquor into Indian County (18 U.S.C. 1154), except as provided therein and expressly delegates to the tribes the decision regarding when and to what extent liquor transactions shall be permitted (18 U.S.C. 1161).

(d) Pursuant to Article III of the Tribe's Articles of Association, the Shingle Springs Tribal Council (Tribal Council) is the governing body of the Tribe. Pursuant to Article VI of the Articles of Association, the Tribal Council is empowered to manage, lease, and operate all unassigned Tribal Lands, to charter tribal enterprises, corporations, and associations, to administer tribal assets and manage all economic affairs and enterprises of the Tribe, and to exercise the Tribe's inherent sovereign authority for the protection of public health and safety, including regulation of the conduct of all persons who enter the jurisdiction of the Tribe.

(e) Pursuant to Article I of the Tribe's Articles of Association, the territorial jurisdiction of the Tribe extends to all lands which now and hereafter comprise the Shingle Springs Rancheria.

(f) The Tribal Council has, by its Ordinance Establishing and Governing the Shingle Springs Tribal Gaming Authority (Gaming Authority Ordinance), created an independent governmental agency of the Tribe, the Shingle Springs Tribal Gaming Authority (Gaming Authority), and conferred upon it the full authority of the Tribe to own and operate the Foothill Oaks Casino and related entertainment and lodging facilities (collectively Casino), except for the regulatory powers retained by the Tribal Council and Tribal Gaming Commission as set forth in the Shingle Springs Gaming Ordinance approved by the National Indian Gaming Commission, and any regulations promulgated thereunder.

(g) The Tribal Council finds that a complete ban on liquor within the Shingle Springs Rancheria is ineffective and unrealistic. However, it recognizes that a need still exists for strict regulation and control over liquor transactions within Tribal Lands because of the many potential problems associated with the unregulated or inadequately regulated sale, possession, distribution, and consumption of liquor. The Tribal Council finds that exclusive tribal control and regulation of liquor is necessary to achieve maximum economic benefit to the tribe, to protect the health and welfare of tribal members and members of the public on Tribal Lands, and to address specific tribal concerns relating to alcohol use on Tribal Lands.

(h) The enactment of a tribal ordinance governing the possession and sale of liquor on Tribal Land will enhance the ability of the tribal government to control liquor distribution and possession on the Shingle Springs Rancheria, and, at the same time, will provide an important source of revenue for the continued operation of the tribal government and the delivery of essential tribal governmental and social services.

(i) Tribal regulation of the sale, possession, and consumption of liquor on Tribal Lands is necessary to protect the health, security, and general welfare of the Shingle Springs Band and members of the public on Tribal Lands. In order to further these goals and to provide for a needed additional source of governmental revenue, the Tribal Council adopts this Ordinance. This Ordinance shall be liberally construed to fulfill the purposes for which it has been adopted.

Article II. Definitions

§ 1. As used in this Ordinance, the following words shall have the following meanings unless the context clearly indicates otherwise.

(a) *Alcohol.* Means ethyl alcohol, ethanol, hydrated oxide of ethyl, or spirits of wine, in any form, and regardless of source or the process used for its production.

(b) *Alcoholic Beverage.* Means any liquid or solid that contains alcohol in an amount not less than one-half of one percent by volume and that is fit for human consumption, either alone or when diluted, mixed, or combined with any other substance(s).

(c) *Beer.* Means any alcoholic beverage obtained by the fermentation of an infusion or decoction, or both, of barley, malt, hops or any other similar product(s), including any cereal(s) or carbohydrates or products prepared therefrom, or any combination thereof, in potable water, with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human consumption, and includes products such as ale, stout, brown, porter and lager, but not sake (also known as rice wine).

(d) *Bottle.* Means any container, irrespective of the material from which the container is made, that contains liquor.

(e) *Liquor.* Means any alcoholic beverage, as defined in this Article.

(f) *Minor.* For purposes of this Ordinance only, means an individual who is less than twenty-one (21) years old.

(g) *Package.* Means any container or receptacle used for holding liquor.

(h) *Sale and Sell.* Means the transfer for consideration of any kind, including by means of exchange or barter.

(i) *Spirits.* Means any alcoholic beverage which has an alcohol content that exceeds twenty-four percent of the total volume of that alcoholic beverage.

(j) *Tribal Land(s).* Means any land, and any building, structure or other object thereon, within the exterior boundaries of the Shingle Springs Rancheria held in trust by the United States for the use and occupancy of the Shingle Springs Band.

(k) *Wine.* Means any alcoholic beverage obtained by fermentation of fruits (grapes, berries, apples, etc.) or other suitable agricultural products containing not more than twenty-four

percent of alcohol by volume, and includes all imitation, other than standard, or artificial product sold as wine, including vermouth, port, sherry, muscatel, angelica and sake or other products referred to as rice wine, regardless of whether such products have been fortified with wine spirits, so long as such product does not contain more than twenty-four percent of alcohol by volume.

Article III. Tribal Liquor Authority

§ 1. There is hereby established the Tribal Liquor Authority (Authority) which shall have the following powers and responsibilities:

(a) To administer this Ordinance by exercising general control, management, and supervision of all liquor sales, places of sale, and sales outlets as well as exercising all powers necessary to accomplish the purposes of this Ordinance.

(b) To publish and enforce rules and regulations adopted by the Tribal Council in furtherance of the purposes of this Ordinance and the performance of the Authority's administrative functions, and to recommend appropriate rules and regulations to the Tribal Council.

(c) To bring suit in the appropriate court to enforce the provisions of this Ordinance with the consent of the Tribal Council. In so doing, the Authority shall not, without the specific consent of the Tribal Council, waive the Tribe's immunity from suit.

(d) To assume the full authority and responsibility of the Tribe with respect to the lawful sale and consumption of liquor on Tribal Land, including the authority to issue permits (including permits issued to the Gaming Authority or other Tribal entities) for the sale of liquor on Tribal Land, subject to compliance with applicable State of California licensing requirements.

(e) To make such reports as may be required by the Tribal Council.

(f) To collect taxes and fees levied or set by the Tribal Council, and to keep accurate records, books, and accounts thereof.

(g) To exercise such other powers as may be delegated to the Authority by the Tribal Council.

§ 2. Designation of Tribal Liquor Authority. In furtherance of this Ordinance, and until otherwise designated by the Tribal Council, the members of the Gaming Authority shall also serve as the members of the Authority.

§ 3. Limitation on Powers, Gratuities.

(a) The members of the Authority shall not accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer, or distributor.

(b) In the exercise of its powers and duties, the Authority and its individual members shall not waive the immunity of the Tribe from suit without the express consent of the Tribal Council, except as authorized by the Gaming Authority Ordinance.

§ 4. Inspection Rights. The premises on which liquor is sold or distributed shall be open for inspection by the Authority at all reasonable times for the purposes of ascertaining compliance with this Ordinance, any other ordinance governing liquor on Tribal Land, or any rule or regulation adopted by the Tribal Council in furtherance of the purposes of this Ordinance or such other ordinance governing liquor.

Article IV. Sales of Liquor

§ 1. Limitations on Sales. No sale of any alcoholic beverage shall be made on Tribal Land except pursuant to a permit issued by the Authority.

§ 2. All Sales Cash. All liquor sales on Tribal Land shall be on a cash only basis and no credit shall be extended to any person, organization, or entity; provided, however, that this provision shall not prevent payment by means of a check or by the use of a debit card or a credit card of a type generally accepted by merchants as a means of making payment for a purchase of liquor.

§ 3. All Sales for Personal Use. All sales shall be for personal use and consumption, and not for resale. Resale of any alcoholic beverage purchased on Tribal Land is prohibited.

Article V. Taxes

§ 1. Sales Tax. There is hereby levied and shall be collected a tax on each retail sale of alcoholic beverages on Tribal Land in the amount of 7.25% of the retail sales price. The tax imposed by this section shall apply to all retail sales of liquor on Tribal Land.

§ 2. Payment and Distribution of Taxes. All taxes from the sale of alcoholic beverages on Tribal Land shall be paid over to the General Treasury of the Tribe and be subject to use or distribution by the Tribal Council.

Article VI. Illegal Activities and Enforcement

§ 1. Violations.

(a) Illegal Sale of Liquor by Drink or Bottle. It shall be a violation of this Ordinance for any person to sell any liquor on Tribal Land, whether by the drink or by the bottle, except as otherwise provided in this Ordinance.

(b) Illegal Sale, Transportation or Production. It shall be a violation of this Ordinance for any person to sell or offer for sale, transport in any manner, or produce any liquor on Tribal Land except in accordance with this Ordinance.

(c) Illegal Purchase of Liquor. It shall be a violation of this Ordinance for any person to buy liquor on Tribal Land from any person other than pursuant to a permit issued by the Authority.

(d) Illegal Possession of Liquor—Intent to Sell. It shall be a violation of this Ordinance for any person to keep or possess liquor upon his or her person or in any place or on premises conducted or maintained by him or her as a principal or agent with the intent to sell that liquor contrary to the provisions of this Ordinance. In any proceeding under this Ordinance, proof of one unlawful sale of liquor shall suffice to establish prima facie the intent or purpose of unlawfully keeping liquor for sale in violation of this Ordinance.

(e) Sales to Persons Apparently Intoxicated. It shall be a violation of this Ordinance for any person to sell liquor to a person who appears intoxicated.

(f) Possession and Use of Liquor by Minors. Except in the case of liquor administered or validly prescribed by a physician or dentist for medicinal purposes, it shall be a violation of this Ordinance for any person under the age of twenty-one (21) to consume, acquire, or have in his or her possession any alcoholic beverage.

(g) Furnishing Liquor to Minors. It shall be a violation of this Ordinance for any person to furnish to a person under the age of twenty-one (21) or to permit any person under the age of twenty-one (21) to consume liquor on his or her premises or on any premises under his or her control, except in those special situations set forth in Section 1(f) of this Article.

(h) Sale of Liquor to Minors. It shall be a violation of this Ordinance for any person to sell any liquor to any person under the age of twenty-one (21) years.

(i) Unlawful Transfer of Identification. It shall be a violation of this Ordinance for any person to transfer in any manner to a minor identification of any type, including identification of the types listed in Section 3 of this Article, for the purpose of enabling such minor to obtain liquor.

(j) Possession or Use or False or Altered Identification. It shall be a violation of this Ordinance for any person under the age of twenty-one (21) years to attempt to purchase an alcoholic beverage through the use of false or altered identification which purports to show that the individual is twenty-one (21) years of age or older, or to possess such false or altered

identification for the purpose of purchasing an alcoholic beverage.

§ 2. General Penalties. Any person found to have violated this Ordinance shall be subject to a civil penalty of not more than five hundred dollars ($500.00) for the first such violation. The Authority may adopt by separate rule or regulation a schedule of fines for each type of violation, taking into account its seriousness and the threat it may pose to the general health and welfare of tribal members and to patrons of the Tribe's business establishment(s). Such schedule may also provide, in the case of repeated violations, for imposition of monetary penalties greater than the five hundred dollar ($500.00) limitation set forth above. The penalties provided for herein shall be in addition to any criminal penalties which may be imposed by federal, state or Tribal law.

§ 3. Identification—Proof of Minimum Age. Where there may be a question of a person's right to purchase liquor by reason of his or her age, such person shall be required to present anyone of the following officially issued cards of identification which shows correct age and bears his/her signature and photograph:

(a) A valid driver's license or identification card issued by any State.

(b) United States Active Duty Military identification.

(c) Passport.

§ 4. Contraband. Any alcoholic beverage possessed contrary to the terms of this Ordinance is declared to be contraband. Any tribal officer, employee, or other agent of any kind who is authorized by the Tribal Council to enforce this Ordinance shall seize all such contraband, and shall preserve that contraband or cause it to be preserved in accordance with the provisions established for the preservation of impounded property under applicable Tribal law, or, in the absence of such Tribal law, under California law. Upon being found in violation of this Ordinance by the Tribal Court, or in the absence of a Tribal Court by a majority of the Tribal Council, the party from whom the contraband was seized shall forfeit all right, title and interest in the item(s) seized, which shall become the property of the Tribe.

Article VII. Abatement

§ 1. Declaration of Nuisance. Any room, house, building, vehicle, structure, or other place where liquor is sold, manufactured, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this Ordinance or of any other tribal law or regulation relating to the manufacture, importation, transportation, possession, distribution, or sale of liquor, and all property kept in and used in maintaining such place, are hereby declared to be a common nuisance.

§ 2. Institution of Action.

The Chair of the Authority or, if the Chair of the Authority fails or refuses to do so, the Chair of the Tribal Council, shall institute and maintain an action in the proper court in the name of the Tribe to abate and perpetually enjoin any nuisance declared under this Ordinance. Restraining orders, temporary injunctions, and permanent injunctions may be granted in the cause as in other injunction proceedings, and upon final judgment against the defendant the Court may also order the room, house, building, vehicle, structure, or place closed for a period of one year or until the owner, lessee, tenant, or occupant thereof shall give bond of sufficient sum (but in any event not less than $10,000) payable to the Tribe and conditioned that liquor thereafter will not be manufactured, kept, sold, bartered, exchanged, given away, furnished, or otherwise disposed of thereof in violation of the provisions of this Ordinance or any other applicable Tribal law, and that such person will pay all fines, costs and damages assessed for any violation of this Ordinance or any other Tribal law or regulation pertaining to alcohol. If any condition of the bond be violated, the whole amount may be recovered for the use of the Tribe.

§ 3. Prima Facie Evidence of Nuisance. In all cases where any person has been found responsible for a violation of this Ordinance relating to the manufacture, importation, transportation, possession, distribution, or sale of liquor, an action may be brought to abate as a nuisance any real estate or other property involved in the violation of the Ordinance and violation of this Ordinance shall be prima facie evidence that the room, house, building, vehicle, structure, or place against which such action is brought is a public nuisance.

Article VIII. Severability and Effective Date

§ 1. If any provision or application of this Ordinance is determined by a court of competent jurisdiction to be invalid, such adjudication shall not be held to render ineffectual the remaining portions of this Ordinance or to render such provisions inapplicable to other persons or circumstances.

§ 2. This Ordinance shall be effective on such date as the Secretary of the Interior certifies this Ordinance and publishes the same in the **Federal Register**.

§ 3. Any and all prior enactments of the Tribal Council which are inconsistent with the provisions of this Ordinance are hereby rescinded.

§ 4. All acts and transactions under this Ordinance shall be in conformity with the laws of the State of California as that term is used in 18 U.S.C. 1161.

Article IX. Amendment

This Ordinance may be amended only by a majority vote of the Tribal Council.

[FR Doc. E8–28800 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM 120–06–1610–DQ]

Notice of Availability of the Socorro Proposed Resource Management Plan and Final Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) has prepared the Socorro Proposed Resource Management Plan/Final Environmental Impact Statement (PRMP/FEIS) for the Socorro Field Office in New Mexico.

DATES: BLM Planning Regulations (43 CFR 1610.5–2) state that any person who meets the conditions as described in the regulations may protest the BLM's Proposed RMP. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes this notice in the **Federal Register**.

ADDRESSES: Copies of the Socorro PRMP/FEIS have been sent to affected Federal, state, and local government agencies and to interested parties. Copies of the PRMP/FEIS are available for public inspection at the Socorro Field Office. Interested persons may also review the PRMP/FEIS on the Internet at *http://www.nm.blm.gov*.

FOR FURTHER INFORMATION CONTACT: Kevin I. Carson, Socorro Field Office, 901 S. Highway 85, Socorro, New Mexico 87801; or by telephone at (575) 838–1280; fax at (575) 835–0223; or e-mail at *nm_comments@nm.blm.gov*.

SUPPLEMENTARY INFORMATION: The planning area encompasses all lands,

regardless of jurisdiction, within Socorro and Catron counties, New Mexico, totaling 8.7 million acres. The decision area for the PRMP/FEIS includes 1.5 million acres of BLM-administered lands and 6.1 million acres of Federal mineral estate located in both counties. Until the Record of Decision on the PRMP/FEIS is signed, these lands and minerals will be managed in accordance with the 1989 Socorro Resource Management Plan and subsequent amendments.

The PRMP/FEIS describes the physical, cultural, historic, and socioeconomic resources in and around the planning area and documents the direct, indirect, and cumulative environmental impacts of four alternatives for BLM-administered lands and resources within the planning area. The impact analysis focuses on resource issues and concerns identified during scoping and public involvement activities. Issues identified during scoping (not in priority order) and from public comment were related to special designations, soil and vegetation conditions, transportation and access, energy development, land use, and recreation and heritage tourism opportunities.

A summary of the four alternatives in the PRMP/FEIS are as follows. The No-Action Alternative, Alternative A, represents the continuation of existing management, which is defined by the 1989 Socorro RMP and subsequent amendments. Alternative B, the BLM's proposed alternative, proposes managing the public lands for multiple uses and sustaining the health, diversity, and productivity of the lands for present and future generations. Alternative C emphasizes resource protection, while Alternative D emphasizes commodity production and use, while still complying with applicable laws, regulations, and BLM policies. Within all alternatives, Areas of Critical Environmental Concern (ACECs) have been identified to protect certain resources. The proposed alternative has identified the following ACECs due to their significant cultural, scenic, or natural values: Cerro Pomo, Horse Mountain, Ladron Mountain Devil's Backbone Complex, Mockingbird Gap, Pelona Mountain, Sawtooth, and Zuni Salt Lake. After the Draft RMP/EIS was released to the public, acreage corrections were made to the following proposed ACECs to address geographical information system data errors. These errors affected only the Alternative B acreages for the Cerro Pomo ACEC and the Tinajas ACEC. The corrections are shown in the table below.

	Draft RMP/EIS	Proposed RMP/EIS
Cerro Pomo ACEC	26,284 acres	28,248 acres.
Tinajas ACEC	1,062 acres	0 acres.

(For additional information on management restrictions and acreage figures for each ACEC refer to Chapter 2 of the PRMP/FEIS.) These corrections do not represent a change in the management of the lands that were evaluated in the Draft RMP/EIS. The Draft RMP/EIS was released to the public for a 90-day comment period in April 2007. The BLM hosted public meetings in Datil and Socorro, New Mexico, to answer questions about the document, as well as to solicit comments from the public. Public comments on the Draft RMP/EIS are on file and available for public review at the address listed above. Public comments on the Draft RMP/EIS resulted in the addition of clarifying text in the PRMP/FEIS, but did not substantively change the proposed decisions in the preferred alternative.

Instructions for filing a protest with the Director of the BLM regarding the PRMP/FEIS may be found in the Dear Reader Letter of Socorro Proposed Resource Management Plan and Final Environmental Impact Statement and at 43 CFR 1610.5–2. E-mail and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the e-mail or faxed protest as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct faxed protests to the attention of the BLM protest coordinator at (202) 452–5112, and e-mailed protests to *Brenda_Hudgens-Williams@blm.gov*.

All protests including the follow up letter (if e-mailing or faxing) must be in writing and must be mailed to the following address:

Regular Mail: Overnight Mail: Director (210), Attention: Brenda Williams,P.O. Box 66538, Washington, DC 20035.

Overnight Mail: Director (210), Attention: Brenda Williams, 1620 L Street, NW., Suite 1075, Washington, DC 20036.

Before including your phone number, e-mail address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Ron Dunton,

New Mexico Deputy State Director.

[FR Doc. E8–28707 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Northwest Area Water Supply Project, ND

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of Final Environmental Impact Statement (Final EIS) on Water Treatment.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969 (NEPA), the Bureau of Reclamation (Reclamation) is notifying the public that Reclamation has prepared a Final EIS on Water Treatment for the Northwest Area Water Supply Project (Project). The proposed action is to construct a biota water treatment plant for the Project to treat the source water from Lake Sakakawea before it is delivered into the Hudson Bay basin. The Final EIS provides information and analyses related to four water treatment alternatives that would further reduce the risk of a Project-related biological invasion from the Missouri River basin into the Hudson Bay basin. Reclamation published a Draft EIS on December 21, 2007. The public comment period continued through March 26, 2008. Revisions were made in the Final EIS to incorporate responses to comments and identify the preferred alternative and the associated cost estimate. However, these revisions do not significantly

impact the analysis or results presented in the Draft EIS. The Final EIS includes written responses to all public comments on the Draft EIS.

DATES: Reclamation will not make a decision on the proposed action until at least 30 days after filing of the Final EIS. After the 30-day waiting period, Reclamation will complete a Record of Decision. The Record of Decision will identify the selected action for implementation and will discuss factors and rationale used in making the decision.

FOR FURTHER INFORMATION CONTACT: Alicia Waters, Northwest Area Water Supply Project EIS, Bureau of Reclamation, Dakotas Area Office, P.O. Box 1017, Bismarck ND 58502; Telephone: (701) 221–1206, or FAX to (701) 250–4326. You may submit an e-mail to *awaters@gp.usbr.gov*. Additional information is available to the public regarding this EIS and is posted on the Web site *http://www.usbr.gov/gp/dkao*.

SUPPLEMENTARY INFORMATION:

Background: The Garrison Diversion Unit's Municipal, Rural, and Industrial Water Supply (MR&I) program was authorized by the U.S. Congress on May 12, 1986, through the Garrison Diversion Unit Reformulation Act of 1986. This Act authorized the appropriation of $200 million of Federal funds for the planning and construction of water supply facilities throughout North Dakota. This Project is designed as a bulk water distribution system that will service local communities and rural water systems in 10 counties in northwestern North Dakota including the community of Minot. The Project is an inter-basin transfer of water from Lake Sakakawea, in the Missouri River basin to the water treatment plant (WTP) in Minot, North Dakota, in the Hudson Bay basin. Reclamation completed an Environmental Assessment (EA) and issued a Finding of No Significant Impact (FONSI) for the Project in 2001. Project construction began in April 2002. In October 2002, the Province of Manitoba, Canada filed a legal challenge in U.S. District Court in Washington DC to compel the Department of the Interior to complete an EIS on the Project. A Court Order dated February 3, 2005, remanded the case to Reclamation for completion of additional environmental analysis.

Subsequent orders issued by the District Court allowed construction to continue on the distribution systems of the Project while the EIS was being prepared. Construction of the main water pipeline between Lake Sakakawea and the Minot WTP was completed in 2008. This buried pipeline was constructed with several safeguards which further reduce the risk of a pipeline breach resulting in a Project-related biological invasion.

Alternatives: The purpose of the proposed action is to adequately treat the Project water from the Missouri River basin (Lake Sakakawea) to further reduce the risk of a Project-related biological invasion into the Hudson Bay basin. The Final EIS considers four water treatment alternatives, a no action alternative and three action alternatives, to meet the purpose and need for the proposed action. Each of the alternatives evaluated include treatment processes which would occur within the Missouri River basin prior to the water being pumped through the buried pipeline to the Minot WTP. At the Minot WTP, the water would be treated to meet Safe Drinking Water Act standards.

Alternatives evaluated in the Final EIS include a no action alternative, as required by NEPA, and three action alternatives. The alternatives evaluated are:

- No Action. The selected action alternative in the FONSI (Reclamation 2001) was evaluated as the No Action Alternative in the EIS. The treatment process includes chemical disinfection of Missouri River water prior to delivery into the Hudson Bay basin. Ultraviolet (UV) disinfection would be provided along with softening and filtration at the existing Minot WTP.
- Basic Treatment. This treatment alternative would include a pretreatment (coagulation, flocculation, sedimentation) process followed by chemical and UV disinfection prior to crossing the drainage divide. The purpose of the pre-treatment process is to reduce raw water turbidity which can influence the effectiveness of the disinfection processes. Softening and filtration would be provided at the existing Minot WTP.
- Conventional Treatment. This treatment would include a pre-treatment of Dissolved Air Flotation followed by media filtration and disinfection using UV and chemicals (chlorine and chloramines) within the Missouri River basin. Softening and filtration would be provided at the existing Minot WTP.
- Microfiltration. This treatment alternative would include pre-treatment (coagulation, pin floc) followed by membrane filtration and chemical and UV disinfection processes prior to the water crossing the drainage divide. Softening and filtration would be provided at the existing Minot WTP.

The Preferred Alternative identified in the Final EIS includes a combination of the treatment processes evaluated in the alternatives described previously. The treatment process of the Preferred Alternative would include the chemical disinfection evaluated as part of the No Action Alternative and the UV disinfection process evaluated as part of the action alternatives. After this treatment within the Missouri River basin, the water would be pumped through the existing pipeline to the Minot WTP where it would be treated with lime softening and filtration to meet Safe Drinking Water Act standards.

All of the treatment alternatives evaluated would effectively inactivate and/or remove a broad range of organisms, including all of the potentially invasive species evaluated in the Final EIS. Estimated costs for construction and annual operation, maintenance and replacement of the alternatives evaluated are provided in the Final EIS.

Public Review Locations: The Final EIS is available for public inspection at the following locations:

- Bismarck Public Library, 515 North 5th Street, Bismarck, ND.
- Minot Public Library, 516 2nd Avenue SW., Minot, ND.
- Dakotas Area Office, Bureau of Reclamation, 304 East Broadway, Bismarck, ND.
- Bureau of Indian Affairs, Fort Berthold Agency, 202 Main Street, New Town, ND.
- North Dakota State Library, 603 East Boulevard Avenue, Bismarck, ND.
- Standing Rock Administrative Service Center, Building 1, North Standing Rock Avenue, Fort Yates, ND.
- Mohall Public Library, 112 Main Street East, Mohall, ND.
- Bottineau City Hall, 115 West 6th Street, Bottineau, ND.

Dated: November 26, 2008.

Bobbi C. Sherwood-Widmann,

Acting, Assistant Regional Director, Great Plains Region.

[FR Doc. E8–28829 Filed 12–4–08; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Oil Pollution Act

Notice is hereby given that on November 25, 2008, a proposed Consent Decree (''Decree'') in *United States* v. *f/v North Wind, Inc.*, Civil Action No. 1:06–cv–00272–DAE–BMK, was lodged with the United States District Court for the District of Hawaii.

The civil action relates to the July 1, 2005 incident when the M/V Casitas, a 145-foot motor vessel owned and operated by f/v North Wind, Inc., ran

aground on the reef near North Island at Pearl and Hermes Atoll, a part of the Hawaiian Islands National Wildlife Refuge, and which is also within the Papahanaumokuakea Marine National Monument. In this action the United States and State of Hawaii seek to obtain damages for injury to natural resources under the Oil Pollution Act (OPA).

The proposed Decree would require North Wind to pay $2,817,626.48 for damages, in exchange for a covenant not to sue from the United States and Hawaii for damages under OPA, the Comprehensive Environmental Response, Compensation, and Liability Act, or state law.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should reference *United States* v. *f/v North Wind Inc.*, Civil Action No. 1:06–cv–00272–DAE–BMK, and DOJ Ref. No. 90–5–1–1–09389.

The Decree may be examined at the Office of the Civil Division, Torts Branch, at West Coast Office, U.S. Department of Justice, 7–5395 Federal Bldg., Box 36028, 450 Golden Gate Avenue, San Francisco, California 94102–3463. During the public comment period, the Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.50 (25 cents per page reproduction cost) for a copy of the consent decree, payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry Friedman,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–28763 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0029]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: Records and Supporting Data: Daily Summaries, Records of Production, Storage, and Disposition, and Supporting Data by Licensed Explosives Manufacturers.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 189, page 56610 on September 29, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 5, 2009. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Records and Supporting Data: Daily Summaries, Records of Production, Storage and Disposition and Supporting Data by Explosives Manufacturers.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. Abstract: These records show daily activities in the manufacture, use, storage, and disposition of explosive materials by manufacturers. The records are used to show where and to whom explosive materials are sent, thereby ensuring that any diversion will be readily apparent and if lost or stolen, ATF will be immediately notified on discovery of the loss or theft. ATF requires that records be kept 5 years from the date a transaction occurs or until discontinuance of business or operations by the licensee.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 2,008 respondents, who will take 15 minutes to maintain each record.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 130,520 total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: December 2, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–28861 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0050]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Identification Markings Placed on Firearms.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 189, page 56609–56610 on September 29, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 5, 2009. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Identification Markings Placed on Firearms.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. Abstract: Each licensed firearms manufacturer or licensed importer must legibly identify each firearm by engraving, casting, stamping (impressing), or otherwise conspicuously placing on the frame or receiver an individual serial number. Also, ATF requires minimum height and depth requirements for identification markings placed on firearms.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 2,962 respondents who will take 5 seconds to mark the firearm.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 2,500 total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: December 2, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–28862 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on July 15, 2008, Cerilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78665–2402, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
Fenethylline (1503)	I
Gamma hydroxybutyric acid (2010).	I
Ibogaine (7260)	I
Lysergic acid diethylamide (7315)	I
2,5-Dimethoxy-4-(n)-propylthiophenethylamine (7348).	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390).	I
4-Bromo-2,5-dimethoxyamphetamine (7391).	I
4-Bromo-2,5-dimethoxyphenethylamine (7392).	I
4-Methyl-2,5-dimethoxyamphetamine (7395).	I
2,5-Dimethoxyamphetamine (7396).	I
3,4-Methylenedioxyamphetamine (7400).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxymethamphetamine (7405).	I
4-Methoxyamphetamine (7411)	I
Alpha-methyltryptamine (7432)	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N-Benzylpiperazine (7493)	I
Etorphine (except HCl)(9056)	I
Heroin (9200)	I

Drug	Schedule
Morphine-N-oxide (9307)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Dextromoramide (9613)	I
Dipipanone (9622)	I
Trimeperidine (9646)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Meperidine (9230)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II
Oripavine (9330)	II
Thebaine (9333)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Poppy Straw Concentrate (9670)	II
Fentanyl (9801)	II

The company plans to import small quantities of the listed controlled substances for the manufacture of analytical reference standards.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 5, 2009.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 26, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–28756 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a registration under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on October 6, 2008, Tocris Cookson, Inc., 16144 Westwoods Business Park, Ellisville, Missouri 63021–4500, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Amphetamine (1100)	II
Phencyclidine (7471)	II
Cocaine (9041)	II
Diprenorphine (9058)	II

The company plans to import the above listed controlled substances for non-clinical laboratory based research only.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections being sent via regular mail should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 5, 2009.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import basic classes of any controlled substances in schedules I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b),(c),(d),(e), and (f) are satisfied.

Dated: November 26, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–28748 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 18, 2008, GE Healthcare, 3350 North Ridge Avenue, Arlington Heights, Illinois 60004–1412, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of Cocaine (9041), a basic class of controlled substance listed in schedule II.

The company plans to manufacture a radioactive product used in diagnostic imaging in the diagnosis of Parkinson's Disease and for manufacture in bulk for investigational new drug (IND) submission and clinical trials.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive,

Springfield, Virginia 22152; and must be filed no later than February 3, 2009.

Dated: November 26, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–28853 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 8, 2008, ISP Freetown Fine Chemicals, 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
2,5-Dimethoxyamphetamine (7396).	I
Amphetamine (1100)	II
Methylphenidate (1724)	II
Phenylacetone (8501)	II
Dextropropoxyphene bulk, non-dosage form (9273).	II

The company plans to manufacture Phenylacetone to be used in the manufacture of Amphetamine for distribution to its customers. The bulk 2,5-Dimethoxyamphetamine will be used for conversion into non-controlled substances.

Any other such applicant and any person who is presently registered with DEA to manufacture such a controlled substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than February 3, 2009.

Dated: November 26, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–28845 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0170]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: Extension of a currently approved collection; Victim of Crime Act, Crime Victim Assistance Grant Program, Subgrant Award Report.

Department of Justice (DOJ), Office of Justice Programs (OJP), Office for Victims of Crime (OVC) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until February 3, 2009. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact DeLano Foster (202) 616–3612, Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, 810 7th Street, NW., Washington, DC 20531.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Victims of Crime Act, Victim Assistance Grant Program, Subgrant Award Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* 1121–0142. Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* State government. *Other:* None. The VOCA, Crime Victim Assistance Grant Program, Subgrant Award Report is a required submission by state grantees, within 90 days of their awarding a subgrant for the provision of crime victim services. VOCA and the Program Guidelines require each state victim assistance office to report to OVC on the impact of the Federal funds, to certify compliance with the eligibility requirements of VOCA, and to provide a summary of proposed activities. This information will be aggregated and serve as supporting documentation for the Director's biennial report to the President and to the Congress on the effectiveness of the activities supported by these grants. This request is for an extension of a currently approved reporting instrument, with no revisions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* The number of VOCA-funded victim assistance programs varies widely from State to State. A review of information currently available to this Office on the number of active victim assistance programs in 15 states selected for variance in size and population revealed that a State would be responsible for entering subgrant data for as many as 436 programs (California) to as few as 12 programs (District of Columbia).

The estimated time to enter a record via the Grants Management System is three minutes (.05 hour). Therefore, the estimated clerical time can range from 36 minutes to 22 hours, based on the number of records that are entered. It would take 295 hours to enter 5,900 responses electronically [5,900 × .05 hour].

(6) An estimate of the total public burden (in hours) associated with the collection: The current estimated burden is 295 (5,900 responses × .05

hour per response = 295 hours). There is no increase in the annual recordkeeping and reporting burden.

If additional information is required contact: Lynn Bryant, Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: December 2, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–28860 Filed 12–4–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Employment Standards Administration

Announcement of Public Briefings on Using the New H–2A Temporary Agricultural Labor Certification Program

AGENCIES: Employment and Training Administration; Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of meeting.

SUMMARY: The Office of Foreign Labor Certification (OFLC) in the Department of Labor's Employment & Training Administration (ETA) has been re-engineering several of its programs, including the H–2A foreign agricultural worker labor certification program. The Wage and Hour Division (WHD) of the Employment Standards Administration (ESA) has been amending contractual obligations applicable to employers of workers subject to Section 218 of the Immigration and Nationality Act (INA). The Department published a Notice of Proposed Rulemaking (NPRM) to redesign the H–2A agricultural labor certification program on February 13, 2008. The Department is currently reviewing public comments on this proposed rule and intends to publish final regulations before the end of the calendar year. In addition, the Department of Homeland Security (DHS) has published an NPRM to amend its H–2A regulations and intends to publish a final rule before the end of the calendar year as well.

Pursuant to the Department of Labor final rule, changes to information collection and regulatory requirements will affect the application forms. The H–2A program will no longer use the Form ETA 750 (OMB control number 1205–0015). Instead the program will utilize the new Form ETA 9142 (OMB control number 1205–0466). The new regulations also federalize the prevailing wage determination process in the H–2A program.

ETA and ESA are issuing this notice to announce that they will offer at least two public briefings to educate stakeholders, program users, and other interested members of the public on using the re-engineered program and new form. Representatives from DHS will also be joining the Department of Labor at the briefing sessions. As currently planned, the two briefings will take place in late 2008 in Atlanta and Denver. This notice provides the public with locations, dates, and registration information regarding the briefings. However, these briefings are subject to change and/or cancellation without further notice in the **Federal Register**. In the event of a change participants who have registered will be notified.

Time and Dates

1. Friday, December 12, 2008, Atlanta, Georgia.
   Time: 8:30 a.m. to 3 p.m.
2. Monday, December 15, 2008, Denver, Colorado.
   Time: 8:30 a.m. to 3 p.m.

ADDRESSES: The meeting locations are:

1. Atlanta—Marriott Marquis, 265 Peachtree Center Avenue, NE, Atlanta, Georgia 30303.
2. Denver—Hyatt Regency Denver, 650 15th Street, Denver, Colorado, 80202.

To Register: To register for a briefing session please complete the registration process on-line, by visiting *http://www.dtiassociates.com/oflcbriefings.* For questions regarding the registration process, please call (703) 299–1623 (this is not a toll-free number). Due to space considerations, attendance will be limited to those who register online. In the event of cancellation or change, participants will be notified.

FOR FURTHER INFORMATION CONTACT: For further information regarding ETA's portion of the briefing, contact William Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone: (202) 693–3010 (this is not a toll-free number). For further information regarding ESA's portion of the briefing, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The registration information should be used by any member of the public planning to attend a briefing session. The agenda assumes publication of both Department of Labor and Department of Homeland Security final rules.

Signed in Washington, DC, this 1st day of December 2008.

Brent R. Orrell,

Deputy Assistant Secretary, Employment and Training Administration.

Alexander J. Passantino,

Administrator, Wage and Hour Division, Employment Standards Administration.

[FR Doc. E8–28847 Filed 12–4–08; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0051]

The Cadmium in Construction Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Cadmium in Construction Standard (29 CFR 1926.1127).

DATES: Comments must be submitted (postmarked, sent, or received) by February 3, 2009.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2008–0051, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution

Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the information collection request (OSHA–2008–0051). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.*, copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may contact Jamaa Hill at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Jamaa N. Hill or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing efforts to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The information collection requirements specified in the Cadmium in Construction Standard protect employees from the adverse health effects that may result from their exposure to cadmium. The major information collection requirements in the Standard include conducting employee exposure monitoring, notifying employees of their cadmium exposures, implementing a written compliance program, implementing medical surveillance of employees, providing examining physicians with specific information, ensuring that employees receive a copy of their medical surveillance results, maintaining employees' exposure monitoring and medical surveillance records for specific periods, and providing access to these records by OSHA, the National Institute for Occupational Safety and Health, the employee who is the subject of the records, the employee's representative, and other designated parties.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Cadmium in Construction Standard (29 CFR 1926.1127). The Agency is proposing to retain its previous estimate of 39,331 burden hours; however, it is proposing to increase the currently approved capital costs from $1,657,460 to $1,775,457, a total increase of $117,997. The increase is due to the Agency increasing the cost to perform medical surveillance and exposure monitoring.

The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Cadmium in Construction Standard (29 CFR 1926.1127).

OMB Number: 1218–0186.

Affected Public: Business or other for-profits; Federal Government; State, Local or Tribal Government.

Number of Respondents: 10,000.

Frequency: On occasion; quarterly; semi-annually; annually.

Average Time per Response: Varies from two minutes (.03 hour) for a secretary to compile and maintain training records to 1.5 hours to administer employee medical examinations.

Estimated Total Burden Hours: 39,331.

Estimated Cost (Operation and Maintenance): $1,775,457

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0051). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://*

www.regulations.gov. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.*, copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, this 26th day of November 2008.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–28787 Filed 12–4–08; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0052]

The Cadmium in General Industry Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Cadmium in General Industry Standard (29 CFR 1910.1027).

DATES: Comments must be submitted (postmarked, sent, or received) by February 3, 2009.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2008–0052, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., *e.t.*

Instructions: All submissions must include the Agency name and OSHA docket number for the ICR (OSHA–2008–0052). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov*. For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.* , copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may contact Jamaa Hill at the address below to obtain a copy of the Information Collection Request (ICR).

FOR FURTHER INFORMATION CONTACT: Jamaa N. Hill or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.* , employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The information collection requirements specified in the Cadmium in General Industry Standard protect employees from the adverse health effects that may result from occupational exposure to cadmium. The major information collection requirements in the Standard include conducting employee exposure monitoring, notifying employees of their cadmium exposures, implementing a written compliance program, implementing medical surveillance of employees, providing examining physicians with specific information, ensuring that employees receive a copy of their medical surveillance results, maintaining employees' exposure monitoring and medical surveillance records for specific periods, and providing access to these records by OSHA, the National Institute for Occupational Safety and Health, the employee who is the subject of the records, the employee's representative, and other designated parties.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Cadmium in General Industry Standard (29 CFR 1910.1027). OSHA is proposing to decrease its current existing burden hour estimate from 121,177 hours to 92,259 hours, for a total decrease of 28,918 hours. Based upon a review of new data, the Agency reduced the number of plants and employees potentially exposed to cadmium. Additionally, while there was an increase in the cost of medical examinations, this was offset by a reduction in the number of employees receiving medical examinations which led to an overall cost decrease of $1,546,815, from $6,191,000 to $4,644,185.

The Agency will summarize the comments submitted in response to This notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Cadmium in General Industry (29 CFR 1910.1027).

OMB Number: 1218–0185.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 50,862.

Frequency of Response: On occasion.

Average Time per Response: Time per response ranges from 5 minutes (.08 hour) to maintain records to 1.67 hours to complete a medical examination.

Estimated Total Burden Hours: 92,259 hours.

Estimated Cost (Operation and Maintenance): $4,644,185.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0052). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov*. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.*, copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, this 26th day of November 2008.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–28788 Filed 12–4–08; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site Visit review of the Partnership for Research and Education in Materials at Howard University, Proposal Review Panel for Materials Research (1203).

Dates & Times: Thursday, January 29, 2009; 7:45 a.m.–9 p.m.; Friday, January 30, 2009; 8 a.m.–3:30 p.m.

Place: Howard University, Washington, DC.

Type of Meeting: Part-open.

Contact Person for More Information: Dr. Thomas Rieker, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–4914.

Purpose of Meeting: To provide advice and recommendations concerning further support of the PREM at Howard University, Washington, DC.

Agenda:

Thursday, January 29, 2009

7:45 a.m.–9 a.m.: Closed—Executive Session

9 a.m.–4 p.m.: Open—Review of the Brown MRSEC

4 p.m.–6 p.m.: Closed—Executive Session

6 p.m.–9 p.m.: Open—Poster Session and Dinner

Friday January 30, 2009

8 a.m.–9 a.m.: Closed—Executive session

9 a.m.–10 a.m.: Open—Review of the Brown MRSEC

10 a.m.–3:30 p.m.: Closed—Executive Session, Draft and Review Report

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: December 2, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–28801 Filed 12–4–08; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site Visit review of the Materials Research Science and Engineering Center (MRSEC) at Brown University, Proposal Review Panel for Materials Research #1203.

Dates & Times: Thursday, January 22, 2009, 2008; 7:30 a.m.–9:30 p.m.; Friday, January 23, 2009; 7:30 a.m.–4:30 p.m.

Place: Brown University, Providence, RI.

Type of Meeting: Part-open.

Contact Person: Dr. Thomas Rieker, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–4914.

Purpose of Meeting: To provide advice and recommendations concerning further support of the MRSEC at Brown University, Providence, RI.

Agenda:

Thursday, January 22, 2009
7:45 a.m.–9 a.m.: Closed—Executive Session.
9 a.m.–4:30 p.m.: Open—Review of the Brown MRSEC.
4:30 p.m.–6 p.m.: Closed—Executive Session.
6 p.m.–9 p.m.: Open—Poster Session and Dinner.

Friday January 23, 2009
8 a.m.–9 a.m.: Closed—Executive session.
9 a.m.–10:15 a.m.: Open—Review of the Brown MRSEC.
10:15 a.m.–3:30 p.m.: Closed—Executive Session, Draft and Review Report.

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

December 2, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–28802 Filed 12–4–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission will convene a teleconference meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on December 18, 2008, to discuss infiltrations of fluorine-18 and therapeutic radiopharmaceuticals as medical events; and the training and experience requirements for the medical use of NeoVista, Inc.'s Epi-Rad$_{90}$ strontium-90 ophthalmic system. A copy of the agenda for the meeting will be available at *http://www.nrc.gov/reading-rm/doc-collections/acmui/agenda* or by contacting Ms. Ashley Tull using the information below.

DATES: The teleconference meeting will be held on Thursday, December 18, 2008, from 1 p.m. to 3 p.m. Eastern Standard Time.

Public Participation: Any member of the public who wishes to participate in the teleconference discussion should contact Ms. Tull using the contact information below.

Contact Information: Ashley M. Tull, e-mail: *ashley.tull@nrc.gov*, telephone: (240) 888–7129.

Conduct of the Meeting

Leon S. Malmud, M.D., will chair the meeting. Dr. Malmud will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Ms. Tull at the contact information listed above. All submittals must be received by December 15, 2008, and must pertain to the topic on the agenda for the meeting.

2. Questions and comments from members of the public will be permitted during the meeting, at the discretion of the Chairman.

3. The transcript will be available on the ACMUI's Web site (*http://www.nrc.gov/reading-rm/doc-collections/acmui/tr/*) on or about January 21, 2009. A meeting summary will be available on or about February 3, 2009.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, U.S. Code of Federal Regulations, Part 7.

Dated: December 1, 2008.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. E8–28843 Filed 12–4–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act; Notice of Meeting

DATES: Week of December 8, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

ADDITIONAL ITEMS TO BE CONSIDERED:

Week of December 8, 2008

Tuesday, December 9, 2008

9:25 a.m. Affirmation Session (Public Meeting) (Tentative).

b. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), re Appeal of Order Striking WestCAN's Request for Hearing (July 31, 2008) (Tentative).

This meeting will be Webcast live at the Web address— *http://www.nrc.gov*.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: December 2, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. E8–28934 Filed 12–3–08; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Opportunity To Comment on Model Safety Evaluation on Technical Specification Improvement To Relocate Surveillance Frequencies to Licensee Control—Risk-Informed Technical Specification Task Force (RITSTF) Initiative 5b, Technical Specification Task Force—425, Revision 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) has prepared a model license amendment request (LAR), model safety evaluation (SE), and model no significant hazards consideration (NSHC) determination. These are related to changes to standard technical specifications (STS) for Technical Specification Task Force (TSTF)—425, Rev. 2, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF Initiative 5b,'' (Agencywide Documents Access Management System (ADAMS) Accession No. ML080280275). The purpose of these models is to permit the NRC to efficiently process amendments that propose to relocate TS surveillance frequencies. Licensees of nuclear power reactors could then request amendments, confirming the applicability of the safety evaluation and NSHC determination to their reactors. The NRC staff is requesting comment on the model safety evaluation and model NSHC determination prior to announcing their availability for referencing in license amendment applications.

DATES: The comment period expires January 5, 2009. Comments received after this date will be considered if it is practical to do so. However, the Commission can only ensure consideration for comments received on or before this date.

ADDRESSES: Please submit comments either electronically or through U.S. mail. E-mail comments to *CLIIP@nrc.gov*. Mail comments to the Chief, Rulemaking, Directives, and Editing Branch, Division of Administrative Services, Office of Administration, Mail Stop: T–6 D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Hand-deliver comments to: 11545 Rockville Pike, Rockville, MD between 7:45 a.m. and 4:15 p.m. on Federal workdays. Copies of comments received may be examined at the NRC's Public Document Room, 11555 Rockville Pike (Room O–1F21), Rockville, MD. You can submit comments electronically to *CLIIP@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Robert Elliott, Mail Stop: O–12H2, Technical Specifications Branch, Division of Inspection & Regional Support, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–8585.

SUPPLEMENTARY INFORMATION:

Background

This notice provides an opportunity for the public to comment on proposed changes to the STS after a preliminary assessment and finding by the NRC staff that the NRC will likely offer the change for adoption by licensees. This notice solicits comment on a proposed change to the STS that modify surveillance frequencies. NRC staff will evaluate any comments received for the proposed change to the STS and reconsider the change or announce the availability of the change for adoption by licensees. Licensees opting to apply for this change are responsible for reviewing the staff's evaluation, referencing the applicable technical justifications, and providing any necessary plant-specific information. The NRC will process and note each amendment application responding to the notice of availability according to applicable NRC rules and procedures.

This notice involves the relocation of most time-based surveillance frequencies to a licensee-controlled program, the Surveillance Frequency Control Program (SFCP), and provides a reference to the SFCP in the administrative controls section of TS. Exceptions to surveillance frequency relocation are those surveillances frequencies that are event driven, event driven with a time component, reference another established licensee program, or condition-based surveillance frequencies. Revision 2 of TSTF–425 addresses all four reactor vendor types. The owners groups participants proposed this change for incorporation into the standard technical specifications in the technical specification task force (TSTF) and is designated TSTF–425, Rev. 2. TSTF–425, Rev. 2 (ADAMS Accession No. ML080280275), can be viewed on the NRC's Web page at *http://www.nrc.gov/reading-rm/adams.html*.

Applicability

TSTF–425, Rev 2, is applicable to all nuclear power reactors and requires the application of the Nuclear Energy Institute (NEI) 04–10, Rev. 1, ''Risk-informed Technical Specifications Initiative 5B, Risk-Informed Method for Control of Surveillance Frequencies,'' (ADAMS Accession No. ML071360456). The NRC staff reviewed and approved NEI 04–10, Revision 1 (Rev. 1), by letter dated September 19, 2007 (ADAMS Accession No. ML072570267). To efficiently process the incoming license amendment applications, the NRC staff requests that each licensee applying for the changes proposed in TSTF–425 include documentation regarding the probabilistic risk assessment (PRA) technical adequacy consistent with the requirements of Section 4.2 Regulatory Guide (RG) 1.200, ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities'' (ADAMS Accession No. ML070240001). Applicants proposing to use PRA models for which NRC-endorsed standards do not exist must submit documentation that identifies characteristics of those models consistent with Sections 1.2 and 1.3 of RG–1.200 or identify and justify the methods to be applied for assessing the risk contribution for those sources of risk not addressed by PRA models.

The proposed change to adopt TSTF–425 does not prevent licensees from requesting an alternate approach or proposing changes other than those proposed in TSTF–425, Rev. 2. Significant deviations from the approach recommended in this notice, or inclusion of additional changes to the license, however, require additional review by the NRC staff. This may increase the time and resources needed for the review or result in staff rejection of the LAR. Licensees desiring significant deviations or additional changes should instead submit a license amendment request that does not claim to adopt TSTF–425, Rev 2.

Public Notices

This notice requests comments from interested members of the public within 30 days of the date of publication in the **Federal Register**. After evaluating the comments received as a result of this notice, the NRC staff will either reconsider the proposed change or announce the availability of the change in a subsequent notice (with possible changes to the safety evaluation or the proposed no significant hazards

consideration determination as a result of public comments). If NRC staff announces the availability of the change, licensees wishing to adopt the change must submit an application in accordance with applicable rules and other regulatory requirements.

For each application the NRC staff will publish a notice of consideration of issuance of amendment to facility operating licenses, a proposed no significant hazards consideration determination, and a notice of opportunity for a hearing. The staff will also publish a notice of issuance of an amendment to the operating license to announce the relocation of surveillance frequencies to licensee-controlled document for each plant that receives the requested change.

Dated at Rockville, MD, this 24th day of November 2008.

For the Nuclear Regulatory Commission.

Robert Elliott,

Chief, Technical Specifications Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation.

THE FOLLOWING EXAMPLE OF AN APPLICATION WAS PREPARED BY THE NRC STAFF. THE MODEL PROVIDES THE EXPECTED LEVEL OF DETAIL AND CONTENT FOR AN APPLICATION TO REVISE TECHNICAL SPECIFICATIONS REGARDING RISK-INFORMED JUSTIFICATION FOR RELOCATION OF SPECIFIC TS SURVEILLANCE FREQUENCIES TO A LICENSEE CONTROLLED PROGRAM CHANGE. LICENSEES REMAIN RESPONSIBLE FOR ENSURING THAT THEIR ACTUAL APPLICATION FULFILLS THEIR ADMINISTRATIVE REQUIREMENTS AS WELL AS NRC REGULATIONS.

U.S. Nuclear Regulatory Commission
Document Control Desk
Washington, DC 20555

SUBJECT: PLANT NAME
DOCKET NO. 50—APPLICATION FOR TECHNICAL SPECIFICATION CHANGE REGARDING RISK-INFORMED JUSTIFICATION FOR THE RELOCATION OF SPECIFIC SURVEILLANCE FREQUENCY REQUIREMENTS TO A LICENSEE CONTROLLED PROGRAM

Dear Sir or Madam:

In accordance with the provisions of Title 10 of the Code of Federal Regulations (10 CFR Part 50.90), ''Application for Amendment License Construction Permit at Request of Holder,'' [LICENSEE] is submitting a request for an amendment to the technical specifications (TS) for [PLANT NAME, UNIT NOS.].

The proposed amendment would modify [LICENSEE] technical specifications by relocating specific surveillance frequencies to a licensee-controlled program with the implementation of Nuclear Energy Institute (NEI) 04–10, ''Risk-Informed Technical Specification Initiative 5B, Risk-Informed Method for Control of Surveillance Frequencies.''

Attachment 1 provides a description of the proposed change, the requested confirmation of applicability, and plant-specific verifications. Attachment 2 provides the existing TS pages marked up to show the proposed change. Attachment 3 provides revised (clean) TS pages. Attachment 4 provides a summary of the regulatory commitments made in this submittal. Attachment 5 provides the proposed TS Bases changes.

[LICENSEE] requests approval of the proposed license amendment by [DATE], with the amendment being implemented [BY DATE OR WITHIN X DAYS].

In accordance with 10 CFR 50.91, ''Notice for Public Comment; State Consultation,'' a copy of this application, with attachments, is being provided to the designated [STATE] Official.

I declare [or certify, verify, state] under penalty of perjury that the foregoing is correct and true. Executed on [Date] [Signature]

If you should have any questions regarding this submittal, please contact [NAME, TELEPHONE NUMBER].

Sincerely,
[Name, Title]

Attachments:
1. Description and Assessment
2. Proposed Technical Specification Changes
3. Revised Technical Specification Pages
4. Regulatory Commitments
5. Proposed Technical Specification Bases Changes

cc: U.S. Nuclear Regulatory Commission Regional Office
NRC Resident Inspector

Attachment 1—Description and Assessment

1.0 Description

The proposed amendment would modify technical specifications by relocating specific surveillance frequencies to a licensee-controlled program with the adoption of Technical Specification Task Force (TSTF)–425, Revision 2, ''Relocate Surveillance Frequencies to Licensee Control—Risk Informed Technical Specification Task Force (RITSTF) Initiative 5.'' Additionally, the change would add a new program, the Surveillance Frequency Control Program, to TS Section [5], Administrative Controls.

The changes are consistent with NRC approved Industry/TSTF STS change TSTF–425, Revision 2, (Rev. 2) (ADAMS Accession No. ML080280275). The **Federal Register** notice published on [DATE] announced the availability of this TS improvement.

2.0 Assessment

2.1 Applicability of Published Safety Evaluation

[LICENSEE] has reviewed the safety evaluation dated [DATE]. This review included a review of the NRC staff's evaluation, the supporting information provided to support TSTF–425, Rev. 2, and the requirements specified in NEI 04–10, Rev. 1, (ADAMS Accession No. ML071360456).

1. [LICENSEE] LAR submittal includes documentation with regards to PRA technical adequacy consistent with the requirements of RG 1.200 (ADAMS Accession No. ML070240001) Section 4.2., and

2. [LICENSEE] proposes to use PRA models without NRC-endorsed standards. The licensee has submitted documentation which identifies the quality characteristics of those models, as described in RG 1.200 (ADAMS Accession No. ML070240001).

[LICENSEE] has concluded that the justifications presented in the TSTF proposal and the safety evaluation prepared by the NRC staff are applicable to [PLANT, UNIT NOS.] and justify this amendment to incorporate the changes to the [PLANT] TS.

2.2 Optional Changes and Variations

[LICENSEE] is not proposing any variations or deviations from the TS changes described in TSTF–425, Rev. 2, and the NRC staff's model safety evaluation dated [DATE].

3.0 Regulatory Analysis

3.1 No Significant Hazards Consideration Determination

[LICENSEE] has reviewed the proposed no significant hazards consideration determination (NSHCD) published in the **Federal Register**. [LICENSEE] has concluded that the proposed NSHCD presented in the **Federal Register** notice is applicable to [PLANT] and has found it acceptable to incorporate into the amendment request that satisfies the requirements of 10 CFR 50.91(a).

Attachment 2—Proposed Technical Specification Changes (Mark-Up)

Attachment 3—Proposed Technical Specification Pages

Attachment 4—List of Regulatory Commitments

The following table identifies the [LICENSEE] commitments in this document. Any other statements in this submittal are provided for information purposes and are not considered regulatory commitments. Please direct questions regarding these commitments to [CONTACT NAME].

Regulatory commitments	Due date
[LICENSEE] commits to implement NEI 04–10, Revision 1, as identified by reference in new TS Administrative Control, ''Surveillance Frequency Control Program (SFCP)''.	[Complete, implemented with amendment OR within X days of implementation of amendment].

Attachment 5—Proposed Changes to Technical Specification Bases Pages

Proposed No Significant Hazards Consideration Determination

Description of Amendment Request: The change requests the adoption of an approved change to the standard technical specifications (STS) for [Babcock and Wilcox (B&W) Plants (NUREG–1430), Westinghouse Plants (NUREG–1431), Combustion Engineering Plants (NUREG–1432), General Electric Plants, BWR/4 (NUREG–1433), and General Electric Plants, BWR/6 (NUREG–1334)], to allow relocation of specific TS surveillance frequencies to a licensee-controlled program. The proposed change is described in Technical Specification Task Force (TSTF) Traveler, TSTF–425, Revision 2 (Rev. 2) (ADAMS Accession No. ML080280275) related to the Relocation of Surveillance Frequencies to Licensee Control—RITSTF Initiative 5b and was described in the Notice of Availability published in the **Federal Register** on [Date] ([xx FR xxxxx]).

The proposed changes are consistent with NRC-approved Industry/Technical Specification Task Force (TSTF) Traveler, TSTF–425, Rev. 2, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF Initiative 5b.'' The proposed change relocates surveillance frequencies to a licensee-controlled program, the Surveillance Frequency Control Program (SFCP). This change is applicable to licensees using probabilistic risk guidelines contained in NRC-approved NEI 04–10, ''Risk-Informed Technical Specifications Initiative 5b, Risk-Informed Method for Control of Surveillance Frequencies,'' (ADAMS Accession No. 071360456).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the [LICENSEE] analysis of the issue of no significant hazards consideration is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed change relocates the specified frequencies for periodic surveillance requirements to licensee control under a new Surveillance Frequency Control Program. Surveillance frequencies are not an initiator to any accident previously evaluated. As a result, the probability of any accident previously evaluated is not significantly increased. The systems and components required by the technical specifications for which the surveillance frequencies are relocated are still required to be operable, meet the acceptance criteria for the surveillance requirements, and be capable of performing any mitigation function assumed in the accident analysis. As a result, the consequences of any accident previously evaluated are not significantly increased.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

No new or different accidents result from utilizing the proposed change. The changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. In addition, the changes do not impose any new or different requirements. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in the margin of safety?

Response: No.

The design, operation, testing methods, and acceptance criteria for systems, structures, and components (SSCs), specified in applicable codes and standards (or alternatives approved for use by the NRC) will continue to be met as described in the plant licensing basis (including the final safety analysis report and bases to TS), since these are not affected by changes to the surveillance frequencies. Similarly, there is no impact to safety analysis acceptance criteria as described in the plant licensing basis. To evaluate a change in the relocated surveillance frequency, [LICENSEE] performed a probabilistic risk evaluation using the guidance contained in NRC approved NEI 04–10, Rev. 1. NEI 04–10, Rev. 1 methodology provides reasonable acceptance guidelines and methods for evaluating the risk increase of proposed changes to surveillance frequencies consistent with Regulatory Guide 1.177.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration as set forth in 10 CFR 50.92(c), Issuance of Amendment,'' and therefore, [LICENSEE] finding of ''no significant hazards consideration'' is justified.

Proposed Safety Evaluation

U.S. Nuclear Regulatory Commission

Office of Nuclear Reactor Regulation

Technical Specification Task Force (TSTF) Change TSTF–425

Relocate Surveillance Frequencies to Licensee Control

1.0 Introduction

By letter dated [llll, 20ll], [LICENSEE] (the licensee) proposed changes to the technical specifications (TS) for [PLANT NAME]. The requested change is the adoption of NRC-approved TSTF–425, Revision 2, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF Initiative 5b'' (Reference 1). When implemented, TSTF–425, Revision 2 (Rev. 2) relocates most periodic frequencies of technical specifications (TS) surveillances to a licensee controlled program, the

Surveillance Frequency Control Program (SFCP), and provides requirements for the new program in the administrative controls section of TS. All surveillance frequencies can be relocated except:

- Frequencies that reference other approved programs for the specific interval (such as the Inservice Testing Program or the Primary Containment Leakage Rate Testing Program),
- Frequencies that are purely event driven (e.g., ''Each time the control rod is withdrawn to the 'full out' position'').
- Frequencies that are event-driven but have a time component for performing the surveillance on a one-time basis once the event occurs (e.g., ''within 24 hours after thermal power reaching ≥ 95% RTP'')
- Frequencies that are related to specific conditions (e.g., battery degradation, age, and capacity) or conditions for the performance of a surveillance requirement (e.g., ''drywell to suppression chamber differential pressure decrease'').

The definition of ''Staggered Test Basis'' in TS Section 1.1, ''Definitions,'' is placed in brackets. Plants that adopt TSTF–425, Rev. 2, and no longer use this defined term in the technical specifications may remove it from Section 1.1. A new Administrative Controls Program is added to TS section 5 as [Specification 5.5.15 (NUREG–1433 and –1434) or Specification 5.5.18 (NUREG–1430, 1431, and 1432)]. The new program is called the Surveillance Frequency Control Program (SFCP) and describes the requirements for the program to control changes to the relocated surveillance frequencies. The TS Bases for each affected surveillance is revised to state that the frequency is set in accordance with the Surveillance Frequency Control Program. Various editorial changes may be made to the Bases as needed to facilitate the addition of the Bases changes. Some surveillance Bases do not contain a discussion of the frequency. In these cases, Bases describing the current frequency were added to maintain consistency with the Bases for similar surveillances. These instances are noted in the markup along with the source of the text. The proposed changes to the administrative controls of TS to incorporate the SFCP includes a specific reference to NEI 04–10, ''Risk-Informed Technical Specifications Initiative 5B, Risk-Informed Method for Control of Surveillance Frequencies,'' Revision 1 (Rev. 1), (Reference 2) as the basis for making any changes to the surveillance frequencies once they are relocated out of TS.

In a letter dated September 19, 2007, the NRC staff approved Nuclear Energy Institute (NEI) Topical Report (TR) 04–10, Rev. 1, ''Risk-Informed Technical Specification initiative 5B, Risk Informed Method for Control of Surveillance Frequencies'' (ADAMS Accession No. 072570267), as acceptable for referencing in licensing actions to the extent specified and under the limitations delineated in NEI 04–10, Rev. 1, and the final acceptance SE providing the basis for NRC acceptance of NEI 04–10, Rev 1.

2.0 Regulatory Evaluation

In the ''Final Policy Statement: Technical Specifications for Nuclear Power Plants'' published in the **Federal Register** (FR) (58 FR 39132, 7/22/93) the NRC addressed the use of Probabilistic Safety Analysis (PSA, currently referred to as Probabilistic Risk Analysis or PRA) in STS. In this 1993 FR publication, the NRC states, in part, ''The Commission believes that it would be inappropriate at this time to allow requirements which meet one or more of the first three criteria [of 10 CFR 50.36] to be deleted from technical specifications based solely on PSA (Criterion 4). However, if the results of PSA indicate that technical specifications can be relaxed or removed, a deterministic review will be performed.'' Additionally, the NRC states in this publication, ''The Commission Policy in this regard is consistent with its Policy Statement on 'Safety Goals for the operation of Nuclear Power Plants,' 51 FR 30028, published on August 21, 1986. The Policy Statement on Safety Goals states in part, * * * probabilistic results should also be reasonably balanced and supported through use of deterministic arguments. In this way, judgments can be made * * * about the degree of confidence to be given these [probabilistic] estimates and assumptions. This is a key part of the process for determining the degree of regulatory conservatism that may be warranted for particular decisions. This 'defense-in-depth' approach is expected to continue to ensure the protection of public health and safety.'' The NRC further states in the 1993 publication, ''The Commission will continue to use PSA, consistent with its policy on Safety Goals, as a tool in evaluating specific line-item improvements to Technical Specifications, new requirements, and industry proposals for risk-based Technical Specification changes.''

Approximately two years later the NRC provided additional detail concerning the use of PRA in the ''Final Policy Statement: Use of Probabilistic Risk Assessment in Nuclear Regulatory Activities'' published in the **Federal Register** (FR) (60 FR 42622, August 16, 1995) the NRC addressed the use of Probabilistic Risk Assessment. In this FR publication, the NRC'S opening statement states, in-part, ''The Commission believes that an overall policy on the use of PRA methods in nuclear regulatory activities should be established so that the many potential applications of PRA can be implemented in a consistent and predictable manner that would promote regulatory stability and efficiency. In addition, the Commission believes that the use of PRA technology in NRC regulatory activities should be increased to the extent supported by the state-of-the-art in PRA methods and data and in a manner that complements the NRC's deterministic approach.''

The following excerpts are taken, in part, from the 1995 Commission Policy Statement: ''PRA addresses a broad spectrum of initiating events by assessing the event frequency. Mitigating system reliability is then assessed, including the potential for multiple and common-cause failures. The treatment, therefore, goes beyond the single failure requirements in the deterministic approach. The probabilistic approach to regulation is, therefore, considered an extension and enhancement of traditional regulation by considering risk in a more coherent and complete manner.

''Therefore, the Commission believes that an overall policy on the use of PRA in nuclear regulatory activities should be established so that the many potential applications of PRA can be implemented in a consistent and predictable manner that promotes regulatory stability and efficiency. This policy statement sets forth the Commission's intention to encourage the use of PRA and to expand the scope of PRA applications in all nuclear regulatory matters to the extent supported by the state-of-the-art in terms of methods and data.

'Therefore, the Commission adopts the following policy statement regarding the expanded NRC use of PRA:

(1) The use of PRA technology should be increased in all regulatory matters to the extent supported by the state-of-the-art in PRA methods and data and in a manner that complements the NRC's deterministic approach and supports the NRC's traditional defense-in-depth philosophy.

(2) PRA and associated analyses (e.g., sensitivity studies, uncertainty analyses, and importance measures) should be used in regulatory matters, where practical within the bounds of the state-

of-the-art, to reduce unnecessary conservatism associated with current regulatory requirements, regulatory guides, license commitments, and staff practices. Where appropriate, PRA should be used to support the proposal for additional regulatory requirements in accordance with 10 CFR 50.109 (Backfit Rule). Appropriate procedures for including PRA in the process should be developed and followed. It is, of course, understood that the intent of this policy is that existing rules and regulations shall be complied with unless these rules and regulations are revised.

(3) PRA evaluations in support of regulatory decisions should be as realistic as practicable and appropriate supporting data should be publicly available for review.

(4) The Commission's safety goals for nuclear power plants and subsidiary numerical objectives are to be used with appropriate consideration of uncertainties in making regulatory judgments on the need for proposing and backfitting new generic requirements on nuclear power plant licensees.''

In 10 CFR 50.36, the NRC established its regulatory requirements related to the content of TS. Pursuant to 10 CFR 50.36, TS are required to include items in the following five specific categories related to station operation: (1) Safety limits, limiting safety system settings, and limiting control settings; (2) limiting conditions for operation; (3) surveillance requirements; (4) design features; and (5) administrative controls. As stated in 10 CFR 50.36(c)(3), ''Surveillance requirements are requirements relating to test, calibration, or inspection to assure that the necessary quality of systems and components is maintained, that facility operation will be within safety limits, and that the limiting conditions for operation will be met.'' The surveillance requirements are required by 10 CFR 50.36(c)(3) to reside in TS and will remain in TS. The new TS SFCP will provide the necessary surveillance frequency programmatic controls and is located in the TS Administrative Controls Section (STS Section 5.0).

Changes to surveillance frequencies in the SFCP are made using the methodology contained in NEI 04–10, Rev. 1, including qualitative considerations, results of risk analyses, sensitivity studies and any bounding analyses, and recommended monitoring of SSCs, are required to be documented. Changes to frequencies are subject to regulatory review and oversight of the SFCP implementation through the rigorous NRC review of safety related SSC performance provided by the reactor oversight program (ROP).

[LICENSEE] SFCP ensures that surveillance requirements specified in the TS are performed at intervals sufficient to assure the above regulatory requirements are met. Existing regulatory requirements, such as 10 CFR 50.65, ''Requirements for Monitoring the Effectiveness of Maintenance at Nuclear Power Plants'' and 10 CFR 50 Appendix B (corrective action program), require licensee monitoring of surveillance test failures and implementing corrective actions to address such failures. One of these actions may be to consider increasing the frequency at which a surveillance test is performed. In addition, the SFCP implementation guidance in NEI 04–10, Rev. 1, requires monitoring of the performance of structures, systems, and components (SSCs) for which surveillance frequencies are decreased to assure reduced testing does not adversely impact the SSCs.

This change is analogous with other NRC-approved TS changes in which the surveillance requirements are retained in technical specifications but the related surveillance frequencies are relocated to licensee-controlled documents, such as surveillances performed in accordance with the In-Service Testing Program and the Primary Containment Leakage Rate Testing Program. Thus, this proposed change complies with 10 CFR 50.36(c)(3) by retaining the requirements relating to test, calibration, or inspection to assure that the necessary quality of systems and components is maintained, that facility operation will be within safety limits, and that the limiting conditions for operation will be met and meets the first key safety principle articulated in Regulatory Guide (RG) 1.177 (Reference 3) for plant-specific, risk-informed TS changes by complying with current regulations.

Licensees are required by TS to perform surveillance test, calibration, or inspection on specific safety related system equipment such as reactivity control, power distribution, electrical, instrumentation, and others to verify system operability. Surveillance frequencies, currently identified in TS, are based primarily upon deterministic methods such as engineering judgment, operating experience, and manufacturer's recommendations. The licensee's use of NRC-approved PRA methodologies identified in NEI 04–10, Rev. 1, provides a way to establish risk-informed Surveillance frequencies that complements the deterministic approach and supports the NRC's traditional defense-in-Depth philosophy.

These regulatory requirements, and the monitoring required by NEI 04–10, Rev. 1, ensure that surveillance frequencies are sufficient to assure that the requirements of 10 CFR 50.36 are satisfied and that any performance deficiencies will be identified and appropriate corrective actions taken.

3.0 Technical Evaluation

[LICENSEE] adoption of TSTF–425, Rev. 2, provides for administrative relocation of applicable surveillance frequencies, and provides for the addition of the SFCP to the administrative controls of TS. TSTF–425, Rev. 2, also requires the application of NEI 04–10, Rev. 1, for any changes to surveillance frequencies within the SFCP. The licensee's application for the changes proposed in TSTF–425, Rev 2, included documentation regarding the probabilistic risk assessment (PRA) technical adequacy consistent with the requirements of Regulatory Guide 1.200 (RG–1.200) (Reference 4), ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities'', Section 4.2. In accordance with NEI 04–10, Rev. 1, probabilistic risk assessment (PRA) methods are used, in combination with plant performance data and other considerations, to identify and justify modifications to the surveillance frequencies of equipment at nuclear power plants. This is in accordance with guidance provided in RG 1.174 (Reference 5) and RG 1.177 in support of changes to surveillance test intervals.

RG 1.177 identifies five key safety principles required for risk-informed changes to TS. Each of these principles is addressed by the industry methodology document, NEI 04–10, Rev. 1. Four of the five principles, which relate to the technical aspects of the proposed change, are discussed below in Sections 3.1 through 3.4.

3.1 The Proposed Change Is Consistent With the Defense-in-Depth Philosophy

Consistency with the defense-in-depth philosophy is maintained if:

- A reasonable balance is preserved among prevention of core damage, prevention of containment failure, and consequence mitigation.
- Over-reliance on programmatic activities to compensate for weaknesses in plant design is avoided.
- System redundancy, independence, and diversity are preserved commensurate with the expected frequency, consequences of challenges to the system, and uncertainties (e.g., no

risk outliers). Because the scope of the proposed methodology is limited to revision of surveillance frequencies, the redundancy, independence, and diversity of plant systems are not impacted.

- Defenses against potential common cause failures are preserved, and the potential for the introduction of new common cause failure mechanisms is assessed.
- Independence of barriers is not degraded.
- Defenses against human errors are preserved.
- The intent of the General Design Criteria in 10 CFR Part 50, Appendix A, is maintained.

TSTF–425, Rev. 2, requires the application of NEI 04–10, Rev. 1, for any changes to surveillance frequencies within the SFCP. NEI 04–10, Rev. 1, uses both the core damage frequency (CDF) and the large early release frequency (LERF) metrics to evaluate the impact of proposed changes to surveillance frequencies. The guidance of RG 1.174 and RG 1.177 for changes to CDF and LERF is achieved by evaluation using a comprehensive risk analysis, which assesses the impact of proposed changes including contributions from human errors and common cause failures. Defense-in-depth is also included in the methodology explicitly as a qualitative consideration outside of the risk analysis, as is the potential impact on detection of component degradation that could lead to increased likelihood of common cause failures. Both the quantitative risk analysis and the qualitative considerations assure a reasonable balance of defense-in-depth is maintained to ensure protection of public health and safety, satisfying the second key safety principle of RG 1.177.

3.2 The Proposed Change Maintains Sufficient Safety Margins

The engineering evaluation conducted by the licensee assessed the impact of the proposed TS change with the principle that sufficient safety margins are maintained. The guidelines used for making that assessment included ensuring the proposed TS Surveillance test frequency change is not in conflict with approved industry codes and standards or adversely affects any assumptions or inputs to the safety analysis, or, if such inputs are affected, justification is provided to ensure sufficient safety margin will continue to exist.

The design, operation, testing methods, and acceptance criteria for SSCs, specified in applicable codes and standards (or alternatives approved for use by the NRC) will continue to be met as described in the plant licensing basis (including the Final Safety Analysis Report and bases to TS), since these are not affected by changes to the surveillance frequencies. Similarly, there is no impact to safety analysis acceptance criteria as described in the plant licensing basis.

Thus, safety margins are maintained by the proposed methodology, and the third key safety principle of RG 1.177 is satisfied.

3.3 When Proposed Changes Result in an Increase in Core Damage Frequency or Risk, the Increases Should Be Small and Consistent With the Intent of the Commission's Safety Goal Policy Statement

RG 1.177 provides a framework for risk evaluation of proposed changes to surveillance frequencies, which requires identification of the risk contribution from impacted surveillances, determination of the risk impact from the change to the proposed surveillance frequency, and performance of sensitivity and uncertainty evaluations. TSTF–425, Rev. 2, requires application of NEI 04–10, Rev. 1, in the SFCP. NEI 04–10, Rev. 1, satisfies the intent of RG 1.177 requirements for evaluation of the change in risk, and for assuring that such changes are small by providing the technical methodology to support risk informed technical specifications for control of surveillance frequencies.

3.4.1 Quality of the PRA

The quality of the [LICENSEE] PRA is compatible with the safety implications of the proposed TS change and the role the PRA plays in justifying the change. That is, the more the potential change in risk or the greater the uncertainty in that risk from the requested TS change, or both, the more rigor that must go into ensuring the quality of the PRA.

[LICENSEE] used RG 1.200 to address the plant PRA technical adequacy. RG 1.200 is NRC developed regulatory guidance, which addresses the use of the American Society of Mechanical Engineers (ASME) RA–Sb–2005, Addenda to ASME RA–S–2002 Standard for Probabilistic Risk Assessment for Nuclear Power Plant Applications (Reference 6), and the NEI peer review process NEI 00–02, PRA Peer Review Process Guidance (Reference 7). The licensee has performed an assessment of the PRA models used to support the SFCP against the requirements of RG 1.200 to assure that the PRA models are capable of determining the change in risk due to changes to surveillance frequencies of SSCs, using plant specific data and models. Capability category II of ASME RA–Sb–2005 is applied as the standard, and any identified deficiencies to those requirements are assessed further in sensitivity studies to determine any impacts to proposed decreases to surveillance frequencies. This level of PRA quality, combined with the proposed sensitivity studies, is sufficient to support the evaluation of changes proposed to surveillance frequencies within the SFCP, and is consistent with regulatory position 2.3.1 of RG 1.177.

3.4.2 Scope of the PRA

[LICENSEE] is required to evaluate each proposed change to a relocated surveillance frequency using the guidance contained in NEI 04–10, Rev. 1, to determine its potential impact on risk, due to impacts from internal events, fires, seismic, other external events, and from shutdown conditions. Consideration is made of both CDF and LERF metrics. In cases where a PRA of sufficient scope or where quantitative risk models were unavailable, [LICENSEE] uses bounding analyses, or other conservative quantitative evaluations. A qualitative screening analysis may be used when the surveillance frequency impact on plant risk is shown to be negligible or zero. The licensee's evaluation methodology is sufficient to ensure the scope of the risk contribution of each surveillance frequency change is properly identified for evaluation, and is consistent with regulatory position 2.3.2 of RG 1.177.

3.4.3 PRA Modeling

The [LICENSEE] determines whether the SSCs affected by a proposed change to a surveillance frequency are modeled in the PRA. Where the SSC is directly or implicitly modeled, a quantitative evaluation of the risk impact may be carried out. The methodology adjusts the failure probability of the impacted SSCs, including any impacted common cause failure modes, based on the proposed change to the surveillance frequency. Where the SSC is not modeled in the PRA, bounding analyses are performed to characterize the impact of the proposed change to surveillance frequency. Potential impacts on the risk analyses due to screening criteria and truncation levels are addressed by the requirements for PRA technical adequacy consistent with guidance contained in RG 1.200, and by sensitivity studies identified in NEI 04–10, Rev. 1.

The licensee performs quantitative evaluations of the impact of selected testing strategy (i.e., staggered testing or sequential testing) consistent with the

guidance of NUREG/CR–6141 and NUREG/CR–5497, as discussed in NEI 04–10 Rev. 1.

Thus, through the application of NEI 04–10, Rev. 1, the [LICENSEE] PRA modeling is sufficient to ensure an acceptable evaluation of risk for the proposed changes in surveillance frequency, and is consistent with regulatory position 2.3.3 of RG 1.177.

3.4.4 Assumptions for Time Related Failure Contributions

The failure probabilities of SSCs modeled in the [LICENSEE] PRA [include] a standby time-related contribution and a cyclic demand-related contribution. NEI 04–10, Rev. 1, criteria adjust the time-related failure contribution of SSCs affected by the proposed change to surveillance frequency. This is consistent with RG 1.177 Section 2.3.3 which permits separation of the failure rate contributions into demand and standby for evaluation of surveillance requirements. If the available data do not support distinguishing between the time-related failures and demand failures, then the change to surveillance frequency is conservatively assumed to impact the total failure probability of the SSC, including both standby and demand contributions. The SSC failure rate (per unit time) is assumed to be unaffected by the change in test frequency, and will be confirmed by the required monitoring and feedback implemented after the change in surveillance frequency is implemented. The process requires consideration of qualitative sources of information with regards to potential impacts of test frequency on SSC performance, including industry and plant-specific operating experience, vendor recommendations, industry standards, and code-specified test intervals. Thus the process is not reliant upon risk analyses as the sole basis for the proposed changes.

The potential beneficial risk impacts of reduced surveillance frequency, including reduced downtime, lesser potential for restoration errors, reduction of potential for test caused transients, and reduced test-caused wear of equipment, are identified qualitatively, but are conservatively not required to be quantitatively assessed. Thus, through the application of NEI 04–10, Rev. 1, [LICENSEE] has employed reasonable assumptions with regard to extensions of surveillance test intervals, and is consistent with regulatory position 2.3.4 of RG 1.177.

3.4.5 Sensitivity and Uncertainty Analyses

NEI 04–10, Rev. 1, requires sensitivity studies to assess the impact of uncertainties from key assumptions of the PRA, uncertainty in the failure probabilities of the affected SSCs, impact to the frequency of initiating events, and of any identified deviations from capability category II of ASME PRA Standard (ASME RA–Sb–2005) (Reference 4). Where the sensitivity analyses identify a potential impact on the proposed change, revised surveillance frequencies are considered, along with any qualitative considerations that may bear on the results of such sensitivity studies. Required monitoring and feedback of SSC performance once the revised surveillance frequencies are implemented will also be performed. Thus, through the application of NEI 04–10, Rev. 1, [LICENSEE] has appropriately considered the possible impact of PRA model uncertainty and sensitivity to key assumptions and model limitations, consistent with regulatory position 2.3.5 of RG 1.177.

3.4.6 Acceptance Guidelines

[LICENSEE] quantitatively evaluates the change in total risk (including internal and external events contributions) in terms of core damage frequency (CDF) and large early release fraction (LERF) for both the individual risk impact of a proposed change in surveillance frequency and the cumulative impact from all individual changes to surveillance frequencies. Each individual change to surveillance frequency must show a risk impact below 1E–6 per year for change to CDF, and below 1E–7 per year for change to LERF. These are consistent with the limits of RG 1.174 for very small changes in risk. Where the RG 1.174 limits are not met, the process either considers revised surveillance frequencies which are consistent with RG 1.174, or the process terminates without permitting the proposed changes. Where quantitative results are unavailable to permit comparison to acceptance guidelines, appropriate qualitative analyses are required to demonstrate that the associated risk impact of a proposed change to surveillance frequency is negligible or zero. Otherwise, bounding quantitative analyses are required which demonstrate the risk impact is at least one order of magnitude lower than the RG 1.174 acceptance guidelines for very small changes in risk. In addition to assessing each individual SSC surveillance frequency change, the cumulative impact of all changes must result in a risk impact below 1E–5 per year for change to CDF, and below 1E–6 per year for change to LERF, and the total CDF and total LERF must be reasonably shown to be less than 1E–4 per year and 1E–5 per year, respectively. These are consistent with the limits of RG 1.174 for acceptable changes in risk, as referenced by RG 1.177 for changes to surveillance frequencies. The staff interprets this assessment of cumulative risk as a requirement to calculate the change in risk from a baseline model utilizing failure probabilities based on the surveillance frequencies prior to implementation of the SFCP, compared to a revised model with failure probabilities based on changed surveillance frequencies. The staff further notes that [LICENSEE] includes a provision to exclude the contribution to cumulative risk from individual changes to surveillance frequencies associated with small risk increases (less than 5E–8 CDF and 5E–9 LERF) once the baseline PRA models are updated to include the effects of the revised surveillance frequencies.

The quantitative acceptance guidance of RG 1.174 is necessary but not sufficient to accept decreases in surveillance frequencies. The process also considers qualitative information to evaluate the proposed changes to surveillance frequencies, including industry and plant-specific operating experience, vendor recommendations, industry standards, the results of sensitivity studies, and SSC performance data and test history.

The final acceptability of the proposed change is based on all of these considerations and not solely on the PRA results compared to numerical acceptance guidelines. Post implementation performance monitoring and feedback are also required to assure continued reliability of the components. The licensee's application of NEI 04–10, Rev. 1, provides reasonable acceptance guidelines and methods for evaluating the risk increase of proposed changes to surveillance frequencies, consistent with Regulatory Position 2.4 of RG 1.177. Therefore, the proposed [LICENSEE] methodology satisfies the fourth key safety principle of RG 1.177 by assuring any increase in risk is small consistent with the intent of the Commission's Safety Goal Policy Statement.

3.4.7 The Impact of the Proposed Change Should Be Monitored Using Performance Measurement Strategies

[LICENSEE] adoption of TSTF–425, Rev. 2, requires application of NEI 04–

10, Rev. 1, in the SFCP. NEI 04–10, Rev. 1, requires performance monitoring of SSCs whose surveillance frequency has been revised as part of a feedback process to assure that the change in test frequency has not resulted in degradation of equipment performance and operational safety. The monitoring and feedback includes consideration of maintenance rule monitoring of equipment performance. In the event of degradation of SSC performance, the surveillance frequency will be reassessed in accordance with the methodology, in addition to any corrective actions which may apply as part of the maintenance rule requirements. The performance monitoring and feedback specified in NEI 04–10, Rev. 1, is sufficient to reasonably assure acceptable SSC performance and is consistent with regulatory position 3.2 of RG 1.177. Thus, the fifth key safety principle of RG 1.177 is satisfied.

3.4.8 Addition of Surveillance Frequency Control Program to TS Section 5

[LICENSEE] has included the SFCP and specific requirements into TS Section [5.5.15 or 5.5.18], administrative controls, as follows:

This program provides controls for surveillance frequencies. The program ensures that surveillance requirements specified in the technical specifications are performed at intervals (frequencies) sufficient to assure that the associated limiting conditions for operation are met.

a. The Surveillance Frequency Control Program contains a list of frequencies of those surveillance requirements for which the frequency is controlled by the program.

b. Changes to the frequencies listed in the Surveillance Frequency Control Program shall be made in accordance with NEI 04–10, ''Risk-Informed Method for Control of Surveillance Frequencies,'' Revision 1.

c. The provisions of surveillance requirements 3.0.2 and 3.0.3 are applicable to the frequencies established in the Surveillance Frequency Control Program.

Summary and Conclusions

The staff has reviewed the [LICENSEE] proposed relocation of surveillance frequencies to a licensee controlled document, and controlling changes to surveillance frequencies in accordance with a new program, the SFCP, identified in the administrative controls of TS. The SFCP and TS Section [5.5.15, 5.5.18] references NEI 04–10, Rev. 1, which provides a risk-informed methodology using plant-specific risk insights and performance data to revise surveillance frequencies within the SFCP. This methodology supports relocating surveillance frequencies from TS to a licensee-controlled document, provided those frequencies are changed in accordance with NEI 04–10, Rev. 1, as referenced in the administrative controls of the TS.

The proposed [LICENSEE] adoption of TSTF–425, Rev. 2, and risk-informed methodology of NEI 04–10, Rev. 1, as referenced in the administrative controls of TS, satisfies the key principles of risk-informed decision making applied to changes to TS as delineated in RG 1.177 and RG 1.174, in that:

- The proposed change meets current regulations;
- The proposed change is consistent with defense-in-depth philosophy;
- The proposed change maintains sufficient safety margins;
- Increases in risk resulting from the proposed change are small and consistent with the Commission's Safety Goal Policy Statement; and
- The impact of the proposed change is monitored with performance measurement strategies.

10 CFR 50.36(c)(3) states ''Technical specifications will include items in the following categories: Surveillance Requirements. Surveillance Requirements are requirements relating to test, calibration, or inspection to assure that the necessary quality of systems and components is maintained, that facility operation will be within safety limits, and that the limiting conditions for operation will be met.'' The NRC staff finds that with the proposed relocation of surveillance frequencies to an owner-controlled document and administratively controlled in accordance with the TS SFCP, [LICENSEE] continues to meet the regulatory requirement of 10 CFR 50.36, and specifically, 10 CFR 50.36(c)(3), surveillance requirements.

The NRC has concluded, on the basis of the considerations discussed above, that (1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the NRC's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

4.0 State Consultation

In accordance with the NRC's regulations, the [ ] State official was notified of the proposed issuance of the amendment. The State official had [(1) no comments or (2) the following comments—with subsequent disposition by the staff].

5.0 Environmental Consideration

The amendment[s] change[s] a requirement with respect to the installation or use of a facility component located within the restricted area as defined in 10 CFR Part 20 or surveillance requirements. The NRC staff has determined that the amendment involves no significant increase in the amounts, and no significant change in the types, of any effluents that may be released offsite, and that there is no significant increase in individual or cumulative occupational radiation exposure. The NRC has previously issued a proposed finding that the amendment involves no significant hazards consideration and there has been no public comment on such finding published [DATE] ([] FR []). Accordingly, the amendment meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendment.

6.0 References

1. TSTF–425, Revision 2, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF Initiative 5b,'' January 17, 2008 (ADAMS Accession Number: ML080280275).
2. NEI 04–10, ''Risk-Informed Technical Specifications Initiative 5B, Risk-Informed Method for Control of Surveillance Frequencies,'' April 2007 (ADAMS Accession Number: ML071360456).
3. Regulatory Guide 1.177, ''An Approach for Plant-Specific, Risk-Informed Decision-making: Technical Specifications,'' August 1998 (ADAMS Accession Number: ML003740176).
4. Regulatory Guide 1.200, Rev. 1 ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities,'' Revision 1, January 2007 (ADAMS Accession Number: ML070240001).
5. Regulatory Guide 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis,'' NRC, August 1998 (ADAMS Accession Number: ML003740133).
6. ASME PRA Standard ASME RA–Sb–2005, Addenda to ASME RA–S–2002, ''Standard for Probabilistic Risk Assessment for Nuclear Power Plant Application.''
7. NEI 00–02, Rev. 1 ''Probabilistic Risk Assessment (PRA) Peer Review Process Guidance, Rev. 1, May 2006 (ADAMS

Accession Number: ML061510621).

[FR Doc. E8–28850 Filed 12–4–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–285]

Omaha Public Power District, Fort Calhoun Station, Unit No. 1; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Omaha Public Power District (the licensee) to withdraw its February 5, 2008, application for proposed amendment to Facility Operating License No. DPR–40 for the Fort Calhoun Station, Unit No. 1, located in Washington County, Nebraska.

The proposed amendment would have revised the Technical Specifications (TS) to eliminate the second condition of Limiting Conditions for Operation from (LCO) 2.5(1)A. The current LCO 2.5(1)A. states, ''With one steam supply to the turbine driven AFW [auxiliary feedwater] pump inoperable, restore the steam supply to OPERABLE status within 7 days and within 8 days from discovery of the failure to meet the LCO.'' The amendment would have eliminated the second condition that states, ''and within 8 days from discovery of failure to meet the LCO.'' The licensee stated that the proposed change would have been consistent with the objective of Technical Specification Task Force (TSTF) Traveler TSTF–439, Revision 2, ''Eliminate Second Completion Times Limiting Time From Discovery of Failure to Meet an LCO.''

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on June 3, 2008 (73 FR 31722). However, by letter dated November 10, 2008, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated February 5, 2008, and the licensee's letter dated November 10, 2008, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 26th day of November 2008.

For the Nuclear Regulatory Commission.

Alan B. Wang,

Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–28846 Filed 12–4–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that a meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, January 8, 2009.

The meeting will start at 10 a.m. and will be held in Room 5A06A, U.S. Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal blue-collar employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the U.S. Office of Personnel Management.

This scheduled meeting will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chair to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the U.S. Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on this meeting may be obtained by contacting the Committee at U.S. Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5526, 1900 E Street, NW., Washington, DC 20415, (202) 606–2838.

Dated: December 1, 2008.

Charles E. Brooks,

Chairman, Federal Prevailing Rate Advisory Committee.

[FR Doc. E8–28835 Filed 12–4–08; 8:45 am]

BILLING CODE 6325–49–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Trade Surplus in Certain Sugar and Syrup Goods and Sugar Containing Products of Chile, Morocco, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: In accordance with relevant provisions of the Harmonized Tariff Schedule of the United States (HTS), the Office of the United States Trade Representative (USTR) is providing notice of its determination of the trade surplus in certain sugar and syrup goods and sugar-containing products of Chile, Morocco, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. As described below, the level of a country's trade surplus in these goods relates to the quantity of sugar and syrup goods and sugar-containing products for which the United States grants preferential tariff treatment under (i) the United States—Chile Free Trade Agreement (Chile FTA), in the case of Chile; (ii) the United States—Morocco

Free Trade Agreement (Morocco FTA), in the case of Morocco; and (iii) the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA-DR), in the case of the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.

DATES: *Effective Date:* December 5, 2008.

ADDRESSES: Inquiries may be mailed or delivered to Leslie O'Connor, Director of Agricultural Affairs, Office of Agricultural Affairs, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: Leslie O'Connor, Office of Agricultural Affairs, 202–395–6127.

SUPPLEMENTARY INFORMATION: *Chile:* Pursuant to section 201 of the United States—Chile Free Trade Agreement Implementation Act (Pub. L. 108–77; 19 U.S.C. 3805 note), Presidential Proclamation No. 7746 of December 30, 2003 (68 FR 75789) implemented the Chile FTA on behalf of the United States and modified the HTS to reflect the tariff and rules of origin treatment provided for in the Chile FTA.

U.S. Note 12(a) to subchapter XI of HTS chapter 99 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Chile's trade surplus, by volume, with all sources for goods in Harmonized System (HS) subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.20, 1702.30, 1702.40, 1702.60, 1702.90, 1806.10, 2101.12, 2101.20, and 2106.90, except that Chile's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Chile FTA are not included in the calculation of Chile's trade surplus.

U.S. Note 12(b) to subchapter XI of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.05 in an amount equal to the lesser of Chile's trade surplus or the specific quantity set out in that note for that calendar year.

U.S. Note 12(c) to subchapter XI of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.10 through 9911.17.85 in an amount equal to the amount by which Chile's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During calendar year (CY) 2007, the most recent year for which data is available, Chile's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 21,613 metric tons according to data published by its customs authority, the *Banco Central de Chile*. Based on this data, USTR determines that Chile's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XI of HTS chapter 99, goods of Chile are not eligible to enter the United States duty-free under subheading 9911.17.05 or at preferential tariff rates under subheading 9911.17.10 through 9911.17.85 in CY2009.

Morocco: Pursuant to section 201 of the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302; 19 U.S.C. 3805 note), Presidential Proclamation No. 7971 of December 22, 2005 (70 FR 76651) implemented the Morocco FTA on behalf of the United States and modified the HTS to reflect the tariff and rules of origin treatment provided for in the Morocco FTA.

U.S. Note 12(a) to subchapter XII of HTS chapter 99 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of Morocco's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that Morocco's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Morocco FTA are not included in the calculation of Morocco's trade surplus.

U.S. Note 12(b) to subchapter XII of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.05 in an amount equal to the lesser of Morocco's trade surplus or the specific quantity set out in that note for that calendar year.

U.S. Note 12(c) to subchapter XII of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.10 through 9912.17.85 in an amount equal to the amount by which Morocco's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During CY2007, the most recent year for which data is available, Morocco's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 745,748 metric tons according to data published by its customs authority, the *Office des Changes*. Based on this data, USTR determines that Morocco's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XII of HTS chapter 99, goods of Morocco are not eligible to enter the United States duty-free under subheading 9912.17.05 or at preferential tariff rates under subheading 9912.17.10 through 9912.17.85 in CY2008.

CAFTA-DR: Pursuant to section 201 of the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (Pub. L. 109–53; 19 U.S.C. 4031), Presidential Proclamation No. 7987 of February 28, 2006 (71 FR 10827), Presidential Proclamation No. 7991 of March 24, 2006 (71 FR 16009), Presidential Proclamation No. 7996 of March 31, 2006 (71 FR 16971), Presidential Proclamation No. 8034 of June 30, 2006 (71 FR 38509), and Presidential Proclamation No. 8111 of February 28, 2007 (72 FR 10025) implemented the CAFTA-DR on behalf of the United States and modified the HTS to reflect the tariff and rules of origin treatment provided for in the CAFTA-DR.

U.S. Note 25(b)(i) to subchapter XXII of HTS chapter 98 provides that USTR is required to publish annually in the **Federal Register** a determination of the amount of each CAFTA-DR country's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that each CAFTA-DR country's exports to the United States of goods classified under HS subheadings 1701.11, 1701.12, 1701.91, and 1701.99 and its imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the CAFTA-DR are not included in the calculation of that country's trade surplus.

U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of each CAFTA-DR country entered under subheading 9822.05.20 in an amount equal to the lesser of that country's trade surplus or the specific quantity set out in that note for that country and that calendar year.

During CY2007, the most recent year for which data is available, the Dominican Republic's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 95,631 metric tons according to data published by the *Instituto Azucarero Dominicano*. Based on this data, USTR determines that the Dominican Republic's trade surplus is negative. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98, goods of the Dominican Republic are not eligible to enter the

United States duty-free under subheading 9822.05.20 in CY2008.

During CY2007, the most recent year for which data is available, El Salvador's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 160,906 metric tons according to data published by the *Banco Central de Reserva de El Salvador.* Based on this data, USTR determines that El Salvador's trade surplus is 160,906 metric tons. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98, the aggregate quantity of goods of El Salvador that may be entered duty-free under subheading 9822.05.20 in CY2009 is 28,000 metric tons (i.e., the amount set out in that note for El Salvador for 2009).

During CY2007, the most recent year for which data is available, Guatemala's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 1,058,320 metric tons according to data published by the *Asociacion de Azucareros de Guatemala.* Based on this data, USTR determines that Guatemala's trade surplus is 1,058,320 metric tons. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98, the aggregate quantity of goods of Guatemala that may be entered duty-free under subheading 9822.05.20 in CY2009 is 37,000 metric tons (i.e., the amount set out in that note for Guatemala for 2009).

During CY2007, the most recent year for which data is available, Honduras' exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 36,227 metric tons according to data published by the *Banco Central de Honduras.* Based on this data, USTR determines that Honduras' trade surplus is 36,227 metric tons. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98, the aggregate quantity of goods of Honduras that may be entered duty-free under subheading 9822.05.20 in CY2009 is 8,480 metric tons (i.e., the amount set out in that note for Honduras for 2009).

During CY2007, the most recent year for which data is available, Nicaragua's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 158,861 metric tons according to data published by the *Ministerio de Fomento, Industria, y Comercio.* Based on this data, USTR determines that Nicaragua's trade surplus is 158,861 metric tons. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98, the aggregate quantity of goods of Nicaragua that may be entered duty-free under subheading 9822.05.20 in CY2009 is 23,320 metric tons (i.e., the amount set out in that note for Nicaragua for 2009).

James Murphy,

Assistant United States Trade Representative.

[FR Doc. E8–28857 Filed 12–4–08; 8:45 am]

BILLING CODE 3190–W9–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2009–10 and CP2009–12; Order No. 141]

International Mail

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Inbound Express Mail International (EMS) Originating from Foreign Posts to the Competitive Product List. The Postal Service has also filed one related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments due December 5, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On November 19, 2008, the Postal Service filed a request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Inbound International Expedited Services 2 to the Competitive Product List.[1] The Postal Service asserts that Inbound International Expedited Services 2 is a competitive product within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2009–10.

The Postal Service contemporaneously filed notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that the Governors have established prices and classifications not of general applicability for inbound Express Mail International (EMS) originating from foreign posts. More specifically, the Governors' Decision defines three price tiers for Inbound Express Mail originating from foreign posts and proposes that the Commission permit the three price tiers applicable to EMS from foreign posts that have prices set using the Universal Postal Union (UPU) process to be classified as a single product, Inbound International Expedited Services 2. Request at 4.[2]

EMS prices have been established for these agreements by the Postal Service in accordance with the UPU,[3] which authorizes each participating destination postal administration to set its prices for inbound Express Mail with notification to partners directly or through the UPU's International Bureau by August 31 of the year prior to the effective date. Request at 2. The Postal Service generally makes notification of prices established through the UPU International Bureau, but also sends letters directly to foreign postal administrations. Governors' Decision at 1, n.2. The Postal Service asserts that the EMS Cooperative process allows the destination administration to set pieces and weight prices according to a three-tier system.[4] The tiers consist of:

1. Pay-for-performance. Available to members of the Kahala Post Group and EMS Cooperative members who elect to comply with pay-for-performance provisions;

2. EMS Cooperative. EMS Cooperative members who elect not to comply with pay-for-performance provisions; and

[1] Request of the United States Postal Service Regarding Inbound Express Mail International (EMS) from Foreign Posts to Add Inbound International Expedited Services 2 to Competitive Product List; and Notice of Establishment of Rates and Classifications Not of General Applicability, November 19, 2008 (Request).

[2] The Governors' Decision states that the Mail Classification Schedule (MCS) language which sets forth three EMS price tiers addresses the Commission recommendation that a consistent approach be used for ''organizing competitive product negotiated agreements within the Mail Classification Schedule.'' PRC Order No. 84, Order Concerning the China Post Group Inbound EMS Agreement, Docket No. CP2008–7, June 27, 2008, at 6.

[3] *See* Attachment 4 to the Request, Certification of Prices for Inbound Express Mail International (EMS), which states prices were established by letter dated August 28, 2008, to the International Bureau of the UPU.

[4] The Postal Service states that at the time of Governors' Decision No. 08–20 in this proceeding, EMS prices met all requirements of the financial model which is reflected in the decision. The financial model filed under seal in the instant case provides inputs that became available subsequent to the Governors' vote. This model as filed has an anomaly because the margin is slightly below the threshold set by the Governors. However, the Postal Service contends that this difference should not impact the Commission's approval of the prices that were established in August 2008 and that the cost coverage presented in the model as filed is above 100 percent and satisfies the statutory pricing criteria for competitive products.

3. All Others. International posts who choose not to be members of the EMS Cooperative.
Request at 2.

In support of its Request, the Postal Service filed a redacted version of the Governors' Decision establishing prices and classifications for Inbound Express Mail International.[5] The Postal Service also filed a Statement of Supporting Justification as required by 39 CFR 3020.32,[6] certification of the Governors' vote,[7] and certification of compliance with 39 U.S.C. 3633(a).[8] In addition, the Postal Service indicates that it filed an unredacted copy of the Governors' Decision, the agreements with foreign posts and other supporting documents designed to establish compliance with 39 CFR 3015.5 under seal. Request at 1, n.2.

In the Statement of Supporting Justification, Brian T. Hutchins, Manager, International Postal Relations, explains that in the instant case, the Postal Service has considered that the new product could have been requested to be merged with the existing product Inbound International Expedited Services 1. He observes, however, the Postal Service only deals with inbound EMS from foreign posts which have one set of demand and market characteristics and a single set of pricing formulas approved by the Governors. He also states that the prices are established through negotiation as with the China Post Group [9] or unilaterally pursuant to the UPU EMS Cooperative.

He notes the rationale for the Postal Service's submission of a separate request is because the pricing formula for EMS was finalized through the UPU in August 2008 with the knowledge that the pricing would be established before the Commission had an opportunity to review the pricing formula for the first time under the Postal Accountability and Enhancement Act (PAEA). The decision was made to submit this Request as a second product for inbound EMS rather than as an addition to the existing product (Inbound International Expedited Services 1). The Postal Service views this as a method to simplify the process of adding the product. Request, Attachment 2, at 2. He observes that the Commission could determine that inbound EMS from foreign posts with the established UPU prices should be included with the existing inbound EMS product (Inbound International Expedited Services 1). However, he states that with either approach, approval of the product will ''improve the Postal Service's competitive posture, while enabling the Commission to verify that prices set according to EMS Cooperative procedures cover their attributable costs and make a positive contribution * * * toward the requisite 5.5 percent of the Postal Service's total institutional costs paid for by competitive products.'' *Id.* at 2–3.

W. Ashley Lyons, Manager, Corporate Financial Planning, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). Request, Attachment 4. He asserts that the EMS agreement ''prices demonstrate that EMS should cover its attributable costs and preclude the subsidization of competitive products by market dominant products.'' *Id.*

The Postal Service filed much of the supporting materials, including the Governors' Decision and the EMS agreements with foreign posts, under seal. It maintains that the EMS agreements with foreign posts, related financial information, and the Governors' Decision should remain under seal as they contain pricing, cost, and other information that are highly confidential. Request at 5.

The Postal Service's existing EMS agreements with the proposed pricing and classification changes established in the Governors' Decision are scheduled to take effect January 1, 2009 after review by the Commission. Governors' Decision at 3.

II. Notice of Filings

The Commission establishes Docket Nos. MC2009–10 and CP2009–12 for consideration of the Request pertaining to the proposed Inbound International Expedited Services 2 product and the related agreements, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than December 5, 2008. The public portions of these filings can be accessed via the Commission's Web site (*www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

It is Ordered:

The Commission establishes Docket Nos. MC2009–10 and CP2009–12 for consideration of the matters raised in each docket.

1. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

2. Comments by interested persons in these proceedings are due no later than December 5, 2008.

3. The Secretary shall arrange for the publication of this Order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–28816 Filed 12–4–08; 8:45 am]

BILLING CODE 7710–FW–P

[5] *See* Attachment 1 to the Request.

[6] *See* Attachment 2 to the Request.

[7] *See* Attachment 3 to the Request.

[8] *See* Attachment 4 to the Request.

[9] *See* Docket No. CP2008–7, PRC Order No. 84, Order Concerning the China Post Group Inbound EMS Agreement, June 27, 2008.

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2009–12 and CP2009–14; Order No. 143]

New Competitive Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Express Mail & Priority Mail Contract 2 to the Competitive Product List. The Postal Service has also filed one related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments due December 10, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On November 25, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Express Mail & Priority Mail Contract 2 to the Competitive Product List.[1] The Postal Service asserts that the Parcel Express Mail & Priority Mail Contract 2 product is a competitive product ''not of general applicability''

[1] Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 2 to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, November 25, 2008 (Request).

within the meaning of 39 U.S.C. 3632(b)(3). *Id*. at 1. The Request has been assigned Docket No. MC2009–12.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2009–14.

Request. The Request incorporates (1) a redacted version of the Governors' Decision authorizing the new product; (2) a redacted version of the contract; (3) requested changes in the Mail Classification Schedule product list; (4) a statement of supporting justification as required by 39 CFR 3020.32; and (5) certification of compliance with 39 U.S.C. 3633(a).[2] Substantively, the Request seeks to add Express Mail & Priority Mail Contract 2 to the Competitive Product List. *Id*. at 1–2.

In the statement of supporting justification, Kim Parks, Manager, Sales and Communications, Expedited Shipping, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id*., Attachment D. Thus, Ms. Parks contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id*.

Related contract. A redacted version of the specific Express Mail & Priority Mail Contract 2 is included with the Request. The contract is for 3 years and is to be effective 1 day after the Commission provides all necessary regulatory approvals. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a) and 39 CFR 3015.7(c). *See id*., Attachment A and Attachment E. It notes that actual performance under this contract could vary from estimates, but concludes that the contract will remain profitable. *Id*., Attachment A.

The Postal Service filed much of the supporting materials, including the Governors' Decision and the specific Express Mail & Priority Mail Contract 2, under seal.[3] In its Request, the Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, and financial projections should remain under seal. *Id*. at 2–3.

II. Notice of Filings

The Commission establishes Docket Nos. MC2009–12 and CP2009–14 for consideration of the Request pertaining to the proposed Express Mail & Priority Mail Contract 2 product and the related contract, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020 subpart B. Comments are due no later than December 10, 2008. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

It is Ordered:

1. The Commission establishes Docket Nos. MC2009–12 and CP2009–14 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 10, 2008.

4. The Secretary shall arrange for the publication of this Order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–28836 Filed 12–4–08; 8:45 am]

BILLING CODE 7710–FW–P

[2] Attachment A to the Request consists of the redacted Decision of the Governors of the United States Postal Service on Establishment of Rate and Class Not of General Applicability for Express Mail & Priority Mail Contract 2 (Governors' Decision No. 08–22). The Governors' Decision includes an attachment which provides an analysis of the proposed Express Mail & Priority Mail Contract 2. Attachment B is the redacted version of the contract. Attachment C shows the requested changes to the Mail Classification Schedule product list. Attachment D provides a statement of supporting justification for this Request. Attachment E provides the certification of compliance with 39 U.S.C. 3633(a).

[3] Documents filed under seal must include a hard copy table of contents page listing, *inter alia*, the titles of the documents being filed under seal.

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2009–11 and CP2009–13; Order No. 142]

New Competitive Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Parcel Select & Parcel Return Service Contract 1 to the Competitive Product List. The Postal Service has also filed one related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments due December 10, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On November 25, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq*. to add Parcel Select & Parcel Return Service Contract 1 to the Competitive Product List.[1] The Postal Service asserts that the Parcel Select & Parcel Return Service Contract 1 product is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). *Id*. at 1. The Request has been assigned Docket No. MC2009–11.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2009–13.

Request. The Request incorporates (1) a redacted version of the Governors' Decision authorizing the new product; (2) a redacted version of the contract; (3) requested changes in the Mail Classification Schedule product list; (4) a statement of supporting justification as required by 39 CFR 3020.32; and (5) certification of compliance with 39 U.S.C. 3633(a).[2] Substantively, the

[1] Request of the United States Postal Service to Add Parcel Select & Parcel Return Service Contract 1 to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, November 25, 2008 (Request).

[2] Attachment A to the Request consists of the redacted Decision of the Governors of the United States Postal Service on Establishment of Rate and Class Not of General Applicability for Parcel Select

Request seeks to add Parcel Select & Parcel Return Service Contract 1 to the Competitive Product List. *Id*. at 1–2.

In the statement of supporting justification, Daniel J. Barrett, Acting Manager, Product & Business Development, Ground Shipping Services, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id*., Attachment D. Thus, Mr. Barrett contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id*.

Related contract. A redacted version of the specific Parcel Select & Parcel Return Service Contract 1 is included with the Request. The contract is to expire on May 31, 2011,[3] and is to be effective 1 day after the Commission provides all necessary regulatory approvals. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a) and 39 CFR 3015.7(c). *See id*., Attachment A and Attachment E. It notes that the agreement remains profitable regardless of discount level and results in a positive contribution impact of the Postal Service under all conditions. *Id*., Attachment A.

The Postal Service filed much of the supporting materials, including the Governors' Decision and the specific Parcel Select & Parcel Return Service Contract 1, under seal. In its Request, the Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, and financial projections should remain under seal. *Id*. at 2–3.

II. Notice of Filings

The Commission establishes Docket Nos. MC2009–11 and CP2009–13 for consideration of the Request pertaining to the proposed Parcel Select & Parcel Return Service Contract 1 product and the related contract, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this Order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020 subpart B. Comments are due no later than December 10, 2008. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Michael J. Ravnitzky to serve as Public Representative in these dockets.

It is Ordered:

1. The Commission establishes Docket Nos. MC2009–11 and CP2009–13 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Michael J. Ravnitzky is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 10, 2008.

4. The Secretary shall arrange for the publication of this Order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–28834 Filed 12–4–08; 8:45 am]

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& Parcel Return Service Contract 1 (Governors' Decision No. 08–21). The Governors' Decision includes an attachment which provides an analysis of the proposed Parcel Select & Parcel Return Service Contract 1. Attachment B is the redacted version of the contract. Attachment C shows the requested changes to the Mail Classification Schedule product list. Attachment D provides a statement of supporting justification for this Request. Attachment E provides the certification of compliance with 39 U.S.C. 3633(a).

[3] The agreement may also be terminated sooner or be extended for an additional year under terms and conditions discussed in the contract. *See* Attachment B at Section III.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28526; 812–12903]

Banc of America Funds Trust, et al.; Notice of Application

December 1, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 17(a) of the Act.

APPLICANTS: Banc of America Funds Trust (''BAFT''), Columbia Funds Series Trust (''CFST''), Columbia Funds Series Trust I (''CFST I''), Columbia Funds Variable Insurance Trust I (''CFVT I''), Columbia Funds Variable Insurance Trust (''CFVT''), Columbia Funds Master Investment Trust, LLC (''CFMIT''), and Columbia Funds Institutional Trust (''CFIT'') (individually, and together with any successor, a ''Company'' and collectively, the ''Companies''), each a registered investment company, on behalf of the money market series thereof (the ''Money Market Funds'') and the other series thereof that are not Money Market Funds (the ''Other Mutual Funds'') (the Money Market Funds together with the Other Mutual Funds, the ''Funds''), Columbia Management Advisors, LLC (together with any successor, ''CMA'' or the ''Advisor'') and Banc of America Securities LLC (together with any successor, ''BAS'') (CMA and BAS, together with the Companies, the ''Applicants'').[1]

SUMMARY OF APPLICATION: Applicants request an order to permit the Funds to engage in principal transactions in certain taxable money market instruments including repurchase agreements with BAS.

FILING DATES: The application was filed on November 18, 2002 and amended on May 8, 2008 and November 26, 2008.[2]

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 24, 2008, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the

[1] Any succession shall be solely by way of change in organization, such as reincorporation or reorganization as a partnership or similar entity. Any Company, Fund or Advisor that currently intends to rely on the requested order is named as an Applicant. Any other Company, Fund or Advisor that relies on the order in the future will comply with the terms and conditions of the application.

[2] Applicants note that after the May 8, 2008 reactivating amendment was filed, Bank of America Corporation (''BAC''), which indirectly controls both CMA and BAS, entered into an Agreement and Plan of Merger dated September 15, 2008 (''Plan of Merger'') with Merrill Lynch & Co., Inc., parent to Merrill Lynch, Pierce, Fenner & Smith, Incorporated, a large broker-dealer that is an important market participant in certain taxable money market instruments. Assuming the Plan of Merger is consummated, the Applicants do not expect that the market share of BAS will decrease, and do expect that the number of Funds (and the amount of Fund assets) invested in taxable money market instruments will increase. The Applicants will cease relying on the requested relief as to a particular type of instrument described herein if the consummation of the Plan of Merger materially reduces BAS' market share with respect to such type of instrument below the levels described in this application.

reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants: BAFT, CFST, CFST I, CFVT I, CFVT, CFMIT, CFIT and CMA, One Financial Center, 11th Floor, Boston, Massachusetts 02111; BAS, Bank of America Tower, One Bryant Park, 18th Floor, New York, New York 10036.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, (202) 551–6990 or Janet M. Grossnickle, Assistant Director, (202) 551–6821 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520 (tel. 202–551–5850).

Applicants' Representations

1. Each Company is an open-end investment company registered under the Act. CFST I, CFVT and CFIT are organized as Massachusetts business trusts. BAFT, CFST and CFVT I are organized as Delaware statutory trusts. CFMIT is organized as a Delaware limited liability company. Each Money Market Fund is subject to rule 2a–7 under the Act (''Rule 2a–7'') and each Fund is permitted to invest in taxable money market instruments, including repurchase agreements.

2. CMA serves as the primary investment adviser for the Funds and is an indirect wholly owned subsidiary of BAC, a Delaware corporation that provides a diversified range of banking and certain nonbanking financial services and products both domestically and internationally. CMA is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (''Advisers Act''). The term ''Advisor'' also includes any other existing or future investment adviser registered under the Advisers Act which acts as investment adviser or sub-adviser to a Fund and which controls, is controlled by, or is under common control (as defined in section 2(a)(9) of the Act) with BAS or CMA.

3. BAS, a wholly owned subsidiary of BAC, is a broker-dealer registered under the Securities Exchange Act of 1934, as amended (the ''1934 Act'') and a full service investment banking firm.[3] BAS, a primary dealer in U.S. Government securities, has grown into one of the largest dealers in commercial paper, repurchase agreements and other taxable money market instruments in the United States. The Applicants believe that BAS' extensive dealing in taxable money market instruments and repurchase agreements makes it a very significant source for money market investment opportunities as well as related market information and expertise.

4. Applicants state that BAS and the Advisor are functionally independent of each other and operate as separate entities under the umbrella of BAC, the parent holding company. While BAS and the Advisor are under common control, each company has its own separate directors, has separate officers and employees, is separately capitalized and maintains its own books and records, except for two dual officers as more fully discussed in the application. The Advisor and BAS operate on different sides of appropriate information barriers with respect to portfolio management activities and investment banking activities, and maintain physically separate offices.

5. Investment management decisions for the Funds are determined solely by the Advisor and other investment advisers (as defined in section 2(a)(20) of the Act) that serve as subadvisers to the Funds, that are unaffiliated with the Advisor, and that do not include BAS. The portfolio managers and other employees that are responsible for portfolio management for registered investment companies function exclusively on behalf of the Advisor (or its affiliates), and not BAS. The personnel assigned to the Advisor's investment advisory operations that are also involved with the business of other affiliates have absolutely no function or responsibility with respect BAS. The compensation of persons employed by the Advisor will not depend on the volume or nature of trades with effected by the Advisor for the Funds with BAS under the requested exemption, except to the limited extent that such trades may minimally affect the profits and losses of BAC and its subsidiaries as a whole or to the extent that such trades affect the investment performance of a Fund.

6. The portfolio securities in which each of the Money Market Funds, consistent with their stated investment objectives and practices, may invest consist of high-credit quality short-term taxable money market instruments, including repurchase agreements. The Other Mutual Funds also are authorized to invest in taxable money market instruments, in addition to the other instruments permitted by their respective investment policies and strategies. Practically all trading in money market instruments takes place in over-the-counter markets consisting of groups of dealer firms that are primarily major securities firms or large banks. Money market instruments are generally traded in round lots of $1,000,000 on a net basis and do not normally involve either brokerage commissions or transfer taxes. The cost of portfolio transactions to the Funds consists primarily of dealer or underwriter spreads. Spreads vary among money market instruments but dealer spreads generally do not exceed 1–5 basis points (.01% to .05%). It has been the experience of the Funds that spreads have narrowed and there is not a great deal of variation in the spreads charged by the various dealers, except during turbulent market conditions.

7. The money market relies upon elaborate communications networks among dealer firms, principal issuers of money market instruments and principal institutional buyers of such instruments. Because the money market is a dealer market rather than an auction market, there is not a single obtainable price for a given instrument that generally prevails at any given time. A dealer acts either as ''agent'' on behalf of issuer clients or as ''principal'' for its own account. In either capacity, a dealer posts rates throughout its internal, private distribution networks that are intended to reflect ''market clearing price levels,'' as determined by the dealer. Only customers of the dealer seeking to purchase money market instruments have access to these postings.

8. Because of the variety of types of money market instruments, the money market is very segmented. The market for the different types of instruments will vary in terms of price, volatility, liquidity and availability. Although the rates for the different types of instruments tend to fluctuate closely together, there are significant differences in yield among the various types of instruments, and even within the particular type, depending upon the maturity date and the credit quality of the issuer. Moreover, from time to time segmenting exists within money market instruments with the same maturity date and rating. The segmenting is based on

[3] BAS is also registered as an investment adviser under the Advisers Act. For purposes of this application, the relief sought applies to BAS as broker-dealer only. The requested relief will not extend to any investment company advised or sub-advised by BAS.

such factors as whether the issuer is an industrial or financial company, whether the issuer is domestic or foreign and whether the instruments are asset-backed or unsecured. Because dealers tend to specialize in certain types of money market instruments, the particular needs of a potential buyer or seller in terms of type of instrument, maturity or credit quality may limit the number of dealers who can provide the most beneficial terms available. Hence, with respect to any given type of instrument, there may be only a few dealers that have such instruments in inventory and can be in a position to quote a competitive price.

9. BAS has become one of the world's largest dealers in taxable money market instruments, ranking among the top firms in each of the major markets and product areas, as more fully discussed in the application. As of September 30, 2008, BAS was the third largest dealer in terms of the number of U.S. commercial paper programs and its market share had been increasing. Applicants state that BAS plays a relatively significant role in the repurchase agreement market and that BAS' market position is among the ten leading dealers. As of September 30, 2008, BAS' average daily repurchase agreement transaction volume was approximately $150 billion. As of October 20, 2008, BAS was one of seventeen primary dealers and has been active in this role since the 1980s. BAS' primary dealer desk actively participates in the U.S. Treasury Bill market (which consists of short-term government obligations that are sold on a weekly basis through public auctions). Average daily Treasury Bill auction volume for BAS in the nine-month period ended September 30, 2008 was approximately $5.2 billion, which is roughly a 12.5% market share. Since 2000, BAS has experienced growth in activity involving instruments issued by U.S. Government agencies. BAS ranked eleventh in the nine-month period ended September 30, 2008 in underwriting activity involving agency instruments with maturities of eighteen months with a market share of approximately 4.8% in 2007. In the Agency Discount Note market, consisting of notes maturing in one year or less, BAS is a major dealer in all of the top-tier discount note programs. BAS is also one of the leading participants in the market for medium-term notes (''MTNs''). MTNs are offered continuously in public or private offerings, with maturities between nine months and thirty years. MTNs represent a significant portion of the longer-term money market investment alternatives because commercial paper is not issued with maturities greater than nine months and bankers' acceptances cannot have an initial maturity of more than six months. For the nine-month period ended September 30, 2008, BAS ranked second as a placement agent /dealer for MTN programs, and for the full year ended 2007, BAS ranked third for MTN programs.

10. Applicants state that over the past seven years, there have been more than 50 mergers and acquisitions involving major banks. From 1990 to June 30, 2008, the number of FDIC-insured commercial banks has declined by 42% due to consolidation. During this period, there has also been a significant decline in the number of primary dealers. As a result, there is a substantially smaller number of major dealers who are active in the money market than was the case only a few years ago. Applicants state that the decline in the number of participants in the money market has not affected the overall price and the availability of money market instruments, but the availability of such instruments to the Funds has declined as BAS' market share has increased. The reduction in the number of participants makes it even more critical for investors to have access to as many dealers that are actively engaged in the market as possible. The availability of BAS to the Funds is important not only because the number of industry participants has declined but because high-credit quality participants such as BAS are becoming more important in the money market. Applicants state that because the Funds currently do not have access to BAS, which is one of the more significant remaining dealers, they are at a distinct disadvantage compared to other institutional investors.

11. Subject to the general supervision of each Company or Fund's respective Board of Trustees (each a ''Board,'' and together, the ''Boards''), the Advisor is responsible for portfolio decisions and placing execution of the Money Market Funds' portfolio transactions. The Advisor, on behalf of the Funds, has no obligation to deal with any dealer or group of dealers in the execution of their portfolio transactions. When placing orders, an Advisor must attempt to obtain the best net price and the most favorable execution of its orders. In doing so, it takes into account such factors as price, the size, type and difficulty of the transaction involved and the firm's general execution and operational facilities. For repurchase agreement transactions in particular, the Advisor places great emphasis on the creditworthiness of the counterparty.

Applicants' Legal Analysis

1. Applicants request an order pursuant to sections 6(c) and 17(b) of the Act exempting certain transactions from the provisions of section 17(a) of the Act to permit BAS, acting as principal, to sell to or purchase from the Funds taxable money market instruments, and to engage in repurchase agreement transactions with the Funds, subject to the conditions set forth below.

2. Section 17(a) of the Act generally prohibits an affiliated person or principal underwriter of a registered investment company, or any affiliated person of such a person, acting as principal, from selling to or purchasing from such registered company, or any company controlled by such registered company, any security or other property. Because BAS and the Advisor are under common control of BAC, BAS could be deemed to be an affiliated person of the Advisor within the meaning of section 2(a)(3)(C) of the Act. Accordingly, BAS could be deemed to be an affiliated person of an affiliated person of the Funds, because the Advisor, as the investment adviser of the Funds, could be deemed to be an affiliated person of the Funds under section 2(a)(3)(E) of the Act. Thus, section 17(a) would prohibit the Funds from selling or purchasing taxable money market instruments to or from BAS to the extent BAS is deemed an affiliated person of an affiliated person of the Funds.

3. Section 17(b) of the Act provides that the Commission, upon application, may exempt a transaction from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair, and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act. Section 6(c) of the Act provides that the Commission may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Act or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants contend that the rationale behind the proposed order is based upon the reduction in the number of participants in the money market, the growing and significant role played in the money market by BAS and the growing investment requirements of the Funds. In particular Applicants note the following:

(a) With over $162 billion invested in money market instruments (including repurchase agreements) as of September 30, 2008, the Funds are major buyers and sellers in the money market with a strong need for unrestricted access to large quantities of high credit quality taxable money market instruments. The Applicants believe that continued denial of access to such a major dealer as BAS in these markets will hinder the Funds' ability to manage their respective portfolios in the most effective manner.

(b) The policy of the Money Market Funds of investing in instruments with short maturities and repurchase agreements, combined with the active portfolio management techniques employed by the Advisor, results in the need to make ongoing purchases and sales of taxable money market instruments. This dynamic makes the need to obtain suitable portfolio instruments and repurchase agreements and the most beneficial terms available from the broadest possible range of major participants in the market especially compelling.

(c) BAS is such a major participant in the money market that being unable to deal directly with it may, upon occasion, deprive the Funds of obtaining the most beneficial terms available.

(d) The money market, including the market for repurchase agreements, is highly competitive and precluding a competitor as important as BAS from engaging in principal transactions with the Funds could indirectly deprive the Funds of obtaining the most beneficial terms available even when the Funds trade with other dealers.

5. Applicants believe that the requested order will provide the Funds with a broader and more complete access to the money market, which is necessary to carry out the policies and objectives of each of the Funds in obtaining the most beneficial terms in all portfolio transactions. In addition, the Applicants respectfully submit that the requested relief will provide the Funds with important new information sources in the money market, to the direct benefit of shareholders in the Funds. Applicants believe that the transactions contemplated by this application are identical to those in which they are currently engaged except for the proposed participation of BAS, and that such transactions are consistent with the policies of the Funds as recited in their registration statements and reports filed under the Act. Applicants further believe that the procedures set forth with respect to transactions with BAS are structured in such a way as to insure that the transactions will be, in all instances, reasonable and fair, will not involve overreaching on the part of any person concerned, and that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. *Transactions Subject to the Exemption*—The exemption shall be applicable to principal transactions in the secondary market and primary or secondary fixed-price dealer offerings not made pursuant to underwriting syndicates. The principal transactions that may be conducted pursuant to the exemption shall be limited to transactions in *Eligible Securities*.[4] To the extent a Fund is subject to Rule 2a–7, such *Eligible Securities* must meet the portfolio maturity and credit quality requirements of paragraphs (c)(2) and (c)(3) of Rule 2a–7. To the extent a Fund is not subject to Rule 2a–7, such *Eligible Securities* must meet the requirements of clauses (i), (iii) and (iv) of paragraph (c)(3) of Rule 2a–7. Additionally:

(a) No Fund shall make portfolio purchases pursuant to the exemption that would result directly or indirectly in a Fund investing pursuant to the exemption more than 2% of its *Total Assets* (or, in the case of a Fund that is not subject to Rule 2a–7, more than 2% of the total of its cash, cash items and *Eligible Securities*) in instruments that, when acquired by the Fund (either initially or upon any subsequent rollover) were *Second Tier Securities;* provided that any Fund may make portfolio sales of *Second Tier Securities* pursuant to the exemption without regard to this limitation.

(b) The exemption shall not apply to an *Unrated Security* other than a *Government Security*.

(c) The exemption shall not apply to any instrument, other than a repurchase agreement, issued by BAC or any affiliated person thereof or to any instrument subject to a *Demand Feature* or *Guarantee* issued by BAC or any affiliated person thereof.

2. *Repurchase Agreement Requirements*—The Funds may engage in repurchase agreements with BAS only if BAS has: (a) Net capital, as defined in rule 15c3–1 under the 1934 Act, of at least $100 million and (b) a record (including the record of predecessors) of at least five years continuous operations as a dealer during which time it engaged in repurchase agreements relating to the kind of instrument subject to the repurchase agreement. BAS shall furnish the Advisor with financial statements for its most recent fiscal year and the most recent semi-annual financial statements made available to their customers. The Advisor shall determine that BAS complies with the above requirements and with the repurchase agreement guidelines adopted by the Boards. Each repurchase agreement will be *Collateralized Fully*.

3. *Volume Limitations on Transactions*—Transactions other than repurchase agreements conducted pursuant to the exemption shall be limited to no more than 25% of (a) the direct or indirect purchases or sales, as the case may be, by each Fund of *Eligible Securities* other than repurchase agreements; and (b) the purchases or sales, as the case may be, by BAS of *Eligible Securities* other than repurchase agreements. Transactions comprising repurchase agreements conducted pursuant to the exemption shall be limited to no more than 10% of (a) the repurchase agreements directly or indirectly entered into by the relevant Fund and (b) the repurchase agreements transacted by BAS. These calculations shall be measured on an annual basis (the fiscal year of each Fund and of BAS) and shall be computed with respect to the dollar volume thereof.

4. *Information Required to Document Compliance with Price Test*—Before any transaction may be conducted pursuant to the exemption, the relevant Fund or the Advisor must obtain such information as it deems necessary to determine that the price test (as defined in condition 5 below) applicable to such transaction has been satisfied. In the case of purchase or sale transactions, the Funds or the Advisor must make and document a good faith determination with respect to compliance with the price test based upon current price information obtained through the contemporaneous solicitation of bona fide offers in connection with the type of instrument involved (comparable security falling within the same category of instrument, credit rating, maturity

[4] Italicized terms are defined as set forth in paragraph (a) of Rule 2a–7, unless otherwise indicated.

and segment, if any, but not necessarily the identical instrument or issuer). With respect to prospective purchases of instruments, these dealers must be those who have, in their inventories, or who otherwise have access to taxable money market instruments of the categories and the types desired and who are in a position to quote favorable prices with respect thereto. With respect to the prospective disposition of instruments, these dealers must be those who, in the experience of the Funds and the Advisor, are in a position to quote favorable prices. Before any repurchase agreements are entered into pursuant to the exemption, the Funds or the Advisor must obtain and document competitive quotations from at least two other dealers with respect to repurchase agreements comparable to the type of repurchase agreement involved, except that if quotations are unavailable from two such dealers, only one other competitive quotation is required.

5. *Price Test*—In the case of purchase and sale transactions, a determination will be required in each instance, based upon the information available to the Funds and the Advisor, that the price available from BAS is at least as favorable as that available from other sources. In the case of ''swaps'' involving trades of one instrument for another, the price test shall be based upon the transaction viewed as a whole, and not upon the two components thereof individually. With respect to transactions involving repurchase agreements, a determination will be required in each instance, based on the information available to the Funds and the Advisor, that the income to be earned from the repurchase agreement is at least equal to that available from other sources in connection with comparable repurchase agreements.

6. *Permissible Dealer Spread*—BAS' spreads in regard to any transaction with the Funds will be no greater than its customary dealer spreads, which will in turn be consistent with the average or standard spread charged by dealers in taxable money market instruments for the type of instrument and the size of transaction involved.

7. *Parties Must Be Factually Independent*—The Advisor on the one hand, and BAS, on the other, will operate on different sides of appropriate walls of separation with respect to the Funds and *Eligible Securities.* The walls of separation will include all of the following characteristics and such others as may from time to time be considered reasonable by BAS and the Advisor to facilitate the factual independence of the Advisor from BAS.

(a) The Advisor will maintain offices physically separate from those of BAS.

(b) The compensation of persons assigned to the Advisor (*i.e.*, executive, administrative or investment personnel) will not depend on the volume or nature of trades effected by the Advisor for the Funds with BAS under this exemption, except to the extent that such trades may affect the profits and losses of BAC and its subsidiaries as a whole or to the extent that such trades affect the investment performance of a Fund.

(c) BAS will not share any of its respective profits or losses on such transactions with the Advisor, except to the extent that such profits and losses affect the general firmwide compensation of BAC and its subsidiaries as a whole.

(d) Personnel assigned to the Advisor's investment advisory operations on behalf of the Funds will be exclusively devoted to the investment advisory business and affairs of the Advisor and the businesses of its affiliates (other than BAS), and have lines of reporting solely within the Advisor or its affiliates (other than BAS). The personnel assigned to the Advisor's investment advisory operations that are also involved with the business of other affiliates have absolutely no function or responsibility with respect to BAS.

(e) Personnel assigned to BAS will not participate in the decision-making process for or otherwise seek to influence the Advisor other than in the normal course of sales and dealer activities of the same nature as are simultaneously being carried out with respect to nonaffiliated institutional clients. The Advisor, on the one hand, and BAS, on the other, may nonetheless maintain affiliations other than with respect to the Funds, and in addition with respect to the Funds as follows:

(i) Advisor personnel may rely on research, including credit analysis and reports prepared internally by various subsidiaries and divisions of BAS.

(ii) Certain senior executives of BAC with responsibility for overseeing operations of various divisions, subsidiaries and affiliates of BAC are not precluded from exercising those functions over the Advisor because they oversee BAS as well; provided that such persons shall not have any involvement with respect to proposed transactions pursuant to the exemption and will not in any way attempt to influence or control the placing by the Funds or the Advisor of orders in respect of *Eligible Securities* with BAS.

8. *Record-Keeping Requirements*—The Funds and the Advisor will maintain such records with respect to those transactions conducted pursuant to the exemption as may be necessary to confirm compliance with the conditions to the requested relief. In this regard:

(a) Each Fund shall maintain an itemized daily record of all purchases and sales of instruments pursuant to the exemption, showing for each transaction: The name and quantity of instruments; the unit purchase or sale price; the time and date of the transaction; and whether such instrument was a *First Tier Security* or a *Second Tier Security.* Such records also shall, for each transaction, document two quotations received from other dealers for comparable instruments (except that, in the case of repurchase agreements and consistent with condition 4, if quotations are unavailable from two such dealers only one other competitive quotation is required), including: The names of the dealers; the names of the instruments; the prices quoted; the times and dates the quotations were received; and whether such instruments were *First Tier Securities* or *Second Tier Securities.*

(b) Each Fund shall maintain a ledger or other record showing, on a daily basis, the percentage of the Fund's *Total Assets* (or, in the case of a Fund that is not subject to Rule 2a–7, the percentage of the total of its cash, cash items and *Eligible Securities*) represented by *Second Tier Securities* acquired from BAS.

(c) Each Fund shall maintain records sufficient to verify compliance with the volume limitations contained in condition 3, above. BAS will provide the Funds with all records and information necessary to implement this requirement.

(d) Each Fund shall maintain records sufficient to verify compliance with the requirements related to repurchase agreements contained in condition 2, above.

The records required by this condition 8 will be maintained and preserved in the same manner as records required under rule 31a–1(b)(1) of the Act.

9. *Guidelines*—BAS and the Advisor, with the assistance of their compliance departments, will prepare and, as necessary, update guidelines for personnel of the BAS or the Advisor, as the case may be, to make certain that transactions conducted pursuant to the exemption comply with the conditions set forth therein, and that the parties generally maintain arm's-length relationships. In training personnel of BAS, particular emphasis will be given to the fact that the Funds are to receive rates as favorable as other institutional

purchasers buying the same quantities. The compliance departments of BAS and the Advisor will periodically monitor the activities of BAS and the Advisor to make certain that the conditions set forth in the exemption are adhered to.

10. *Audit Committee Review*—The audit committee, compliance committee, or another committee which, in each case, consists of members of the Board who are not interested persons as defined in section 2(a)(19) of the Act (''Independent Members''), will approve, periodically review and update as necessary, guidelines for the Advisor and BAS reasonably designed to ensure that transactions conducted pursuant to the exemption comply with the conditions set forth herein and that the procedures described herein are followed in all respects. The respective audit committees will periodically monitor the activities of the Funds, the Advisor and BAS in this regard to ensure that these matters are being accomplished.

11. *Scope of Exemption*—Applicants expressly acknowledge that any order issued on the application would grant relief from section 17(a) of the Act only, and would not grant relief from any other section of, or rule under, the Act including, without limitation, Rule 2a–7.

12. *Board Review*—The Boards, including a majority of the Independent Members, will have approved each Fund's participation in transactions conducted pursuant to the exemption and determined that such participation by the Fund is in the best interests of the Fund and its shareholders. The minutes of the meeting of the Board at which this approval is given will reflect in detail the reasons for the Board's determinations. The Boards will review no less frequently than annually a Fund's participation in transactions conducted pursuant to the exemption during the prior year and determine whether the Fund's participation in such transactions continues to be in the best interests of the Fund and its shareholders. Such review will include (but not be limited to): (a) A comparison of the volume of transactions in each type of instrument conducted pursuant to the exemption to the market presence of BAS in the market for that type of instrument; and (b) a determination that the Funds are maintaining appropriate trading relationships with other sources for each type of instrument to ensure that there are appropriate sources for the quotations required by condition 4 above. The minutes of the meetings of the Boards at which this determination is made will reflect in detail the reasons for the Boards' determinations.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–28795 Filed 12–4–08; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11552]

Maine Disaster # ME–00015 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of Maine, dated 12/01/2008.

Incident: Northeast Harbor Fire.

Incident Period: 07/29/2008.

DATES: *Effective Date:* 12/01/2008.

EIDL Loan Application Deadline Date: 09/01/2009.

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: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for economic injury disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Hancock.

Contiguous Counties:

Maine: Penobscot, Waldo, Washington.

The Interest Rate is: 4.000.

The number assigned to this disaster for economic injury is 115520.

The State which received an EIDL Declaration # is Maine.

(Catalog of Federal Domestic Assistance Number 59002)

Dated: December 1, 2008.

Sandy K. Baruah,

Acting Administrator.

[FR Doc. E8–28881 Filed 12–4–08; 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 4.

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 through 10/03/2008.

DATES: *Effective Date:* 11/26/2008.

Physical Loan Application Deadline Date: 01/15/2009.

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 extend the deadline for filing applications for physical damages as a result of this disaster to 01/15/2009.

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. E8–28879 Filed 12–4–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice to waive the Nonmanufacturer Rule for Control Cable and Conductors; Trailers and Heavy Duty Truck Tractors; and Line Hardware (Insulator Strings) Manufacturing.

SUMMARY: The U.S. Small Business Administration (SBA) is granting a waiver of the Nonmanufacturer Rule for Control Cable and Conductors, Trailers

and Heavy Duty Truck Tractors, and Line Hardware (Insulator Strings) Manufacturing. The basis for waiver is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any manufacturer on a Federal contract set aside for small businesses, service-disabled veteran-owned small businesses or participants in SBA's 8(a) Business Development Program.

DATES: This waiver is effective December 22, 2008.

FOR FURTHER INFORMATION CONTACT: Edith G. Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at (202) 481–1788; or by e-mail at *Edith.Butler@sba.gov*.

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act (Act), 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor of the product. SBA's regulations provided the same for procurements set aside for service-disabled veteran-owned small business concerns. This requirement is commonly referred to as the Nonmanufacturer Rule. See 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors available to participate in the Federal market.

In order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. 13 CFR 1202(c).

The SBA defines ''class of products'' based on the Office of Management and Budget's North American Industry Classification System (NAICS).

SBA received a request on September 4, 2008, to waive the Nonmanufacturer Rule for Control Cable and Conductors, NAICS 335931, Product Service Code (PSC) 6145, Trailers and Heavy Duty Truck Tractors, NAICS 333924, PCS 2330 and Line Hardware (Insulator Strings) Manufacturing, 335932, PSC 6145.

In response, on October 10, 2008, SBA published in the **Federal Register** a notice of intent to waive the Nonmanufacturer Rule for Control Cable and Conductors, Trailers and Heavy Duty Truck Tractors, and Line Hardware (Insulator Strings). SBA explained in the notice that it was soliciting comments and sources of small business manufacturers of this class of products. No comments were received and SBA has determined that there are no small business manufacturers of these classes of products. Therefore, SBA is granting the waiver of the Nonmanufacturer Rule for Control Cable and Conductors, Trailers and Heavy Duty Truck Tractors, and Line Hardware (Insulator Strings) Manufacturing.

Dated: December 1, 2008.

Karen C. Hontz,

Director for Government Contracting.

[FR Doc. E8–28750 Filed 12–4–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

Public Notice; Culturally Significant Objects Imported for Exhibition Determinations: ''Leonardo da Vinci's Horse and Rider? A Technical Investigation''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Leonardo da Vinci's Horse and Rider? A Technical Investigation,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the National Gallery of Art, Washington, DC, from on or about May 3, 2009, until on or about September 7, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**. Following the exhibition at the Gallery, all objects but the principal statue will be returned to the lenders; the principal statue will travel to other U.S. museums to become part of new exhibitions for which new notices will be applied.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8048). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 1, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–28878 Filed 12–4–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6443]

Notice of Availability of the Draft Environmental Impact Statement; Enbridge Energy, Limited Partnership (''Alberta Clipper Project'')

AGENCY: Department of State.

ACTION: Notice of Availability of the Draft Environmental Impact Statement; Enbridge Energy, Limited Partnership (''Alberta Clipper Project'').

SUMMARY: The staff of the Department of State has prepared a Draft Environmental Impact Statement (EIS) for the proposed Enbridge Energy, Limited Partnership (''Enbridge'') Alberta Clipper Pipeline Project. Enbridge has applied to the Department of State for a Presidential Permit, pursuant to Executive Order 13337 of April 30, 2004, to construct, connect, operate, and maintain a 36-inch diameter crude oil and liquid hydrocarbon pipeline at the U.S.-Canadian border near Neche, Pembina County, North Dakota, for the purpose of transporting liquid hydrocarbons and other petroleum products between the United States and Canada. Enbridge seeks this authorization in connection with its Alberta Clipper Pipeline Project (''Alberta Clipper Project''), which is designed to transport Canadian crude oil from the Western Canadian Sedimentary Basin (''WCSB'') to existing refinery markets primarily in the Midwest region of the United States.

The Secretary of State is designated and empowered to receive all applications for Presidential Permits, as referred to in Executive Order 13337, as amended, for the construction, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of

petroleum, petroleum products, coal, or other fuels to or from a foreign country.

Any person wishing to comment on the Draft EIS may do so. To ensure consideration prior to a Department of State decision on the Enbridge proposal, it is important that we receive your comments by January 30, 2009.

SUPPLEMENTARY INFORMATION: The Draft EIS was prepared to conform to the requirements of the National Environmental Policy Act (NEPA) and to evaluate the potential environmental impacts of the proposed pipeline project. The document also evaluates alternatives to the proposal, including system alternatives and pipeline route alternatives.

The federal cooperating agencies for the development of this EIS are: U.S. Army Corps of Engineers; U.S. Department of Agriculture—Farm Service Agency and Natural Resources Conservation Service; U.S. Department of Interior—U.S. Fish and Wildlife Service and Bureau of Indian Affairs; and the U.S. Environmental Protection Agency. In addition, two Indian Bands are acting as cooperating agencies for this EIS: The Fond du Lac Band of Lake Superior Chippewa and the Leech Lake Band of Ojibwe Indians. Cooperating agencies either have jurisdiction by law or special expertise with respect to the environmental impacts assessed in connection with the proposal and are involved in the Department's analysis of those environmental impacts.

The Draft EIS addresses the potential environmental effects of the construction and operation of the United States portion of the Alberta Clipper Project. The proposed Alberta Clipper Project would be a new pipeline that would transport crude oil from Enbridge's existing facilities in Hardisty, Alberta, Canada to its existing terminal in Superior, Wisconsin. From there, the liquid hydrocarbons would be transported to Midwestern markets, the eastern United States and Canada, and the Midcontinent and U.S. Gulf markets. Crude oil would be transported to markets in the Midwest via Enbridge's Lakehead System, which is currently being expanded, and potentially through pipelines that may be constructed in the future. The proposed Project would be designed to transport an average crude oil volume of approximately 450,000 bpd.

Overall, the Alberta Clipper Project would consist of a new pipeline and associated facilities in both Canada and the United States. The Draft EIS focuses on the portion of the Alberta Clipper Project in the United States. The primary components of the U.S. portion of the Project would be the new pipeline, new mainline valves, and additional pumping capacity at three existing pump stations. The pipeline would extend approximately 331.8 miles from the U.S./Canada border near Neche, North Dakota through Minnesota and Wisconsin to the existing Enbridge terminal in Superior. A total of 32 mainline valves would be installed at key locations along the alignment.

The Canadian portion of the Alberta Clipper Project received its final Canadian National Energy Board certificate in other approvals by August 2008.

Approximately 82 percent of the proposed pipeline route in the United States (about 270 miles) would be within or adjacent to an existing Enbridge pipeline corridor. The existing corridor houses six pipelines between the U.S./Canada border and Clearbrook, Minnesota (including the Southern Lights LSr Project pipeline which began construction in summer 2008), and four existing pipelines between Clearbrook and Superior. The existing pipelines transport crude oil or petroleum products. A fifth pipeline has been proposed for the corridor between Clearbrook and Superior, and Enbridge proposes to construct it concurrently with the Alberta Clipper Project pipeline.

Three existing Enbridge pump stations along the corridor would be upgraded to accommodate the Alberta Clipper pipeline. The upgrades would include additional pumps and the associated electrical equipment necessary to power the pumps.

If approved, Enbridge proposes to begin construction of the project in the spring of 2009, with an in-service date of early 2010.

As a separate but connected action to the Alberta Clipper Project, Enbridge is proposing to construct, operate, and maintain the Superior Terminal Expansion Project. This project would consist of five new 250,000-barrel storage tanks and associated piping and facilities at the existing Enbridge terminal. The Superior Terminal Expansion Project is not part of the Presidential Permit Application submitted to Department of State and would be permitted separately from the Alberta Clipper Project.

Construction of the proposed pipeline would generally require a 140-foot-wide construction right-of-way to allow temporary storage of topsoil and spoil and to accommodate safe operation of construction equipment. Enbridge would retain a portion of the construction right-of-way in order to maintain a 75-feet right-of-way from the current outermost pipeline.

The Alberta Clipper Project would not require construction of new pump stations. Mainline valves would be installed along the pipeline to limit the volume of a spill if one were to occur. Enbridge conducted an analysis to determine the most appropriate locations for mainline valves in compliance with the requirements of 49 CFR Part 195. Construction of the pipeline would require establishment of rail unloading sites for delivery of pipe and contractor/pipe storage yards at locations near the construction right-of-way to temporarily store pipe and the contractor's vehicles, equipment, tools, and other construction-related items. Rail unloading areas would be located adjacent to railroad sidings. Enbridge would need to gain access to the construction right-of-way during pipeline installation and the permanent right-of-way during operation. In general, Enbridge would use existing public roads to gain access to the construction right-of-way as much as possible. In areas where public roads are limited, existing privately owned roads may be used for access, provided that Enbridge receives permission from the landowners. If neither public nor privately owned roads are available, Enbridge would construct new access roads that typically would be approximately 10 to 30 feet wide.

U.S. States and counties that could possibly be affected by construction of the proposed pipeline are:

- North Dakota: Pembina;
- Minnesota: Kittson, Marshall, Pennington, Red Lake, Polk, Clearwater, Beltrami, Hubbard, Cass, Itasca, Aitkin, St. Louis, Carlton; and
- Wisconsin: Douglas.

Comment Procedures and Public Meetings: Any person wishing to comment on the Draft EIS may do so. To ensure consideration prior to a Department of State decision on the proposal, it is important that we receive your comments by no later than January 30, 2009.

Options for submitting comments on the Draft EIS are as follows:

- *By mail to:* Elizabeth Orlando, Alberta Clipper Project Manager, U.S. Department of State, OES/ENV Room 2657, Washington, DC 20520. Please note that Department of State mail can be delayed due to security screening.
- *Fax to:* (202) 647–5947, attention Elizabeth Orlando.
- *E-mail to: AlbertaClipperEIS@state.gov.*
- *Comment over the internet via the Alberta Clipper EIS Web site: mailto:www.albertaclipper.state.gov.*

Comments received will be included in the public docket without change and may be made available on-line at *http://www.albertaclipper.state.gov*, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through e-mail. If you send a comment by e-mail, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you want to submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

In addition to or in lieu of sending written comments, the Department of State invites you to attend the public meetings in the project area to receive comments on the Draft EIS. A court reporter will be present and will accept comments for the record. Dates and locations for the public meetings are:

- Monday, December 15, 2008, 6 to 9 p.m., Thief River Falls, Minnesota, Best Western, 1060 Highway 32 South, Thief River Falls.
- Tuesday, December 16, 2008, 11 a.m. to 2 p.m., Cass Lake, Minnesota, Cass Lake Palace Casino, 6280 Upper Cass Lake Frontage Road, NW., Cass Lake.
- Tuesday, December 16, 2008, 6 p.m. to 9 p.m., Bemidji, Minnesota, Holiday Inn Express Conference Center, 2422 Ridgeway Avenue, NW., Bemidji.
- Wednesday, December 17, 2008, 6 p.m. to 9 p.m., Grand Rapids, Minnesota, Wendego Conference Center, 20108 Golf Crest Road, Grand Rapids.
- Thursday, December 18, 2008, 11 a.m. to 2 p.m., Carlton, Minnesota, Black Bear Hotel—Lake Hall Room, 1785 Highway 210, Carlton.
- Thursday, December 18, 2008, 6 p.m. to 9 p.m., Superior, Wisconsin, Barkers Island Inn, 300 Marina Drive, Superior.

After comments are reviewed, any significant new issues are investigated, and modifications are made to the Draft EIS, a final EIS will be published and distributed by the Department of State. The final EIS will contain the Department's response to timely comments received on the Draft EIS.

Copies of the Draft EIS have been mailed to interested federal, tribal, state and local agencies; public interest groups; individuals and affected landowners who requested a copy of the Draft EIS or provided comments during the scoping process; libraries; and other stakeholders.

FOR FURTHER INFORMATION CONTACT: The Enbridge application for a Presidential Permit, including associated maps, the Draft EIS; a list of libraries where the Draft EIS may be reviewed; and other project information is available for viewing and download at the project Web site: *http://www.albertaclipper.state.gov*.

For information on the proposed project or the Draft EIS contact Elizabeth Orlando, OES/ENV Room 2657, U.S. Department of State, Washington, DC, 20520, or by telephone (202) 647–4284, or by fax at (202) 647–5947.

Issued in Washington, DC on December 5, 2008.

Daniel Fantozzi,

Director, Bureau of Oceans and International Environmental and Scientific Affairs/Office of Environmental Policy, Department of State.

[FR Doc. E8–28866 Filed 12–4–08; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket Number—[Docket No. DOT–OST–2008–0371]

Agency Information Collection Activities; Proposals, Submissions, and Approvals

AGENCY: Department of Transportation (DOT), Office of the Secretary (OST).

ACTION: Notice and request for comments; Request OMB Clearance for extension of a currently approved information collection, Foreign Air Carrier Application for Statement of Authorization.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, the Department of Transportation, Office of the Secretary invites the general public, industry and other governmental parties to comment on the Foreign Air Carrier Application for Statement of Authorization. The pre-existing information collection request previously approved by the Office of Management and Budget (OMB) expires on January 31, 2009.

DATES: Written comments should be submitted by February 3, 2009.

FOR FURTHER INFORMATION CONTACT: George Wellington, (202) 366–2391, Office of International Aviation, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W86–125, Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

ADDRESSES: You may submit a comment to Docket No. DOT–OST–2008–0371 through one of the following methods:

Web site: http://www.regulations.gov. Follow the instructions for submitting comments on the FDMS electronic docket site.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Room 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 Wednesday and Federal holidays.

Instructions: All comments must include the agency name and FDMS Docket No. DOT–OST–2008–0371. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act Statement in the **Federal Register** published on February 3, 2006 (71 FR 5780), or you may visit *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or 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 a.m., Monday through Friday, except Wednesday and Federal holidays.

If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on Docket No. DOT–OST–2008–0371.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices

in Washington, DC, we recommend that persons consider an alternative method (Internet, fax, or professional delivery service) to submit comments to the docket and to ensure their timely receipt at U.S. DOT.

SUPPLEMENTARY INFORMATION:

OMB Approval No. 2106–0035.

Title: Foreign Air Carrier Application for Statement of Authorization.

Form No.: Form OST 4540.

Type of Review: Extension of a currently approved collection.

Respondents: Foreign Air Carriers.

Number of Respondents: Approximately 100.

Estimated Time per Response: 2.25 hours per application.

Total Annual Burden: 1,000 hours.

Abstract: Applicants use Form OST 4540 to request statements of authorization to conduct numerous types of operations authorized under Title 14, CFR part 212. The form requires basic information regarding the carrier(s) conducting the operation, the party filing the form, the operations being conducted, the number of third- and fourth-freedom flights conducted in the last twelve-month period, and certification of reciprocity from the carrier's homeland government. DOT analysts will use the information collected to determine if applications for fifth-freedom operations meet the public interest requirements necessary to authorize such applications.

Burden Statement: We estimate that the industry-wide total hour burden for this collection to be approximately 1,000 hours or approximately 2.25 hours per application. Conservatively, we estimate the compilation of background information will require 1.75 hours, and the completion and submission of OST Form 4540 will require thirty (30) minutes.

Reporting the number of third- and fourth-freedom operations conducted by an applicant carrier will require collection of flight data, and detailed analysis to determine which flights conducted by the carrier are third- and fourth-freedom. Applicants should be able to use data collected for the Department's T–100 program to provide this information (under this program, carriers are required periodically to compile and report certain traffic data to the Department, as more fully described in the Docket referenced in footnote 1 below). The Bureau of Transportation Statistics (BTS) provide carriers with a computer program that allows them to compile and monitor, among other things, flight origin and destination data, to be used in making the carriers' T–100 submissions.[1] We estimated that carriers will require 1.25 hours per application [2] to compile and analyze the data necessary to disclose the number of third- and fourth-freedom flights conducted within the twelve-month period preceding the filing of an application.

Foreign carriers will also have to provide evidence that their homeland government will afford reciprocity to U.S. carriers seeking authority for the similar fifth-, sixth- and seventh-freedom operations. Carriers may cite certifications submitted by carriers from the same homeland if that homeland issued such certification within the preceding six-month period. Approximately 100 carriers from roughly 30 distinct homelands use OST Form 4540 to apply for statements of authorization annually. We estimate that one foreign carrier from any given homeland will expend roughly 4 hours every six-months to obtain certification from its homeland governments.[3] We have apportioned 30 minutes to each application to account for the time required to obtain certifications from homeland governments.

We have no empirical data to indicate how much time is required for a person to complete OST Form 4540; however, anecdotal evidence reveals that respondents spend thirty (30) minutes or less completing the form and brief justification. In some cases, respondents spend a limited amount of time, less than ten (10) minutes, reviewing the form before sending it via facsimile or e-mail to the Department. In the interest of providing a conservative estimate so as to not understate the burden hours, we estimate the hour burden for completing OST Form 4540 as thirty (30) minutes.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the Office of the Secretary's performance; (2) the accuracy of the estimated burden; (3) ways for the Office of the Secretary to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC on December 1, 2008.

Tracey M. Jackson,

Office of the Chief Information Officer.

[FR Doc. E8–28808 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–9X–P

[1] The rule-making associated with the T–100 program can be found on the Federal Docket Management System (FDMS) at *http://www.regulations.gov*, in Docket DOT–OST–1998–4043. Information regarding burden hours is on file in the Office of Aviation Analysis (X–50).

[2] The Office of Aviation Analysis (X–50) estimated that small-carriers would require 1 burden hour per report, and large carriers would require 3 burden hours per report to analyze and report T–100 program data. Considering that the data required in this information collection can be derived from data already collected, we have taken an average of the estimated time required, and conservatively shortened the time by 45 minutes because no new data entry will be required.

[3] Calculation: (4 burden hours per application) × (30 foreign homelands) × (2 requests per year) = 240 annual burden hours. Apportioning 240 annual burden hours equally among an average of 430 applications annually = approximately 30 burden minutes per application.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q)

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) during the Week Ending October 31, 2008. The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2008–0314.

Date Filed: October 28, 2008.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: November 18, 2008.

Description: Application of Avolar Aerolineas, S.A. de C.V. (''Avolar'') requesting an exemption and foreign air carrier permit authorizing Avolar (1) to provide scheduled foreign air transportation of persons, property and mail between Los Angeles and San Jose

del Cabo and Oakland and Tijuana, and (2) to conduct charters.

Docket Number: DOT–OST–2008–0318.

Date Filed: October 31, 2008.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: November 21, 2008.

Description: Application of Air Excursions, LLC requesting a certificate of public convenience and necessity to transport passengers, property and mail in interstate air transportation.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–28822 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Seeking OMB Approval

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA invites public comments about our intention to request the Office of Management and Budget's (OMB) revision of a current information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 19, 2008, vol. 73, no. 183, page 54448–54449. The FAA would amend the regulations governing flight data recorders to increase the number of digital flight data recorder parameters for certain Boeing airplanes.

DATES: Please submit comments by January 5, 2009.

FOR FURTHER INFORMATION CONTACT: Carla Mauney at *Carla.Mauney@faa.gov*.

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Revisions to Digital Flight Data Recorder Regulations for Boeing 737 Airplanes and All Part 125 Airplanes.

Type of Request: Reinstatement, without change, of a previously approved Collection.

OMB Control Number: 2120–0616.

Form(s): There are no FAA forms associated with this collection.

Affected Public: An estimated 2,960 Respondents.

Frequency: This information is collected on occasion.

Estimated Average Burden per Response: This is a passive information collection activity. Responses are recorded automatically in the aircraft's digital flight data recorder.

Estimated Annual Burden Hours: An estimated 1 hour annually.

Abstract: The FAA would amend the regulations governing flight data recorders to increase the number of digital flight data recorder parameters for certain Boeing airplanes. This change is based on safety recommendations from the National Transportation Safety Board following its investigations of two accidents and several incidents involving 737s.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/(FAA), and sent via electronic mail to *oira_submission@omb.eop.gov*, or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 24, 2008.

Carla Mauney,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. E8–28510 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Killeen-Skylark Field, Killeen, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release airport property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the Killeen-Skylark Field 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 January 5, 2009.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Mike Nicely, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Texas Airports Development Office, ASW–650, Fort Worth, Texas 76193–0650.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. John W. Sutton, Director of Aviation, at the following address: 8101 Clear Creek Road, Box C, Killeen, Texas 76549–2557.

FOR FURTHER INFORMATION CONTACT: Mr. Steven Cooks, Program Manager, Federal Aviation Administration, Texas Airports Development Office, ASW–650, 2601 Meacham Boulevard, Fort Worth, Texas 76193–0650, Telephone: (817) 222–5608, e-mail: *Steven.Cooks@faa.gov, fax:* (817) 222–5989.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Killeen-Skylark Field under the provisions of the AIR 21.

The following is a brief overview of the request:

The City of Killeen requests the release of 15.058 acres of non-aeronautical airport property. This property was incorporated into the airport by an agreement with the FAA in 1988. The property to be released will be sold to allow for future development and maintenance of the airport.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at the Killeen-Skylark Field, telephone number (254) 501–6100.

Issued in Fort Worth, Texas on October 9, 2008.

Kelvin Solco,

Manager, Airports Division.

[FR Doc. E8–28744 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Wayne County, MI

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of availability (NOA) of the Final Environmental Impact Statement (FEIS) for the Detroit River International Crossing Study and Section 4(f) Evaluation.

SUMMARY: This notice announces the availability of a Final Environmental Impact Statement (FEIS) and Section 4(f) Evaluation for the Detroit River International Crossing Study (DRIC). This action is pursuant to the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.*, as amended and the Council on Environmental Quality Regulations (40 CFR parts 1500–1508). The FEIS identifies the Preferred Alternative for a new border crossing between Detroit, Michigan and Windsor, Ontario; describes the environmental impacts of the proposed project and proposed mitigation; and addresses comments received on the Draft Environmental Impact Statement and Section 4(f) Evaluation issued in February 2008.

DATES: Any comments must be received on or before January 5, 2009. The FEIS waiting period ends 30 days after the U.S. Environmental Protection Agency publishes the DRIC's NOA in the **Federal Register** (currently scheduled to be published on December 5th).

ADDRESSES:

1. *Document Availability:* Copies of the FEIS are available for public inspection and review on the project Web site: *http://www.partnershipborderstudy.com* and at the following locations:

MDOT Bureau of Transportation Planning, 425 Ottawa St., Lansing;
MDOT Metro Region Office, 18101 W. Nine Mile Rd., Southfield;
MDOT Detroit Transportation Service Center, 1400 Howard St., Detroit;
MDOT Taylor Transportation Service Center, 25185 Goddard, Taylor;
Henry Ford Centennial Library, 16301 Michigan Ave., Detroit;
Detroit Public Library, 5201 Woodward Ave., Detroit;
Bowen Branch of the Detroit Public Library, 3648 W. Vernor, Detroit;
Library at Southwestern High School, 6921 W. Fort St., Detroit;
Delray Recreation Center, 420 Leigh St., Detroit;
Allen Park Library, 8100 Allen Rd., Allen Park;
Ecorse Library, 4184 W. Jefferson Ave., Ecorse;
Melvindale Library, 18650 Allen Rd., Melvindale;
River Rouge Library, 221 Burke St., River Rouge;
Kemeny Recreation Center, 2260 S. Fort St., Detroit;
Campbell Brand Library, 8733 W. Vernor Hwy., Detroit;
Neighborhood City Hall Central District, 2 Woodward Ave., Detroit;
Neighborhood City Hall Northwestern District, 19180 Grand River Ave., Detroit;
Neighborhood City Hall Northeastern District, 2328 E. Seven Mile Rd., Detroit;
Neighborhood City Hall Western District, 18100 Meyers Road, Detroit;
Neighborhood City Hall Eastern District, 7737 Kercheval St., Detroit;
Neighborhood City Hall Southwestern District, 7744 W. Vernor St., Detroit.

Copies of the FEIS may be requested from Bob Parsons (Public Involvement and Hearings Officer) at the Michigan Department of Transportation, 425 W. Ottawa Street, P.O. Box 30050, Lansing, MI 48909 or by calling (517) 373–9534.

2. *Comments:* Send any comments on the FEIS to the Michigan Department of Transportation, c/o Bob Parsons (Public Involvement and Hearings Officer), 425 W. Ottawa Street, P.O. Box 30050, Lansing, MI 48909; Fax: (517) 373–9255; or e-mail: *parsonsb@michigan.gov*. Information regarding this proposed action is available in alternative formats upon request.

FOR FURTHER INFORMATION CONTACT: Ryan Rizzo, Major Project Manager, at FHWA Michigan Division, 315 W. Allegan Street, Room 201, Lansing, MI 48933; by phone at (517) 702–1833, or e-mail at *Ryan.Rizzo@FHWA.DOT.US*.

David Williams, Environmental Program Manager, FHWA Michigan Division, 315 W. Allegan Street, Room 201, Lansing, MI 48933; by phone at (517) 702–1820; or e-mail at *David.Williams@FHWA.DOT.US*.

SUPPLEMENTARY INFORMATION: The Detroit River International Crossing (DRIC) Study is a bi-national effort to complete the environmental study processes related to a new border crossing. The DRIC Study identifies solutions that support the region, state, provincial and national economies while addressing the civil and national defense and homeland security needs of the busiest trade corridor between Canada and the United States. Leading the study is the Border Transportation Partnership (The Partnership) comprised of the following agencies: Federal Highway Administration (FHWA), Michigan Department of Transportation (MDOT), Transport Canada (TC) and Ontario Ministry of Transportation (MTO). The Partnership completed the Planning/Needs and Feasibility Study in February 2004, released the DEIS for public review and comment in February 2008 and conducted public hearings in March 2008. The FEIS includes responses to the comments received during that public comment period. All approvals will be consistent with the National Environmental Policy Act (NEPA) in the U.S., the Ontario Environmental Assessment Act (OEAA) and the Canadian Environmental Assessment Act (CEAA). The Canadian environmental clearance process also is nearing completion.

Purpose and Need for the Project: The purpose of the DRIC Study is to provide safe, efficient and secure movement of people and goods across the U.S.-Canadian border in the Detroit River area to support the economies of Michigan, Ontario, Canada and the United States, and to support the mobility needs of national and civil defense to protect the homeland. To address future border crossing mobility requirements through 2035, there is a need to: Provide new border-crossing capacity to meet increased long-term demand; improve system connectivity to enhance the seamless flow of people and goods; improve operations and processing capability in accommodating the flow of people and goods; and provide reasonable and secure crossing options (i.e., redundancy) in the event of incidents, maintenance, congestion, or other disruptions.

Preferred Alternatives: The Preferred Alternative evaluated includes an interchange with I–75, a customs inspection plaza, and a bridge from the plaza that spans the Detroit River. The FEIS analyzes the issues/impacts on the United States' side of the proposed new border crossing. A Canadian-produced set of documents analyzes the issues/impacts on the Canadian side. The No-Build Alternative would not result in a new international border crossing system in the Detroit-Windsor area. Only the existing crossings, plazas and freeway connections, including the Gateway connection currently under construction, would continue operations. The No-Build Alternative considered the proposal by the private-sector owners of the Ambassador Bridge to build a six-lane span to replace the existing four-lane bridge.

Authority: 42 U.S.C. 4321 *et seq.*, as amended and the Council on Environmental Quality Regulations (40 CFR Parts 1500–

1508) 23 CFR 771.117; and 23 U.S.C. 139(1)(1).

Issued on: November 24, 2008.

James J. Steele,

Division Administrator, Lansing, Michigan.

[FR Doc. E8–28563 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

WCTU Railway Company

[Waiver Petition Docket Number FRA–2008–0106]

The WCTU Railway Company (WCTU), as a subsidiary of Railserve Inc. having its office located in Atlanta, Georgia, has petitioned FRA for a waiver of compliance from 49 CFR Part 223, Safety Glazing Standards for one locomotive, specifically locomotive number WCTU 1001. Locomotive WCTU 1001 is an EMD Switcher-Model SW1, built in 1946. The existing glazing is an ASI laminated safety glass, and is currently in good condition. WCTU, which is located in White City, Oregon, operates on approximately 20 miles of track and serves approximately 12 small rail shippers around White City, OR.

WCTU interchanges with the Central Oregon & Pacific Railroad Company. The records indicate that there have been no reported incidents of vandalism or any other incidents that involved WCTU 1001. WTCU operates over 20 miles of track at a speed not exceeding 10 miles per hour. To install FRA Type I or Type II safety glazing would impose an extreme financial burden to this railroad.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0106) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on December 1, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–28886 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2008–0189]

Initial Decision That Certain BMW Mini Cooper S Vehicles Contain a Safety-Related Defect Regarding the Exhaust Pipe Tips; and Scheduling of a Public Meeting

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of initial decision and public meeting.

SUMMARY: NHTSA will hold a public meeting regarding its Initial Decision that model year (MY) 2007 and certain MY 2008 BMW Mini Cooper S vehicles (subject vehicles) contain a defect related to motor vehicle safety in the vehicle's exhaust pipe tips.

DATES: The public meeting will be held beginning at 10 a.m. on Wednesday, December 17, 2008.

FOR FURTHER INFORMATION CONTACT: AnnaLisa Nash, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–5263. NHTSA's Initial Decision, and the information on which it was based, is available at NHTSA's Technical Information Services (TIS), Room E12–100, 1201 New Jersey Avenue, SE., Washington, DC 20590; Telephone: (202) 366–2588. When visiting Technical Information Services or contacting it via telephone, refer to investigation EA08–020. In addition, the agency's initial decision is available on the agency's Web site at *http://www.nhtsa.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 49 U.S.C. 30118(a) and 49 CFR 554.10, on November 26, 2008, NHTSA's Associate Administrator for Enforcement made an Initial Decision that MY 2007 and certain 2008 BMW Mini Cooper S vehicles manufactured by BMW of North America, LLC (BMW) contain a defect related to motor vehicle safety. The exhaust pipe tips on these vehicles cause and contribute to burns on the legs of people.

A. The Agency's Investigation and Request That BMW Conduct a Recall

On April 28, 2008, NHTSA's Office of Defects Investigation (ODI) opened an investigation, Preliminary Evaluation (PE08–031), to investigate an alleged safety-related defect concerning burn injuries in MY 2007 Mini Cooper S (hardtop) vehicles. ODI requested information from BMW. After a review

of BMW's response, ODI upgraded PE08–031 to an Engineering Analysis (EA08–020) on August 29, 2008, and expanded the scope of the investigation to include MY 2008 Mini Cooper S vehicles.

ODI and BMW have received numerous complaints indicating that consumers' legs have been burned while they access the rear cargo area of the subject vehicles via the rear hatchback shortly after the vehicles have been driven. As reflected by the complaints, people accessing the cargo area naturally place their legs at the rear of the vehicle. People are burned as they inadvertently contact either of the two hot exhaust pipe tips while removing items from, or placing items in, the rear cargo area. Some of the burn injuries are significant second degree burns, causing blistered skin or scarring, often in a half-moon shape pattern matching the approximately 2¾-inch diameter of the exhaust tips.

Prior to the redesign of the subject vehicles for MY 2007, there were relatively few instances of burns from the exhaust pipe tips of Mini Cooper S vehicles. As redesigned for MY 2007, the Mini Cooper S vehicles have much larger exhaust pipe tips than under the previous design, and the tips extend beyond the rear bumper cover. After the redesign, reports of burn injuries from Mini Cooper S vehicles increased dramatically. BMW has acknowledged that the exhaust tips have caused burn injuries. BMW redesigned the tips so they do not extend as far back as originally designed for MY 2007 vehicles. This redesign was incorporated into mid-year production on approximately July 1, 2008, of the MY 2008 subject vehicles.

ODI advised BMW, by letter of October 10, 2008, of its belief that the subject vehicles contain a safety-related defect in the exhaust pipe tips of the subject vehicles within the meaning of the National Traffic and Motor Vehicle Safety Act, as amended. ODI requested BMW to initiate a safety recall, in accordance with 49 U.S.C. 30118–30120, to notify all owners, purchasers, and dealers of the defect and to provide a free remedy for each of the subject vehicles. In its October 27, 2008, response to ODI, BMW declined to conduct the safety recall stating it is not warranted and informed NHTSA that, in the interest of customer satisfaction, it had instituted a Service Campaign concerning this issue.

B. Initial Decision

Based on the available information, NHTSA's Associate Administrator for Enforcement has made an Initial Decision, pursuant to 49 U.S.C. 30118(a) and 49 CFR 554.10, that MY 2007 and certain 2008 BMW Mini Cooper S vehicles manufactured by BMW of North America, LLC (BMW) contain a safety-related defect. The exhaust pipe tips, which are located at the center of the rear of the vehicle and protrude rearward beyond the bumper cover, are situated in such a way that persons conducting completely foreseeable tasks at the rear of the vehicle may experience significant and painful burns on their legs. An initial decision is not a final agency action.

This initial decision reflects the agency's rejection of BMW's proffer of a service campaign instead of a recall. The subject vehicles built prior to the production modification in 2008 pose a significant risk of burn injuries to persons accessing the rear cargo area via the hatchback. It is unreasonable for people, who engage in the routine activity of standing near or against the back of a vehicle with the hatch up to remove items from or place items in the rear cargo area, to be subject to a significant risk of painful burns. The National Traffic and Motor Vehicle Safety Act as amended provides for a safety recall when there is a safety-related defect. In that situation, the manufacturer has a duty to provide a defect notice to the agency and proper notice to the vehicle owner. The statute does not give the manufacturer the option of choosing a different course of action. A safety recall would assure that vehicle owners have the proper statutory notice of the safety risks along with a free remedy, thus presenting the greatest opportunity for preventing a significant risk of any further burn injuries. Unlike a manufacturer's service campaign, a notice to the vehicle owner pursuant to 49 CFR 577.5(f) must explain the risk to safety related to the defect and the type of injury that can result from the defect. Additionally, pursuant to 49 CFR 573.7, after initiating a recall BMW would be required to provide quarterly reporting to the agency to ensure that all vehicles have been remedied.

Pursuant to 49 U.S.C. 30118(b)(1) and 49 CFR 554.10(b), NHTSA will conduct a public meeting, beginning at 10 a.m., Wednesday, December 17, 2008, in Room W40–302, Department of Transportation Building, 1200 New Jersey Avenue, SE., Washington, DC, at which time the manufacturer and other interested parties will be afforded an opportunity to present information, views, and arguments on the issue of whether MY 2007 and certain 2008 BMW Mini Cooper S vehicles contain a safety-related defect in the exhaust pipe tips.

Interested persons are invited to participate in this proceeding through written and/or oral presentations. Persons wishing to make oral presentations must notify Ethel Hayden, National Highway Traffic Safety Administration, W45–206, 1200 New Jersey Avenue, SE., Washington, DC 20590; Telephone: (202) 366–3217, or by fax at (202) 366–3081, before the close of business on Friday, December 12, 2008. The notifications should specify the amount of time that the presentation is expected to last. The agency will prepare a schedule of presentations. Depending upon the number of persons who wish to make oral presentations, and the anticipated length of those presentations, the agency may add an additional day or days to the meeting/hearing and may limit the length of oral presentations. This will not be an adjudicatory proceeding. Although the agency may ask questions of those who make oral presentations, there is no cross examination of witnesses by other participants in the public meeting.

Persons who wish to file written comments should submit them to the same address, no later than Friday, December 12, 2008.

Authority: 49 U.S.C. 30118(a), (b); delegations of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Issued on: November 26, 2008.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E8–28883 Filed 12–4–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35201]

Eastern Washington Gateway Railroad Company—Change in Operator Exemption—Rail Line of Spokane County, WA

Eastern Washington Gateway Railroad Company (EWG),[1] a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to change operators from Western Rail Switching, Inc. (WRS) to EWG over approximately 5.9 miles of rail line (the Geiger Spur)

[1] EWG is a wholly owned subsidiary of US Rail Partners, Ltd., a noncarrier holding company which also controls the Blackwell Northern Gateway Railroad Company, a Class III carrier, in Oklahoma. *See US Rail Partner, Ltd.—Continuance in Control Exemption—Eastern Washington Gateway Railroad Company*, STB Finance Docket No. 35030 (STB served May 25, 2007).

owned by the County of Spokane (County). As recently reconfigured, the line extends from milepost 2.5 at the east gate of Fairchild Air Force Base to milepost 4.93 at McFarlane and Hayford Roads near Airway Heights, WA, and from a connection with EWG at milepost 0.00 at Geiger Junction near Medical Lake, WA, to milepost 3.45 at a connection with the first segment (milepost 2.7 on the first segment).[2] EWG will acquire all of WRS's interests in an existing operating agreement with the County and will replace WRS as the operator of the Geiger Spur.

EWG certifies that its projected annual revenue as a result of this transaction will not result in the creation of a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

The transaction is expected to be consummated on or after December 21, 2008, which is the earliest the transaction can be consummated (30 days after the exemption was filed).

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction. Petitions for stay must be filed no later than December 12, 2008 (at least 7 days before the exemption becomes effective).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law 110–161, section 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: Collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35201, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: November 26, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–28717 Filed 12–4–08; 8:45 am]

BILLING CODE 4915–01–P

[2] EWG states that the western end of the Geiger Spur traverses Fairchild Air Force Base, and for security reasons the U.S. Air Force has required the County to remove rail operations from the base by September 30, 2009. The relocation involves construction of approximately 3.45 miles of track from new milepost 0.00 at Geiger Junction to new milepost 3.45 at a new switch connection with the existing Geiger Spur.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35197]

Delaware and Hudson Railway Company, Inc. and The New York, Susquehanna and Western Railway Corporation—Joint Relocation Project Exemption—in Binghamton, NY

On November 19, 2008, Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific (CP), and The New York, Susquehanna and Western Railway Corporation (NYS&W), jointly filed a notice of exemption under 49 CFR 1180.2(d)(5) to jointly use and operate over track stemming from the sale by CP to NYS&W of approximately 0.95 miles of track and right-of-way and the exchange of non-exclusive overhead trackage rights between CP and NYS&W.[1]

The purpose of the joint relocation project is to rationalize track usage and freight operations in the Binghamton terminal area, which will enable more efficient and expeditious rail service without disruption to shippers.

The project consists of the following transactions:

(1) CP will sell to NYS&W its currently out-of-service Liberty Street Main trackage and right-of-way between Points C (located at Norfolk Southern Railway Company (NS) milepost 214.1 ±) and D (located at CP milepost 613.62), a distance of approximately 0.95 miles. Prior to being taken out of service, this track doubled as the connecting track between CP's freight main line and the NS Southern Tier Line, on the one hand, and NYS&W's switching lead on the north side of its freight yard, on the other. However, as stated by the parties, the movement of through freight trains over this track segment disrupted switching operations. This sale will significantly reduce these disruptions as through freight trains will be routed on the trackage described in part 2 below. The parties contend that NYS&W intends, and is better positioned, to repair, rehabilitate, and upgrade the trackage so the parties may ultimately resume operations over this segment.

(2) NYS&W will grant CP non-exclusive overhead trackage rights to operate over trackage owned by NYS&W located between: (1) Points A (located at NS milepost 214.1 (±)) and B (located at CP milepost 613.84) (the Buffalo Runner); (2) Points C and D; and (3) Points D and F (located at CP milepost 612.77), a distance of approximately 2.56 miles.[2] These trackage rights are intended to enable CP to continue through movements from its freight main line to NS's Southern Tier Line and avoid disruption of switching operations. NYS&W has already rehabilitated the Buffalo Runner to accommodate through freight movements to and from the Southern Tier Line, which will eliminate a bottleneck occurring when a train passes between NS and CP, and will prevent CP trains from blocking NYS&W access to its freight yard. NYS&W will continue to operate over these segments.

(3) CP will grant NYS&W non-exclusive overhead trackage rights to operate over trackage owned by CP located between: (1) Points B and D; (2) Points E (located at CP milepost 613.54) and G (located at CP milepost 612.98); (3) Points G and H (located at CP milepost 613.99); and (4) Points I (located at CP milepost 614.13) and J (located at CP milepost 614.30), a distance of approximately 1.96 miles. These trackage rights are intended to enable NYS&W to use CP's Bevier Street Yard for operations unrelated to interchange with CP and to operate on CP's Binghamton Runner between NYS&W's Syracuse and Utica Branch on the north, NYS&W's Binghamton Yard,

[1] Applicants state that the overhead reciprocal trackage rights will terminate 10 years from the effective date (initial term). Unless CP or NYS&W notifies the other in writing at least 6 months prior to the expiration of the initial term or any successive term, the reciprocal trackage rights may continue in full force and effect for up to three successive terms of 10 years each under the same terms and conditions. The parties must seek appropriate Board authority for the trackage rights to expire at the end of the initial term or at the end of the successive term or terms, as appropriate.

[2] NYS&W's grant of trackage rights to CP incorporates the trackage rights CP previously granted to NS over the Buffalo Running Track in Norfolk Southern Railway Company-Trackage Rights Exemption-Delaware and Hudson Railway Company, Inc., STB Finance Docket No. 34209 (STB served July 25, 2002). Once this transaction is consummated, NS may also effectuate those trackage rights through the Binghamton terminal over trackage between Points A to B to D in order to further the joint project's rationalization of terminal operations to better accommodate switching and through movements.

and the Southern Tier. CP will continue to operate over these segments.

Applicants state that the proposed project will not disrupt service to shippers as CP and NYS&W will continue to have access to the Binghamton terminal area. Additionally, applicants state that the proposed project will not involve an expansion of service by CP or NYS&W into new territory, or alter the existing competitive situation.

The Board will exercise jurisdiction over the abandonment, construction, or sale components of a relocation project, and require separate approval or exemption, only where the removal of track affects service to shippers or the construction of new track or transfer of existing track involves expansion into new territory. *See City of Detroit* v. *Canadian National Ry. Co., et al.*, 9 I.C.C.2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority* v. *ICC*, 59 F.3d 1314 (D.C. Cir. 1995), *Flats Industrial Railroad Company and Norfolk Southern Railway Company—Joint Relocation Project Exemption—in Cleveland, OH*, STB Finance Docket No. 34108 (STB served Nov. 15, 2001). Line relocation projects may embrace trackage rights transactions such as those involved here. *See D.T.&I.R.—Trackage Rights*, 363 I.C.C. 878 (1981). Under these standards, the sale and incidental trackage rights components require no separate approval or exemption when the relocation project, as here, will not disrupt service to shippers and thus qualifies for the class exemption at 49 CFR 1180.2(d)(5).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

The earliest this transaction may be consummated is the December 19, 2008 effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay must be filed no later than December 12, 2008 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35197, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on applicants' representatives: W. Karl Hansen, Leonard, Street and Deinard Professional Association, 150 South Fifth Street, Suite 2300, Minneapolis, MN 55402, and Nathan Fenno, The New York, Susquehanna and Western Railway Corporation, 1 Railroad Avenue, Cooperstown, NY 13326.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 1, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–28798 Filed 12–4–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Proposed Collection; Comment Request; Suspicious Activity Report by the Securities and Futures Industry

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for comments.

SUMMARY: FinCEN invites comment on a renewal without change of an information collection contained in the form, ''Suspicious Activity Report by the Securities and Futures Industry (SAR–SF).'' The form will be used by the securities and futures industry to report suspicious activity to the Department of the Treasury. This request for comments also covers 31 CFR 103.17 and 31 CFR 103.19. This request for comments is being made pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

DATES: Written comments are welcome and must be received on or before February 3, 2009.

ADDRESSES: Written comments should be submitted to: Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, Virginia 22183, Attention: PRA Comments—SAR–Securities and Futures Industry Form. Comments also may be submitted by electronic mail to the following Internet address: *regcomments@fincen.treas.gov*, again with a caption, in the body of the text, ''*Attention:* PRA Comments—SAR–Securities and Futures Industry Form.''

Inspection of comments. Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905–5034 (not a toll free call).

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Helpline at 800–949–2732, select option 3.

SUPPLEMENTARY INFORMATION: *Title:* Suspicious Activity Report by the Securities and Futures Industry (SAR–SF), 31 CFR 103.17, and 31 CFR 103.19.

OMB Number: 1506–0019.

Form Number: FinCEN Form 101.

Abstract: The statute generally referred to as the ''Bank Secrecy Act,'' Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5332, authorizes the Secretary of the Treasury, *inter alia*, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities, to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[1] Regulations implementing Title II of the Bank Secrecy Act appear at 31 CFR Part 103. The authority of the Secretary to administer the Bank Secrecy Act has been delegated to the Director of FinCEN.

The Secretary of the Treasury was granted authority in 1992, with the enactment of 31 U.S.C. 5318(g), to require financial institutions to report suspicious transactions. On July 1, 2002, FinCEN issued a final rule requiring brokers or dealers in securities (''broker-dealers'') to report suspicious transactions (''Broker-Dealer SAR rule''), (67 FR 44048). The final Broker-Dealer SAR rule can also be found at 31 CFR 103.19. On August 5, 2002, FinCEN issued a final rule requiring futures commission merchants and introducing brokers in commodities to report suspicious transactions (''FCM SAR rule''), (67 FR 50751). The final FCM SAR rule can also be found at 31 CFR 103.17.

The information collected on the form is required to be provided pursuant to 31 U.S.C. 5318(g), 31 CFR 103.17 and 31

[1] Language expanding the scope of the Bank Secrecy Act to intelligence or counter-intelligence activities to protect against international terrorism was added by Section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the ''USA PATRIOT Act''), Public Law 107–56.

CFR 103.19. This information will be made available, in accordance with strict safeguards, to appropriate criminal law enforcement and regulatory personnel, and to the registered securities associations and national securities exchanges (so-called self-regulatory organizations) for use in official performance of their duties, for regulatory purposes and in investigations and proceedings involving domestic and international money laundering, terrorist financing, tax violations, fraud, and other financial crimes.

Broker-dealers, futures commission merchants, and introducing brokers in commodities required to report suspicious transactions, or reporting such transactions voluntarily, will be subject to the protection from liability contained in 31 U.S.C. 5318(g)(3) and to the prohibition contained in 31 U.S.C. 5318(g)(2) against notifying any person involved in the transaction that a suspicious activity report has been filed.

The current SAR–SF may be reviewed at *http://www.fincen.gov/forms/files/fin101_sar-sf.pdf.*

Type of Review: Renewal without change of a currently approved information collection.

Affected public: Business or other for-profit institutions.

Frequency: As required.

Estimated Reporting Burden: Average of 60 minutes per response. (The reporting burden of the regulations (31 CFR 103.17 and 103.19) is reflected in the burden for the form.)

Estimated Recordkeeping Burden for 31 CFR 103.17 or 31 CFR 103.19: 2 hours.

Estimated number of respondents = 8,300.

Estimated Total Annual Responses = 15,500.

Estimated Total Annual Reporting and Recordkeeping Burden: 46,500 hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the Bank Secrecy Act must be retained for five years.

Request for Comments:

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected: (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: November 25, 2008.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E8–28804 Filed 12–4–08; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0636]

Agency Information Collection (Accelerated Payment Verification of Completion Letter) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 5, 2009.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0636'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0636.''

SUPPLEMENTARY INFORMATION:

Title: Accelerated Payment Verification of Completion Letter.

OMB Control Number: 2900–0636.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants electing to receive an accelerated payment for educational assistance allowance must certify they received such payment and how the payment was used. The data collected is used to determine the claimant's entitlement to accelerated payment.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 23, 2008, at page 54898.

Affected Public: Individuals or households.

Estimated Annual Burden: 150 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,119.

Estimated Annual Responses: 1,798.

Dated: November 25, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28825 Filed 12–4–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0003]

Proposed Information Collection (Application for Burial Benefits) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information

needed to determine a deceased veteran's eligibility for burial benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 3, 2009.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0003'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Burial Benefits (Under 38 U.S.C. Chapter 23), VA Form 21–530.

OMB Control Number: 2900–0003.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21–530 to apply for burial benefits, including transportation for deceased veterans. VA will use the information collected to determine the veteran's eligibility for burial benefits.

Affected Public: Individuals or households and businesses or other for profit.

Estimated Annual Burden: 100,000 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 300,000.

Dated: November 24, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28828 Filed 12–4–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0098]

Agency Information Collection (Application for Survivors' and Dependents' Educational Assistance) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 5, 2009.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–0098'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0098.''

SUPPLEMENTARY INFORMATION:

Title: Application for Survivors' and Dependents' Educational Assistance (Under Provisions of Chapter 35, Title 38, U.S.C.), VA Form 22–5490.

OMB Control Number: 2900–0098.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 22–5490 is completed by a veteran's spouse, surviving spouse, or children to apply for Survivors' and Dependents' Educational Assistance (DEA) benefits. DEA benefits are payable if the veteran is permanently and totally disabled, died as a result of a service-connected disability, missing in action, captured or detained for more than 90 days. VA uses the data collected to determine the claimant's eligibility to DEA benefits.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 23, 2008, at pages 54898–54899.

Affected Public: Individuals or households.

Estimated Annual Burden: 22,566.

Estimated Average Burden per Respondent: 45 minutes

Frequency of Response: One time.

Estimated Number of Respondents: 30,088.

Dated: November 25, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28824 Filed 12–4–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (VAARS 810.7108 and 819.7113)]

Agency Information Collection (Mentor-Protege Program Application and Reports) Activities Under OMB Review

AGENCY: Office of Management, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Management (OM), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 5, 2009.

ADDRESSES: Submit written comments on the collection of information through

www.Regulations.gov; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–New (VAARS 810.7108 and 819.7113)'' in any correspondence.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–New (VAARS 810.7108 and 819.7113).''

SUPPLEMENTARY INFORMATION:

Titles:

a. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 819.7108, Application Process.

b. Department of Veterans Affairs Acquisition Regulation (VAAR) Clause 819.7113, Reports.

OMB Control Number: 2900–New (VAARS 819.7108 and 819.7113).

Type of Review: New collection.

Abstract: The information collected under Department of Veterans Acquisition Regulation (VAAR) Clauses 819.7108 and 819.7113 will be used to institute a mentor-protege program whereby large businesses agree to provide mutually developmental support to veteran-owned small business and service-disabled veteran-owned small business. VA will use the data to measure the protege progress against the developmental plan contained in the approved agreement and to report the specific actions taken by the mentor to increase the participation of the protege as a prime or subcontractor to VA.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 25, 2008 at pages 55598–55599.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden:

a. VAAR Clause 819.7108, Application Process—50 hours.

b. VAAR Clause 819.7113, Reports—150 hours.

Estimated Average Burden per Respondent:

a. VAAR Clause 819.7108, Application Process—60 minutes.

b. VAAR Clause 819.7113, Reports—60 minutes.

Frequency of Response: Quarterly.

Estimated Number of Respondents:

a. VAAR Clause 819.7108, Application Process—50.

b. VAAR Clause 819.7113, Reports—50.

Total number of Responses: 200.

Dated: November 25, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–28827 Filed 12–4–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Friday,
December 5, 2008

Part II

Environmental Protection Agency

40 CFR Part 112

Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements—Amendments; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2007–0584; FRL–8746–3]

RIN 2050–AG16

Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements—Amendments

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is amending the Spill Prevention, Control, and Countermeasure (SPCC) rule in order to provide increased clarity, to tailor requirements to particular industry sectors, and to streamline certain requirements for those facility owners or operators subject to the rule, which should result in greater protection to human health and the environment. Specifically, this final rule: Exempts hot-mix asphalt (HMA), pesticide application equipment and related mix containers, and heating oil containers at single-family residences from the SPCC rule; amends the definition of ''facility'' to clarify the existing flexibility associated with describing a facility's boundaries; amends the facility diagram requirement to provide additional flexibility; defines ''loading/unloading rack'' to clarify the equipment subject to the provisions for facility tank car and tank truck loading/unloading racks, as well as amends the provisions for this equipment; provides streamlined requirements for a subset of qualified facilities; amends the general secondary containment requirement to provide more clarity; exempts non-transportation-related tank trucks from the sized secondary containment requirements; amends the security requirements; amends the integrity testing requirements to allow greater flexibility in the use of industry standards; amends the integrity testing requirements for containers that store animal fats or vegetable oils and meet certain criteria; streamlines a number of requirements for onshore oil production facilities; and exempts underground oil storage tanks at nuclear power generation facilities. EPA is also providing clarification in the preamble to this final rule on additional issues raised by the regulated community and, in a separate action in the **Federal Register** of November 26, 2008, (73 FR 72016), the Agency is proposing a new compliance date for farms.

DATES: This final rule is effective February 3, 2009.

ADDRESSES: The public docket for this rulemaking, Docket ID No. EPA–HQ–OPA–2007–0584, contains the information related to this rulemaking, including the response to comment document. All documents in the docket are listed in index at the *http://www.regulations.gov.* Although listed in the index, some information may not be publicly available, such as Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the EPA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Public Reading Room is 202–566–1744, and the telephone number to make an appointment to view the docket is 202–566–0276.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 800–424–9346 or TDD at 800–553–7672 (hearing impaired). In the Washington, DC metropolitan area, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 703–412–9810 or TDD 703–412–3323. For more detailed information on specific aspects of this final rule, contact either Vanessa E. Rodriguez at 202–564–7913 *(rodriguez.vanessa@epa.gov),* or Mark W. Howard at 202–564–1964 *(howard.markw@epa.gov),* U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC, 20460–0002, Mail Code 5104A.

SUPPLEMENTARY INFORMATION: The contents of this preamble are:

I. General Information
II. Entities Potentially Affected by This Final Rule
III. Statutory Authority and Delegation of Authority
IV. Background
V. This Action
A. Hot-Mix Asphalt
1. Hot-Mix Asphalt Exemption
2. Alternative Options Considered
B. Farms
1. Exemption for Pesticide Application Equipment and Related Mix Containers
2. Applicability of Mobile Refueler Requirements to Farm Nurse Tanks
3. Differentiating the SPCC Requirements for Farms
C. Residential Heating Oil Containers
1. Exemption for Residential Heating Oil Containers
2. Alternative Option Considered
D. Definition of Facility
1. Revisions to the Definition of Facility
2. Determining the Components of a Facility: Examples of Aggregation or Separation
3. Alternative Options Considered
E. Facility Diagram
1. Revision to the Facility Diagram Requirement Regarding Mobile or Portable Containers
2. Indicating Complicated Areas of Piping or Oil-filled Equipment on a Facility Diagram
F. Loading/Unloading Racks
1. Loading/Unloading Rack Definition
2. Requirements for Loading/Unloading Racks
3. Exclusions
4. Alternative Option Considered
G. Tier I Qualified Facilities
1. Eligibility Criteria
2. Provisions for Tier I Qualified Facilities
3. SPCC Plan Template
4. Self-Certification and Plan Amendments
5. Tier II Qualified Facility Requirements
6. Alternative Option Considered
H. General Secondary Containment
1. Revisions to the General Secondary Containment Requirement
I. General Secondary Containment for Non-Transportation-Related Tank Trucks
J. Security
1. Revisions to the Security Requirements
K. Integrity Testing
1. Amendments to Integrity Testing Requirements
L. Animal Fats and Vegetable Oils
1. Differentiated Requirements for AFVOs
2. Differentiation Criteria: Containers Subject to FDA Regulations—21 CFR part 110
3. Differentiation Criteria: Elevated Bulk Storage Containers
4. Differentiation Criteria: Containers made from Austenitic Stainless Steel
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7. Required Recordkeeping
8. Other Suggested Criteria and Options
M. Oil Production Facilities
1. Definition of Production Facility
2. Modifications to § 112.9 for Drilling and Workover Facilities
3. SPCC Plan Preparation and Implementation
4. Flowlines and Intra-facility Gathering Lines
5. Flow-Through Process Vessels
6. Alternative Qualified Facility Eligibility Criteria for Oil Production Facilities
7. Produced Water Containers
8. Clarification of the Definition of Permanently Closed Containers
9. Oil and Natural Gas Pipeline Facilities
N. Man-made Structures
O. Underground Emergency Diesel Generator Tanks at Nuclear Power Stations

P. Wind Turbines
Q. Technical Corrections
VI. Statutory and Executive Order Reviews
A. Executive Order 12866—Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order—13132 Federalism
F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045—Protection of Children from Environmental Health & Safety Risks
H. Executive Order 13211—Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. General Information

The Environmental Protection Agency (EPA or the Agency) is amending the Spill Prevention, Control, and Countermeasure (SPCC) rule to address a number of issues that have been raised by the regulated community. These amendments are intended to clarify, tailor, and streamline certain requirements for those facility owners or operators who are required to prepare and implement an SPCC Plan (or ''Plan''). Specifically:

- EPA is exempting hot-mix asphalt (HMA) from the SPCC requirements. This material is unlikely to flow as a result of the entrained aggregate, such that there would be very few circumstances in which a discharge of HMA would have the potential to reach navigable waters or adjoining shorelines. EPA will continue to regulate asphalt cement (AC), asphalt emulsions, and cutbacks, which are not HMA (that is, they are not entrained with aggregate).
- EPA is exempting pesticide application equipment and related mix containers, regardless of ownership or where used, that may currently be subject to the SPCC rule when crop oil or adjuvant oil is added to formulations.
- EPA is exempting residential heating oil containers (that is, those used solely at single-family residences) from the SPCC requirements. This exemption applies to aboveground containers, as well as completely buried heating oil tanks, at single-family residences, including those located at farms.
- EPA is modifying the definition of ''facility'' to clarify that contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines may be considered separate facilities, and to specify that the ''facility'' definition governs the applicability of 40 CFR part 112. These revisions will allow an owner or operator to separate or aggregate containers to determine the facility boundaries, based on such factors as ownership or operation of the buildings, structures, containers, and equipment on the site, the activities being conducted, property boundaries, and other relevant considerations.
- EPA is revising the facility diagram requirement at § 112.7(a)(3) to clarify how containers, fixed and mobile, are identified on the facility diagram. EPA is also clarifying that where facility diagrams become complicated due to the presence of multiple fixed oil storage containers or complex piping/transfer areas at a facility, the owner or operator can include that information separately in the SPCC Plan in an accompanying table or key. For any mobile or portable containers located in a certain area of the facility, an owner or operator can mark the area on the diagram. If the total number of mobile or portable containers changes, the owner or operator can indicate the potential range in number of containers and the anticipated contents and capacities of the mobile or portable containers maintained at the facility in the Plan.
- EPA is defining the term ''loading/unloading rack,'' and specifying that this definition governs the applicability of the provision at § 112.7(h), *Facility tank car and tank truck loading/unloading rack*. This amendment provides clarity to the regulated community on whether this provision applies to a facility. Furthermore, EPA is specifically excluding oil production facilities and farms from the requirements at § 112.7(h), because loading/unloading racks are not typically found at these facilities (loading/unloading activities at these facilities will remain subject to the general secondary containment requirements of § 112.7(c)). EPA also is finalizing editorial revisions to the provision at § 112.7(h) for clarity.
- EPA is streamlining and tailoring the SPCC requirements for a subset of qualified facilities. Qualified facilities were addressed in a recent amendment to the SPCC rule (71 FR 77266, December 26, 2006). The owner or operator of such a facility has the option to self-certify his SPCC Plan. This final rule further designates a subset of qualified facilities (''Tier I qualified facilities'') as those that meet the current qualified facility eligibility criteria and that have no oil storage containers with an individual aboveground storage capacity greater than 5,000 U.S. gallons. The owner or operator of a Tier I qualified facility has the option to complete a self-certified SPCC Plan template (found in Appendix G to 40 CFR part 112) in lieu of a full SPCC Plan. The owner or operator can complete the SPCC Plan template, which is comprised of a set of streamlined SPCC rule requirements, and implement those streamlined requirements, to comply with the SPCC regulation. All other qualified facilities will be designated as ''Tier II qualified facilities.''
- EPA is amending the general secondary containment requirements at § 112.7(c) to clarify that the scope of secondary containment need only take into consideration the typical failure mode, and most likely quantity of oil that would be discharged, consistent with current Agency guidance. This amendment also provides additional examples of prevention systems for onshore facilities found at § 112.7(c)(1).
- EPA is extending the exemption from the sized secondary containment requirement for mobile refuelers provided in the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006) to non-transportation-related tank trucks at a facility subject to the SPCC rule.
- EPA is amending the facility security requirements at § 112.7(g) to allow an owner or operator of a facility to tailor his security measures to the facility's specific characteristics and location. A facility owner or operator is required to describe in the SPCC Plan how he secures and controls access to the oil handling, processing, and storage areas; secures master flow and drain valves; prevents unauthorized access to starter controls on oil pumps; secures out-of-service and loading/unloading connections of oil pipelines; and addresses the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges. This action extends the streamlined security requirements that EPA provided to qualified facilities in the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006) to all facilities subject to the security requirements.
- EPA is amending the requirements at §§ 112.8(c)(6) and 112.12(c)(6) to provide flexibility in complying with the bulk storage container integrity testing requirements. That is, EPA is modifying the current provision to allow an owner or operator to consult and rely on industry standards to determine the appropriate qualifications for personnel performing tests and

inspections, as well as the type and frequency of integrity testing required for a particular container size and configuration. This action extends the streamlined bulk storage container inspection requirement that EPA provided to qualified facilities in the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006) to all facilities subject to the integrity testing provisions.

- EPA is differentiating the integrity testing requirements at § 112.12(c)(6) for an owner or operator of a facility that handles certain types of Animal Fats and Vegetable Oils (AFVOs). EPA is providing the Professional Engineer (PE) or an owner or operator self-certifying an SPCC Plan with the flexibility to determine the scope of integrity testing that is appropriate for containers that store AFVOs, based on compliance with certain FDA regulations and other criteria.
- EPA is finalizing several amendments to tailor the requirements for oil production facilities to address a number of concerns that have been raised by this sector. Specifically, EPA is: Modifying the definition of ''production facility'' to be consistent with the amendments to the definition of ''facility;'' extending the timeframe by which the owner or operator of a new oil production facility must prepare and implement an SPCC Plan; providing an alternative option for flow-through process vessels at oil production facilities to comply with the general secondary containment requirement and additional oil spill prevention measures in lieu of sized secondary containment requirements; providing an exemption for certain intra-facility gathering lines subject to regulatory requirements of the U.S. Department of Transportation's (DOT's) pipeline regulations in 49 CFR parts 192 or 195; providing an alternative option for flowlines and intra-facility gathering lines at oil production facilities for contingency planning in lieu of all secondary containment requirements, while establishing more specific requirements for a flowline/intra-facility gathering line maintenance program; exempting certain produced water containers that do not contain oil as certified by a Professional Engineer (PE); providing compliance alternatives to sized secondary containment for produced water storage containers that are not otherwise exempt; establishing an option for an oil production facility to be eligible to self-certify an SPCC Plan as a qualified facility; and clarifying the definition of ''permanently closed'' as it applies to oil production facilities and containers present at an oil production facility.
- EPA is exempting underground oil storage tanks deferred under 40 CFR part 280 that supply emergency diesel generators at nuclear power generation facilities and that are subject to design criteria under the Nuclear Regulatory Commission (NRC) regulations. This exemption includes both tanks that are completely buried and tanks that are below-grade and vaulted.

In this notice, EPA is also reiterating clarifications to a number of issues of concern to the regulated community that were provided in the 2007 proposal (72 FR 58378, October 15, 2007), including the consideration of man-made structures in determining how to comply with the SPCC rule requirements and the applicability of the rule to wind turbines that are used to produce electricity. Additionally, EPA is explaining actions that will be taken in collaboration with DOT to clarify the jurisdiction over facilities, as defined in a Memorandum of Understanding (MOU) between the DOT and EPA (36 FR 24080, November 24, 1971). EPA also is finalizing technical corrections to §§ 112.3 and 112.12. This rulemaking marks the completion of the SPCC-related improvements planned by the Agency at this time. EPA greatly benefited from the considerable public input in the recent SPCC rulemakings. Given the breadth of these changes, and the importance of the SPCC program, EPA plans to review the implementation of these changes after these latest revisions become effective. With regard to the oil production industry, this revision would include an examination of the utility and effectiveness of the new approaches for avoiding and minimizing spills.

II. Entities Potentially Affected by This Final Rule

Industry sector	NAICS code
Oil Production	211111
Farms	111, 112
Electric Utility Plants	2211
Petroleum Refining and Related Industries	324
Chemical Manufacturing	325
Food Manufacturing	311, 312
Manufacturing Facilities Using and Storing Animal Fats and Vegetable Oils	311, 325
Metal Manufacturing	331, 332
Other Manufacturing	31–33
Real Estate Rental and Leasing	531–533
Retail Trade	441–446, 448, 451–454
Contract Construction	23
Wholesale Trade	42
Other Commercial	492, 541, 551, 561–562
Transportation	481–488
Arts Entertainment & Recreation	711–713
Other Services (Except Public Administration)	811–813
Petroleum Bulk Stations and Terminals	4247
Education	61
Hospitals & Other Health Care	621, 622
Accommodation and Food Services	721, 722
Fuel Oil Dealers	45431
Gasoline stations	4471
Information Finance and Insurance	51, 52
Mining	212
Warehousing and Storage	493
Religious Organizations	813110
Military Installations	928110
Pipelines	4861, 48691

Industry sector	NAICS code
Government	92

The list of potentially affected entities in the above table may not be exhaustive. The Agency's goal is to provide a guide for readers to consider regarding entities that potentially could be affected by this action. However, this action may affect other entities not listed in this table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section titled **FOR FURTHER INFORMATION CONTACT**.

III. Statutory Authority and Delegation of Authority

Section 311(j)(1)(C) of the Clean Water Act (CWA or the Act), 33 U.S.C. 1321(j)(1)(C), requires the President to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil to navigable waters or adjoining shorelines from vessels and facilities and to contain such discharges. The President delegated the authority to regulate non-transportation-related onshore facilities to EPA in Executive Order 11548 (35 FR 11677, July 22, 1970), which was superseded by Executive Order 12777 (56 FR 54757, October 22, 1991). An MOU between DOT and EPA (36 FR 24080, November 24, 1971) established the definitions of transportation-related and non-transportation-related facilities. An MOU between EPA, the U.S. Department of the Interior (DOI), and DOT (59 FR 34102, July 1, 1994) re-delegated the responsibility to regulate certain offshore facilities from DOI to EPA.

IV. Background

The SPCC rule was originally promulgated on December 11, 1973 (38 FR 34164). On July 17, 2002, EPA published a final rule amending the SPCC rule, formally known as the Oil Pollution Prevention regulation (40 CFR part 112). The July 2002 rule included revisions to the requirements for SPCC Plans and for Facility Response Plans (FRPs). It also included new subparts outlining the requirements for various classes of oil; revised the applicability of the regulation; amended the requirements for completing SPCC Plans; and made other modifications (67 FR 47042). The revised rule became effective on August 16, 2002. After publication of this rule, several members of the regulated community filed legal challenges to certain aspects of the rule.[1] All of the issues raised in the litigation have been resolved; EPA published clarifications in the **Federal Register** to several aspects of the revised rule (69 FR 29728, May 25, 2004),[2] and in a separate action in the **Federal Register** of November 26, 2008, (73 FR 71941), the Agency is announcing the vacatur of the July 17, 2002 revisions to the definition of ''navigable waters.'' In addition, concerns were raised about the ability to implement certain aspects of the July 2002 rule.

As a result, EPA proposed amendments to the SPCC rule in December 2005 and finalized them in December 2006 to address a number of issues, including those pertaining to certain ''qualified'' facilities, qualified oil-filled operational equipment, motive power containers, mobile refuelers, removal of provisions inapplicable to AFVOs, and the compliance date for farms. See the rule amendment that was published in the **Federal Register** at 71 FR 77266 (December 26, 2006) for a more detailed discussion of these amendments.

In addition, EPA released the *SPCC Guidance for Regional Inspectors* in December 2005. This guidance document is intended to assist regional inspectors in reviewing the implementation of the SPCC rule at a regulated facility. The guidance document is designed to facilitate an understanding of the rule's applicability, to help clarify the role of the inspector in the review and evaluation of a facility owner or operator's compliance with the performance-based SPCC requirements, and to provide a consistent national policy on several SPCC-related issues. The guidance is available on the Agency's Web site at *http://www.epa.gov/emergencies*. EPA intends to issue revisions to this guidance document that address changes made to the SPCC rule, consistent with the regulatory amendments in this action and the December 2006 amendments (71 FR 77266, December 26, 2006).

Furthermore, EPA has amended the dates for compliance with the July 2002 amendments to the SPCC rule by extending the dates for preparing or amending, and implementing revised SPCC Plans in 40 CFR 112.3(a), (b), and (c), most recently by a rule published May 16, 2007 (72 FR 27443). EPA took the most recent action to provide owners or operators of facilities the time necessary to fully understand the amendments to the SPCC rule finalized in December 2006, and to allow potentially affected owners and operators an opportunity to make any changes to their facilities and to their SPCC Plans, as well as to provide time for the Agency to take final action on this amendment. EPA expects that this extension will provide the regulated community time to review and understand any revised material presented in the *SPCC Guidance for Regional Inspectors*. Please see the **Federal Register** notice at 72 FR 27443, May 16, 2007 for further discussion of the July 1, 2009 compliance date. In a separate action in the **Federal Register** of November 26, 2008 (73 FR 72016), EPA is also proposing new dates by which the owners or operators of facilities must prepare or amend and implement their SPCC Plan.

The December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006) addressed only certain areas of the SPCC requirements and specific issues and concerns raised by the regulated community. The EPA Regulatory Agenda and the 2005 Office of Management and Budget (OMB) report on ''Regulatory Reform of the U.S. Manufacturing Sector'' highlighted other areas where further changes may be appropriate. Therefore, in October 2007, EPA proposed additional amendments to the SPCC rule to address these changes (72 FR 58378, October 15, 2007). Section V of this notice describes EPA's final action on those proposed amendments and presents the major comments received on the proposal, as well as EPA's response to those comments. For a more complete discussion of the comments received, and the Agency's response to comments, *see Comment and Response Document: Spill Prevention, Control, and Countermeasure Rule 2008 Amendments*, a copy of which is available in the docket for this rulemaking.

[1] *American Petroleum Institute* v. *Johnson*, 571 F.Supp. 2d 165 (D.D.C. 2008). The only issue resolved through litigation was the challenge to the definition of navigable waters in the 2002 rule amendment.

[2] Several commenters requested that the Agency codify the clarifications as part of this rulemaking. To the extent the subject matter of the clarification has been reflected in this rulemaking, the Agency has either incorporated the clarification in the regulatory text or reaffirmed the Agency's position in this preamble.

V. This Action

A. Hot-Mix Asphalt

Hot-mix asphalt (HMA) is a blend of asphalt cement (AC) and aggregate material, such as stone, sand, or gravel, which is formed into final paving products for use on roads and parking lots. All types of asphalt, including HMA, are petroleum oil products. Under this amendment to the SPCC rule, EPA is exempting HMA from SPCC rule applicability.

1. Hot-Mix Asphalt Exemption

EPA is exempting HMA from SPCC rule applicability by adding a new paragraph (8) under the general applicability section, § 112.1(d), and modifying § 112.1(d)(2) so that the capacity of storage containers solely containing HMA is not counted toward the facility's oil storage capacity calculation. EPA is taking this action based on the fact that this material is unlikely to flow as a result of the entrained aggregate, such that there would be very few circumstances in which a discharge of HMA would have the potential to reach navigable waters or adjoining shorelines. This is particularly of concern at facilities subject to the SPCC requirements solely because of the presence of HMA. EPA never intended that HMA be included as part of a facility's SPCC Plan.

a. Comments

Several commenters expressed general support for the exemption, and no comments were submitted that opposed the proposed exemption.

b. Response to Comments

EPA agrees with the commenters and is finalizing the exemption for HMA, as proposed.

2. Alternative Options Considered

As an alternate approach, EPA also considered exempting both HMA and AC from the requirements of the SPCC rule, but chose not to propose, nor finalize, such an option. Therefore, this exemption for HMA does not include AC. Although AC is semi-solid or solid at ambient temperature and pressure, it is generally stored at elevated temperatures. At such elevated temperatures, AC has fluid flow properties similar to other semi-solid oils, such as paraffin wax and heavy bunker fuels and therefore is capable of flowing. All of these oils are regulated under the SPCC rule to prevent discharges to navigable waters or adjoining shorelines.

a. Comments

A number of alternative approaches focused on extending the exemption to other similar materials, such as AC, Group 5 oils (that is, those oils with specific gravities greater than or equal to 1.0), waxes and other heavy oils. One commenter suggested extending the exemption to all solid or non-flowing materials, such as whenever oil is mixed with material that will make the mixture unlikely to flow at ambient temperatures: Oil mixed with sorbents, gelled oils, etc. Another commenter suggested extending the exemption to other Group 5 oils. Other commenters suggested extending this exemption to paraffin wax or to all waxes. One commenter requested that EPA clarify that any oils associated with asphalt production be regulated if their total volume exceeds 1,320 U.S. gallons.

b. Response to Comments

The Agency disagrees with these commenters. Unlike HMA, these materials do have the potential to discharge into navigable waters or adjoining shorelines because they are generally stored at elevated temperatures and thus, are capable of flowing if there is a release from the container. No new or compelling data was provided by commenters who disagreed with this position. However, it should be noted that the SPCC rule only applies to facilities that, due to their location, can reasonably be expected to discharge oil to navigable waters or adjoining shorelines. In determining whether there is a reasonable expectation of discharge, an owner or operator of a facility may consider the nature and flow properties of the oils handled at the facility. If a facility owner or operator determines that there is a reasonable expectation of a discharge of oil to navigable waters or adjoining shorelines from any single oil container (including a container storing oil associated with hot-mix asphalt production), and other rule applicability criteria are met, then all oil containers at the facility are subject to the rule's requirements (except as otherwise exempted).

In addition, as EPA noted in the preamble to the proposed rule, the Agency believes that the SPCC rule already provides the facility owner or operator with significant flexibility to select prevention and control measures that are appropriate and cost-effective for the facility and type of product being stored. For example, the secondary containment requirements of the SPCC rule may be satisfied if the secondary containment system, including walls and floor, are capable of containing the oil and are constructed so that any discharge from a primary containment system will not escape secondary containment before cleanup occurs (§ 112.7(c)) and diked areas are sufficiently impervious to contain the oil (§§ 112.8(c)(2) and 112.12(c)(2)). Therefore, the flow properties of Group 5 oils (as for any oil) may be considered in designing appropriate means of secondary containment. If, once cooled, the oil remains in place, an effective means of secondary containment may involve surrounding the bulk storage container with an earthen berm that will contain the oil until it can solidify.

B. Farms

The owner or operator of a farm, by virtue of storing or using oil, is potentially subject to the SPCC requirements. EPA promulgated the definition of farm at § 112.2 in the December 2006 amendments to the SPCC rule (71 FR 77266, December 26, 2006), which defined a farm as ''* * * a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.'' While the December 2006 amendments streamlined the requirements for most of the farms that are subject to SPCC requirements, EPA believes further amendments to the SPCC regulations are appropriate given the unique characteristics of farms (for example, their geographic scale, configuration, land ownership and lease structure, and on-farm activities). Specifically, EPA recognizes that a farm: May be privately owned and may contain the residence of the owner or operator; has a configuration that varies across the country, from farm to farm and season to season; contains low-volume oil storage that is often dispersed across different land parcels separated by roads and natural barriers; may have multiple fueling sites; may be located in a remote area; stores oil on-site for on-farm use and not for further distribution; uses oil seasonally in different quantities; and leases a significant amount of land to or from secondary parties. EPA is finalizing a number of amendments to the SPCC rule potentially affecting farms and other facilities which were proposed in October 2007 (72 FR 58378, October 15, 2007), including an exemption for pesticide application equipment and related mix containers, and providing clarification on the applicability of the mobile refueler requirements to farm nurse tanks. Additionally farms are likely to benefit

from other amendments finalized in this rule, such as clarifications to the definition of facility; the option to allow a subset of qualified facilities (''Tier I qualified facilities'') to complete the SPCC Plan template in Appendix G of this part in lieu of preparing a full SPCC Plan; exemption of residential heating oil tanks at single family residences; amendments to the security and integrity testing requirements; exemption from the loading/unloading rack requirements; and amendments to the facility diagram requirements.

In addition, EPA extended the compliance date for the owner or operator of a farm, as defined in § 112.2, to prepare or amend and implement the farm's SPCC Plan until the effective date of a rule addressing whether to provide differentiated requirements for farms (71 FR 77266, December 26, 2006). EPA believes that the amendments to the SPCC rule in this action address the concerns raised by the agricultural industry. In a separate action in the **Federal Register** of November 26, 2008, (73 FR 72016), EPA is proposing new dates by which the owner or operator of a farm that is a qualified facility must prepare or amend and implement his SPCC Plan.

1. Exemption for Pesticide Application Equipment and Related Mix Containers

EPA is adding a new paragraph (10) under the general applicability section, § 112.1(d), to exempt all pesticide application equipment and related mix containers. EPA is also modifying § 112.1(d)(2) so that the capacity of these pesticide application equipment and related mix containers is not counted toward the facility's oil storage capacity calculation. Pesticide application equipment includes ground boom applicators, airblast sprayers, and specialty aircraft that are used to apply measured quantities of pesticides to crops and/or soil. Related mix containers are those used to mix pesticides with water and, as needed, adjuvant oils, just prior to loading into application equipment. In the October 2007 (72 FR 58378, October 15, 2007), proposal, EPA proposed to limit this exemption to pesticide application equipment and related mix containers used at farms. In this final rule, however, EPA is extending the exemption to all pesticide application equipment and related mix containers, regardless of ownership or where used, because the application of pesticides through the use of this equipment is the same at any location.

EPA is taking this action consistent with its findings in evaluating the potential harm posed by pesticide containers and application equipment when promulgating the *Standards for Pesticide Containment Structures* in 40 CFR part 165, Subpart E (see 71 FR 47330, August 16, 2006). These regulations apply to retailers who repackage agricultural pesticides, custom blenders of agricultural pesticides, and commercial applicators of agricultural pesticides, but do not apply to pesticide application equipment and related mix containers, because they do not fit the definition of stationary pesticide containers. In the development of the proposed exemption to the SPCC rule (72 FR 58378, October 15, 2007), EPA indicated that pesticide formulations may contain crop oil or adjuvant oil in the mix formulations just prior to application, which could subject certain pesticide containers to the SPCC requirements. This same condition could exist at agricultural retailers that provide custom application services, as well as commercial applicators. At these facilities, pesticide application equipment, such as ground boom sprayers and aerial applicators could be loaded with pesticide mix formulations with crop oil or adjuvant oil. In these instances, similar to on-farm pesticide application equipment, this equipment could have been subject to the SPCC requirements when oil is mixed with the pesticide formulation just prior to use.

Under this amendment, containers (55 U.S. gallons or greater in capacity) storing oil prior to mixing it with a pesticide, or containers used to store pesticides that contain oil, are considered bulk storage containers and continue to be regulated as such under the SPCC rule.

a. Comments

Several commenters expressed general support for the exemption of pesticide application equipment and related mix containers on farms from the SPCC requirements. Other commenters suggested that the exemption should be extended to all users of this equipment, arguing that this would limit the potential for duplicative regulation of pesticides by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the SPCC program. For example, the energy utilities sector requested an exemption for the pesticide application equipment and related mix containers they use to maintain their right-of-way networks and to preserve treated wood poles used in electricity transmission and distribution. One commenter suggested that the Agency exempt pesticide mixtures with low concentrations of oil from SPCC regulation altogether.

b. Response to Comments

EPA evaluated the merits of extending the exemption for all pesticide application equipment and related mix containers at farms to all such equipment, regardless of ownership or where used, based on the fact that this pesticide use, and certain pesticide containers, are already subject to ''similar'' regulation under FIFRA to assure the safe use, reuse, storage, and disposal of pesticide containers. As such, EPA agrees with the commenters that it would be appropriate to extend the exemption to pesticide application equipment and related mix containers, regardless of ownership or point of use.

On the other hand, EPA does not agree that the Agency should exempt pesticide mixtures with low concentrations of oil from SPCC regulation. Pesticide mix formulations, such as those that contain crop oil or adjuvant oil, are potentially subject to the SPCC rule because they are considered oil mixtures. The statutory definition of oil includes oil of any kind and in any form (33 U.S.C. section 1321(a)(1)), and does not exclude oil mixtures. Discharges of oil mixtures to navigable waters or adjoining shorelines may be harmful as set forth in 40 CFR part 110.

2. Applicability of Mobile Refueler Requirements to Farm Nurse Tanks

In the October 2007 notice of proposed rulemaking (72 FR 58378, October 15, 2007), EPA clarified that the definition of mobile refueler, as promulgated in the December 2006 amendments to the SPCC rule (71 FR 77266, December 26, 2006), includes a nurse tank, which is a mobile/portable container used at farms to store and transport fuel for transfers to or from farm equipment (such as tractors and combines) to other bulk storage containers (such as containers used to provide fuel to wellhead/relift pumps) at the farm. A nurse tank is often mounted on a trailer for transport around the farm; thus, EPA believes that this function is consistent with that of a mobile refueler. A nurse tank, like other types of mobile refuelers, is exempt from the sized secondary containment requirements at §§ 112.8(c)(2) and 112.12(c)(2), but is still subject to the general secondary containment requirements at § 112.7(c).

a. Comments

Several commenters supported the Agency's clarification that a nurse tank is considered a mobile refueler, and

thus exempt from the sized secondary containment requirements. Some commenters also requested that EPA clarify that the definition of mobile refuelers includes non-road licensed refueling equipment which are used to refuel farm equipment in the fields.

b. Response to Comments

EPA agrees with those commenters supporting the clarification. EPA also understands that agricultural retail suppliers may provide refueling services via non-road licensed equipment to farm equipment in farm fields. As the Agency described in the preamble to the proposed rule (72 FR 58378, October 15, 2007), a nurse fuel tank is typically used at a farm to store and transport fuel to or from farm equipment. Therefore, EPA agrees with commenters that non-road licensed equipment that is used to refuel farm equipment functions as a mobile refueler, similar to a farm fuel nurse tank. Additionally, owners and operators of these nurse tanks may benefit from other amendments in this action regarding the extension of relief from sized secondary containment to all non-transportation-related tank trucks. For example, nurse tanks containing oils other than a fuel such as lubrication or hydraulic oil, would also be eligible.

3. Differentiating the SPCC Requirements for Farms

In developing the amendments in the October 2007 proposed rule, EPA considered and took comment on a number of alternatives for differentiating the SPCC requirements for farms, but are not finalizing them, as discussed below.

a. No Further Action

EPA evaluated whether any further action was necessary specific to farms, including no further action. As described in the proposal (72 FR 58378, October 15, 2007), the Agency proposed amendments based on previous comments from agricultural stakeholders, farm-related site visits conducted by EPA and the August 16, 2006, action concerning pesticide containers (40 CFR part 165, Subpart E, 71 FR 47330). EPA is finalizing those actions; the Agency also is promulgating the following additional amendments to the SPCC regulation that could also benefit farmers: Clarifications to the definition of facility; the option to allow the owners and operators of a subset of qualified facilities (*i.e.*, ''Tier I qualified facilities'') to complete the SPCC Plan template in Appendix G of this part in lieu of preparing a full SPCC Plan; exemption of residential heating oil tanks at single family residences, including at farms; amendments to the security and integrity testing requirements; exemption from the loading/unloading rack requirements; and amendments to the facility diagram requirements.

b. Exempt Farms Below a Certain Storage Capacity Threshold

EPA considered exempting farms that stored oil below a certain oil storage capacity threshold (other than 1,320 U.S. gallons) from the SPCC requirements, but determined that there was insufficient data available to support an exemption exclusive to farms. While farming operations may be unique, the storage tanks found at farms are similar in function and design as those found at other types of facilities, and therefore have a similar potential for discharge. As a result, EPA chose not to propose this option, but did request comment on the merits of this approach.

c. Alternative Qualified Facility Eligibility Criteria for Farms

Under § 112.6, a facility that has an aggregate aboveground storage capacity of 10,000 U.S. gallons or less and has not had a single discharge exceeding 1,000 U.S. gallons or two discharges each exceeding 42 U.S. gallons within any twelve month period in the three years prior to Plan certification, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years is eligible for the qualified facility Plan requirements (*i.e.* a self-certified Plan in lieu of a PE certified Plan). The current criteria for qualified facilities, found at § 112.3(g), treat farms like all other facilities. However, EPA considered whether there are alternative criteria unique to farms that would be appropriate for identifying qualified facilities. In the October 2007 proposed rulemaking, EPA requested comment on (1) whether a change in the criteria is appropriate for farms; and (2) whether a higher threshold is appropriate for farms.

d. Comments

Several commenters recommended that the Agency provide an exemption for farms at a minimum of 10,000 U.S. gallons oil storage capacity, citing a lack of risk at such a volume and/or the potential for cost savings, although no specific data was provided to support this position. Other commenters suggested that EPA adopt a higher threshold, such as a 20,000-gallon threshold, as a criterion for qualified facility eligibility. Specifically, agricultural stakeholders requested that EPA raise the Tier I individual container threshold to 10,000 U.S. gallons and raise the Tier II total oil storage capacity threshold to 20,000 U.S. gallons. These commenters supported this threshold by citing limitations on the lower limit for bulk purchase of oil, the need to maintain empty and/or seasonal-use tanks on a farm, the lack of financial resources to hire environmental managers, the low likelihood of oil spills in the industry, and general environmental stewardship practices inherently in place.

Still other commenters provided additional comments and suggestions related to farms. One commenter requested that EPA remove the qualified facility approach so that all farmers, including small businesses and other small oil storage facilities are required to prepare a complete SPCC Plan certified by a PE based on 1,320-gallon storage capacity. Other commenters requested additional time for farms to comply with the SPCC regulation, stating that this additional time will provide farmers and others the opportunity to work with government agencies, including the U.S. Department of Agriculture (USDA), on the development of a model plan or guidelines. Finally, a commenter sought clarification that oil tanks not in use can be classified as out of service, without the need to remove the tanks from the facility.

e. Response to Comments

EPA continues to believe that there is insufficient data to support an outright exemption exclusively for farms beyond the existing aboveground storage capacity threshold of 1,320 U.S. gallons that applies to all facilities (§ 112.1(d)(2)(ii)). As noted previously, no data was provided by the commenters to support such an exemption. In addition, EPA notes that a significant number of owners and operators of farms will benefit from the amendments finalized in this action and the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006), which allow a significant number of farms to develop self-certified SPCC Plans.

With respect to an alternative ''qualified facility'' threshold, EPA considered the commenters' suggestions for modifying the existing qualified facilities threshold of 10,000 U.S. gallons total aboveground storage capacity. However, the agricultural community did not provide information that would lead the Agency to conclude that farms are sufficiently different to warrant further differentiation from other facilities that store oil. In fact, EPA believes that many non-farm facilities could have similar needs to purchase

fuel in bulk and may have similar if not identical storage needs as identified by agricultural stakeholders. Thus, EPA is not persuaded by these comments to raise the existing qualified facilities threshold solely for farms beyond 10,000 U.S. gallons. In setting the qualified facilities threshold at 10,000 U.S. gallons in the December 2006 amendments, EPA sought to provide an alternative for facilities, among other things, with simple oil storage configurations and smaller quantities of oil handled (see 71 FR 77271, December 26, 2006). EPA continues to maintain that the focus of the qualified facilities alternative should be on simple configurations and small quantities of oil stored or handled.[3]

It should also be noted that, as described in Section V.G of this notice, EPA is finalizing a multi-tiered approach to allow the owner or operator of a facility that meets the eligibility criteria for a qualified facility to self-certify his SPCC Plan, and allow the owners or operators of a subset of qualified facilities (*i.e.*, ''Tier I qualified facilities'') to complete the SPCC Plan template in Appendix G of this part in lieu of preparing a full SPCC Plan. EPA believes that the Tier I qualified facility alternative should focus on facilities with the simplest configurations and smallest oil storage containers. Commenters did not provide sufficient data to support an increase in the Tier I threshold for farms higher than proposed. For more information on Tier I and Tier II qualified facilities, see Section V.G of this notice.

EPA also disagrees that the amendments to the SPCC rule in December 2006 provide ''special treatment'' to any eligible facility. Farmers, small businesses, and other small oil storage facilities may be eligible to self-certify their SPCC Plans if they meet the eligibility criteria for qualified facilities in § 112.3(g). In providing this option for facilities handling smaller amounts of oil, the Agency sought to focus on those smaller, less complex operations that may be concerned about the impact of using a PE on their limited budget. Some of the current noncompliance with the SPCC regulation may be attributed to those concerns. The Agency believes that providing a streamlined option for owners and operators of these smaller, less complex facilities should improve the overall compliance for the SPCC regulation, ultimately resulting in greater environmental protection (71 FR 77270, December 26, 2006). The owners and operators of farms, small businesses and other small oil storage facilities may be eligible to self-certify their SPCC Plans if they meet the eligibility criteria for qualified facilities in § 112.3(g).

EPA defines permanently closed at § 112.2. Any container that meets this definition is not subject to the SPCC regulation and therefore would not be included in the facility's aggregate oil storage capacity. The definition does not require that the permanently closed container be removed from the facility. Similarly, a new, empty tank that arrives at a farm or other SPCC-regulated facility is not to be counted towards a facility's aggregate oil storage capacity until the tank is actually used to contain oil. EPA discusses this clarification further in section V.M of this notice.

In response to the commenters requesting additional time for farms to comply with the SPCC regulation, EPA believes that the amendments to the SPCC rule in this final action address the concerns raised by the agricultural industry. Farmers will benefit from many of the streamlined rule provisions including: Clarifications to the definition of facility; the option to allow the owners and operators of a subset of qualified facilities (*i.e.*, ''Tier I qualified facilities'') to complete the SPCC Plan template in Appendix G of this part in lieu of preparing a full SPCC Plan; exemption of residential heating oil tanks at single family residences, including farmsteads; amendments to the security and integrity testing requirements; exemption from the loading/unloading rack requirements; and amendments to the facility diagram requirements. Furthermore, in a separate action in the **Federal Register** of November 26, 2008, (73 FR 72016), EPA is proposing a new compliance date for the owner or operator of a farm, as defined in § 112.2, that also meets the eligibility criteria as a qualified facility, to prepare or amend and implement the farmer's SPCC Plan.

C. Residential Heating Oil Containers

Many regulated facilities, including farms, may include the residence of the owner or operator within the geographical confines of the facility. EPA did not intend to regulate residential uses of oil (that is, those at non-commercial buildings) under the SPCC rule. Therefore, EPA is exempting residential heating oil containers at single family residences from the SPCC requirements.

1. Exemption for Residential Heating Oil Containers

EPA is adding a new paragraph (9) under the general applicability section, § 112.1(d) to exempt from SPCC applicability containers that are used to store oil for the sole purpose of heating single-family residences (including a residence at a farm). EPA is also modifying § 112.1(d)(2) so that the capacity of the single-family residential heating oil containers are not counted toward facility aggregate oil storage capacity. This action removes from SPCC applicability containers (both aboveground and completely buried) located at a single-family residence that are used solely to store heating oil used to heat the residence. Under this amendment, the owner or operator is not required to count any residential heating oil container as part of the facility's aggregate storage capacity for the purpose of determining SPCC applicability, and no SPCC requirements will apply to the exempt containers. The SPCC requirements continue to apply, however, to oil containers used to heat other non-residential buildings within a facility, because the exemption covers only residential heating oil containers at single family residences.

a. Comments

Several commenters expressed support for the exemption of residential heating oil containers at single family residences from the SPCC requirements. However, some commenters suggested extending the exemption to locations beyond single-family residences. One commenter suggested that EPA exempt buildings and offices located remotely from mining operations. Another commenter suggested the exemption should include heating oil tanks at a facility occupied daily, with storage capacity not exceeding 5,000 gallons, in containers not exceeding 1,000 gallons, because these facilities are regularly occupied, and thus would not pose any more likelihood of a release than a single-family residence. One commenter suggested exempting heating oil storage containers that serve four or fewer households, consistent with the Federal underground storage tank regulations.

b. Response to Comments

EPA agrees with those commenters who supported the exemption, and is finalizing the exemption as proposed, because EPA views a single-family residence as a household that has direct ownership of the oil stored in the heating oil container. The Agency did not intend, by itself, that a single-family

[3] Although the Agency chose not to raise the threshold for farms in identifying who is eligible as a ''qualified facility,'' the Agency estimates that under the current qualified facilities eligibility criteria, greater than 90 percent of farms subject to the SPCC rule could be eligible.

residence that stores heating oil for its use be subject to SPCC applicability, particularly because such residences generally do not have significant quantities of other types of oil. The preamble to the original 1973 SPCC rule (38 FR 34164, December 11, 1973), identified containers of 660 U.S. gallons as the normal domestic code size for non-buried heating oil containers, and that buildings may have two such containers. The storage capacity thresholds for SPCC rule applicability were initially established at 660 U.S. gallons for an individual container and 1,320 U.S. gallons total aboveground capacity for the facility, based on the possible capacity of residential heating oil containers. Thus, the presence of heating oil containers at a single-family residence was generally not intended, by itself, to trigger SPCC applicability. On the other hand, EPA disagrees with those commenters who suggested extending the exemption beyond heating oil containers at single-family residences. Owners and operators of commercial facilities, such as mining operations and commercial multi-family structures (such as condominiums and apartment complexes), will generally store much larger volumes of oil, and if there is a reasonable expectation of an oil discharge to navigable waters or adjoining shorelines, EPA believes it needs to be addressed in the SPCC Plan. Of course, any facility that has an aggregate oil storage capacity of less than 1,320 U.S. gallons in aboveground containers or 42,000 U.S. gallons in completely buried tanks are not subject to the SPCC regulation (see § 112.1(d)(2)). In addition, if a commercial facility (for example, a university) includes a single-family residence on the premises, then any heating oil container associated solely with this residence is exempt from SPCC rule applicability.

2. Alternative Option Considered

EPA invited comments on an exemption only for residential heating oil containers located at farms, because farms commonly include, within the geographical confines of the facility, the residence of the farmer. Under this option, only heating oil containers associated with single-family residences on farms would benefit from an exemption from the SPCC rule.

a. Comments

One commenter supported exempting heating oil storage containers located at a farm facility's single-family residence.

b. Response to Comments

EPA agrees with the commenter that heating oil containers located at a single-family residence at a farm should be exempt from the SPCC rule and is finalizing such an exemption. However, the commenter did not provide any basis to limit the exemption solely to farms. Because EPA believes the same rationale applies to exempt heating oil containers to single-family residences at facilities other than farms, the exemption applies to all single-family residences.

D. Definition of Facility

EPA first defined both ''facility'' and ''production facility'' at § 112.2 in the July 2002 amendments to the SPCC rule (67 FR 47042, July 17, 2002). Under this action, EPA is modifying the definition of facility in three ways: (1) To clarify that this definition alone governs the applicability of 40 CFR part 112; (2) to clarify that containers can be separated or aggregated, based on various factors in defining ''facility''—that is, the owner or operator has discretion in identifying which contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines make up the facility; and (3) to add the qualifier ''oil'' before the term ''waste treatment.''

1. Revisions to the Definition of Facility

EPA is amending the definition of ''facility,'' as found in § 112.2, in the following ways:

- To show that only the definition of ''facility'' rather than the definition of ''production facility'' determines applicability for purposes of part 112, and specifically in § 112.20(f)(1) when applied to an oil production facility, EPA is adding the sentence ''Only this definition governs whether a facility is subject to this part.'' to the definition of facility. This language is consistent with the clarification on the definition of facility published in a May 25, 2004 **Federal Register** notice (69 FR 29728).
- To address concerns over how oil containers and equipment can be separated or aggregated for purposes of determining ''the facility,'' and thus, the applicability of the SPCC requirements to ''the facility,'' EPA is inserting the sentence ''Contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines under the ownership or operation of the same person may be considered separate facilities.'' These revisions allow an owner or operator of a facility to separate or aggregate containers to determine the facility boundaries, based on such factors as ownership or operation of the buildings, structures, containers, and equipment on the site, and activities being conducted, property boundaries, and other relevant considerations. EPA is adding the terms ''property,'' ''parcel,'' and ''lease'' to the list of terms mentioned in the first sentence of the definition. EPA believes that adding these terms further distinguishes the attributes that can be considered in determining facility boundaries. These additions are merely examples of terms that might define a facility and are familiar to the regulated community, such as farmers or oil production facility owners. They are not meant to be exclusive.
- To clarify that the term ''waste treatment'' refers to oil waste treatment and not to treatment of any other type of waste that may be generated, EPA is amending the first sentence of the definition of facility to add the qualifier ''oil'' before the term ''waste treatment.''

a. Comments

Many commenters expressed general support for the proposed amendments. Several commenters stated that these revisions would allow them the ability to prioritize compliance activities in environmentally and economically beneficial ways (for example, being able to plan for potential discharges in areas where they are more likely to occur). Several commenters indicated that certain types of facilities, such as those in the wind power, agriculture, electrical utility, forestry, aviation, and coal mining industries, might be managed by multiple operators, and that dividing a parcel of land into facilities on the basis of these individual operations makes sense.

One commenter, however, objected to the amendment if it would result in a facility being disaggregated into more than one facility, thereby lowering the total oil capacity volume of the 'new' facility to below the regulatory thresholds.

b. Response to Comments

EPA agrees with those commenters who supported this approach. The Agency also agrees with the commenters that the owner or operator has the discretion to determine what constitutes a facility. That is, the rule may become applicable to a facility for the first time in cases of aggregation of buildings, structures or equipment and associated storage or type of activity, or the division of the facility may end applicability due to separation of buildings, structures or equipment and associated oil storage or type of activity. Thus, EPA recognizes that this

amendment may have the effect of removing a facility from being subject to the SPCC requirements. However, an owner or operator may not make facility determinations indiscriminately and in such a manner as to simply avoid applicability of the rule (for example, the division of one facility into separate facilities with one oil storage container located at each facility where all storage containers are located side-by-side or close to each other, and are used for the same purpose). For further information on the definition of facility, *see* Chapter 2 of the *SPCC Guidance for Regional Inspectors.*

2. Determining the Components of a Facility: Examples of Aggregation or Separation

The factors for determining the boundaries of a facility as listed in the definition of facility are not exclusive, but are merely examples. The *SPCC Guidance for Regional Inspectors* elaborates on additional factors that may be considered. Those factors may include, but are not limited to: Ownership, management, or operation of the containers, buildings, structures, equipment, installations, pipes, or pipelines on the site; similarity in functions, operational characteristics, and types of activities occurring at the site; adjacency; or shared drainage pathways. In the October 2007 proposed rule, EPA provided several examples and hypothetical scenarios of how a facility owner or operator may determine what is considered a ''facility'' for the purposes of an SPCC Plan (*see* 72 FR 58387, October 15, 2007).

a. Comments

One commenter stated that, for oil and gas operations, owners and/or operators often combine many leases together. These leases may not be associated with the same oil or gas field, but they are associated with the same operator. The commenter requested assurance that this practice is consistent with the amended definition of facility.

While additional comments did not focus on the specific examples provided, several commenters raised questions about how the modification to the definition of facility may affect various types of facilities. One commenter supported flexibility to prepare single or multiple SPCC Plans for wind power plants, which potentially involve many landowners spread over large areas. One commenter requested clarity that a petroleum refinery owner may determine that refinery operations are a facility and ongoing remediation activities at the same petroleum refinery location can be considered a separate facility. Another commenter from the aviation sector requested that EPA clarify whether a tank at an exempt facility may be subject to regulation by transferring fuel from the tank to a regulated mobile refueler. Several commenters suggested that operators may prepare multi-facility SPCC Plans that combine common elements (such as structures, equipment, inspections, integrity testing, secondary containment designs, and response procedures), while retaining site-specific information; these commenters urge EPA to clarify that using a single Plan for multiple locations does not force facilities to be considered a single facility for FRP purposes.

b. Response to Comments

As described in the hypothetical scenario (72 FR 58387, October 15, 2007), the Agency reiterates that an owner or operator of an oil production facility may aggregate some or all of his leases into one Plan, at his discretion, whether or not they are associated with the same oil or gas field. Thus, this practice is consistent with the amended definition of facility being promulgated by this action.

With respect to the other comments submitted on how the definition of facility may affect various types of facilities, EPA agrees that wind power plants, whether spread over large or small areas and which may involve multiple landowners, may be appropriately defined as single or multiple facilities, depending on the circumstances, at the owner or operator's discretion. Such facilities may be included in single or multiple facility SPCC Plans. EPA also generally agrees with the commenter that a petroleum refinery owner or operator may, at his discretion, decide that remediation activities at an operating petroleum refinery constitute a separate facility. Furthermore, EPA agrees with the commenter that the Agency does not regulate the transfer of fuel at an exempt facility. However, once the fuel is transferred to a regulated container at an otherwise regulated SPCC facility, the transfer activity becomes subject to the SPCC requirements.

Finally, as noted previously, the definition of facility determines the applicability for all purposes under part 112. Thus, once an owner or operator defines the extent of his facility, that definition determines applicability for both SPCC and FRP purposes. The owner or operator may, at his discretion, create a Plan that includes more than one site, and define it as one facility which pertains to both FRP and SPCC applicability. An owner or operator may also combine multiple facilities into a single SPCC Plan, combining common elements, while retaining facility-specific information (a multi-facility Plan). While the Plan may encompass multiple facilities, the applicability of SPCC and FRP requirements is determined by the extent of each individual facility. The amendment to the definition of facility and the clarifications described in this action should not be viewed as a deterrent to the use of multi-facility SPCC Plans, a concern expressed by operators in the oil production sector.

3. Alternative Options Considered

In developing the amendments finalized in this notice, EPA considered alternatives for addressing the definition of facility, including taking no action, and addressing concerns only through guidance. No comments were received on these specific alternative options. EPA also requested comments on other alternatives that could serve to address the needs of the regulated community, while at the same time maintain appropriate levels of environmental protection.

a. Comments

A commenter suggested removing the terms ''* * * property, parcel, lease * * *'' from the definition of facility because the commenter believes these terms complicate and confuse the definition. Another commenter urged EPA to state that the determination of a ''facility'' for the purpose of preparing an SPCC Plan does not preclude the operator from making a different determination of the scope of the facility for the purposes of reporting or planning under any other Federal or state statute. Other commenters recommended that EPA clarify that a lease does not necessarily define a facility. Another commenter also requested that EPA clarify that the definition of facility excludes DOT and U.S. Coast Guard (USCG) components. Still another commenter suggested that EPA codify the litigation settlement language either as rule amendments or an appendix to the rule. Finally, one commenter recommended that EPA give 120 days to a facility owner or operator to resolve any compliance concerns, including a disputed facility determination.

b. Response to Comments

EPA disagrees with the suggested edit to remove the terms ''* * * property, parcel, lease * * *'' from the definition of facility. Unlike the commenter, the

Agency believes that these terms serve as clarifying examples of what may constitute a facility.

EPA agrees that the definition of facility, as defined in § 112.2, applies only for purposes of part 112, and not for purposes of any other Federal or state statute. However, this would not prevent the owner or operator of a facility from defining the facility boundaries in the same way that he defines it to comply with other regulations.

EPA clarifies that a lease may, at the owner or operator's discretion, constitute a facility, but does not necessarily create a facility. According to the definition, contiguous or non-contiguous buildings, properties, leases, structures, installations, pipes, or pipelines under the ownership or operation of the same person may be considered separate facilities. The definition further lists several site-specific factors, including, but not limited to, ownership or operation of buildings, structures, and equipment on the same site and types of activity at the site.

Generally, a facility for SPCC purposes excludes components which are not subject to EPA's jurisdiction, but are subject to the jurisdiction of other agencies, such as DOT or USCG. However, EPA and DOT recognize that in certain situations, dual jurisdiction has been applied to certain components of a facility, and that this approach can pose confusion to the regulated community. EPA and DOT thus are currently working to minimize overlapping regulation in accordance with their 1971 MOU regarding agency jurisdiction (36 FR 24080, November 24, 1971) and will publish the results of that effort in the **Federal Register** at a later date. For more information, please refer to the proposed rule **Federal Register** notice (72 FR 58419, October 15, 2007).

EPA believes that this action addresses the facility definition issue in the settlement of the 2002 SPCC rule litigation, because in the amended definition, EPA clarifies that only this definition is used to determine whether a facility is subject to 40 CFR part 112. EPA also has stated in this preamble that the positions that EPA has taken in the July 2002 SPCC rule litigation settlement are still the Agency's existing positions.

Finally, EPA disagrees that owners or operators of SPCC regulated facilities should be given 120 days to address any possible compliance concerns, including but not limited to, differences of opinion on a facility determination. Whether or not a total or partial Plan is needed, or whether an existing SPCC Plan should be amended is a compliance issue, subject to the provisions of § 112.1(f) or § 112.4(e) and (f). Both of these sections provide adequate time for appeal from an initial decision of the Regional Administrator to the Administrator. Therefore, a period of 120 days is not included in this final rule to allow the owner or operator to resolve compliance issues.

E. Facility Diagram

Section 112.7(a)(3) of the SPCC rule requires that a facility owner or operator include in his SPCC Plan a facility diagram that identifies the location and contents of oil containers, connecting piping, and transfer stations. EPA is amending the SPCC rule to provide additional flexibility to the requirement that the facility diagram include the location and contents of each container.

EPA is also requiring that certain containers and piping, exempted from SPCC requirements in this action, be identified on the facility diagram and marked as ''exempt.'' This includes intra-facility gathering lines subject to the requirements of 49 CFR part 192 or 195 as described in § 112.1(d)(11); and any produced water container, as defined in § 112.2, that meets the requirements at § 112.9(c)(6)(i) as described in § 112.1(d)(12). This will assist facility and EPA personnel in defining the jurisdictional boundaries at the facility and provide emergency response personnel with information that can be used to identify hazards during a spill response activity. EPA has not required that all containers exempted from the rule be marked on the facility diagram because in many cases it would be burdensome. For example, the mobility of motive power containers and mobile/portable containers with a capacity of less than 55 U.S. gallons would make them difficult to track on a facility diagram. For more information on these exemptions, see sections V.L and V.M of this preamble.

1. Revision to the Facility Diagram Requirement Regarding Mobile or Portable Containers

EPA is amending § 112.7(a)(3) to clarify that the facility diagram must include all fixed (that is, not mobile or portable) containers. For any mobile or portable containers (such as drums or totes), a facility owner or operator must mark the area of the facility on the diagram where such containers are stored. The facility owner or operator may mark the number of containers, contents and capacity of each container either on the facility diagram, or provide a separate description in the SPCC Plan. If the total number of mobile or portable containers changes, the owner or operator can include an estimate in the Plan of the number of containers, the anticipated contents, and capacities of the mobile or portable containers maintained at the facility.

EPA believes that the revision to the facility diagram requirements for mobile or portable containers will simplify the process for developing a facility diagram by allowing for a general description of both the area of the facility where they are located and of their contents, rather than representing each container individually.

a. Comments

Many commenters expressed general support for the amendments, while one commenter opposed the amendment because of increased cost estimates for facility diagram preparation. Several other commenters requested that EPA clarify, via rule language, which containers are considered mobile or portable (such as 55-gallon drums, intermodal bulk containers, mobile/portable maintenance tanks, and other small containers put into place and later moved). Other commenters suggested that EPA require only mobile or portable storage container locations that are ''fixed,'' ''permanent,'' or ''dedicated'' be included in the diagram. These commenters assert that internal facility tracking of these containers is sufficient for planning and emergency response purposes, that single drums are not reasonable to track on a diagram, and that their inclusion on the diagram does not provide increased environmental protection.

Several additional approaches were suggested by commenters. One commenter suggested that EPA allow facility operators to use ''range reporting'' for the number of containers and their quantities that may be in use at the facility. One commenter recommended allowing the use of an administrative alternative, such as a computerized tracking system, to provide real-time information on the quantity, type, location, and person responsible for mobile/portable containers. One other commenter suggested that § 112.5 should be amended to specify other examples of Plan changes that do not require re-certification. Finally, one commenter supported the use of facility diagrams for SPCC Plans that have already been prepared for other programs.

b. Response to Comments

The Agency agrees with those commenters that support the proposal,

and believes that clarification and simplification of these requirements will reduce costs and facilitate compliance. Thus, EPA disagrees with the commenter who argued, without any supporting data, that the facility diagram amendments would increase the cost of preparing a facility diagram. In addition, the Agency does not believe that it needs to clarify, via rule language, which containers are considered mobile or portable. The Agency has already provided examples of mobile/portable containers in *Section 4.4.4: Secondary Containment Requirements for Mobile/Portable Containers of the SPCC Guidance for Regional Inspectors* (for example, 55 gallon drums, skid tanks, totes, and intermodal bulk containers). Some oil refinery tank trucks and fueling trucks dedicated to a particular facility (such as a construction site, military base, or similar large facility) may fall under this category.

The Agency also disagrees with those commenters regarding the need to include on the facility diagram only those mobile or portable container locations that are ''fixed,'' ''permanent,'' or ''dedicated.'' The Agency believes and clearly stated in preamble to the proposed rule (72 FR 58378, October 15, 2007) that mobile or portable containers should be marked on the facility diagram in their out-of-service or designated storage area, primary storage areas, or areas where they are most frequently located, and believes that the final rule language accomplishes this purpose.

The Agency agrees with the comments supporting the flexibility of reporting an area on the facility diagram (such as a drum storage area) for these containers, as well as providing reasonable estimates (including ranges) for the potential number of mobile or portable containers, types of oil, and anticipated capacities in the SPCC Plan. The Agency believes that these estimates can be effectively used to determine the applicability of the rule thresholds and provide a general description of the mobile/portable containers in the Plan; this clarification may be particularly useful when the number of containers change frequently at the facility.

While the idea of an internal computerized tracking system, utilizing container bar codes to provide real-time information on the quantity, type, location, and person responsible for oil containers of 55 U.S. gallons or greater may suit some facilities, the Agency does not believe it can reasonably require such a system for all SPCC-regulated facilities. However, EPA believes that the amendments allow a facility owner or operator to implement such a system to assist in their tracking of mobile or portable containers, and to use it to meet the SPCC Plan requirement for these types of containers, if desired.

Also, the Agency does not believe it needs to expand the list of examples of compliance activities that do not require PE certification, as including every potential scenario is unreasonable. Owners or operators can refer to the existing list of changes that may require PE certification in § 112.5 and to the *SPCC Guidance for Regional Inspectors*.

Finally, the Agency does not require that a facility diagram be developed exclusively for the SPCC Plan, and does not agree that it needs to amend the rule language to allow for this. A facility diagram prepared for a state or Federal plan (including the FRP requirements under § 112.20) or for other purposes (for example, construction permits, facility modifications, or other pollution prevention requirements) may be used in an SPCC Plan if it meets the requirements of the SPCC rule (for example, it includes the contents and capacities of containers; transfer areas; and piping). Thus, EPA believes that the existing regulations allow for a facility diagram developed for other programs to be used, which not only facilitates compliance with this requirement, but also reduces the cost of diagram preparation.

2. Indicating Complicated Areas of Piping or Oil-Filled Equipment on a Facility Diagram

A facility diagram must also include all transfer stations and connecting pipes (§ 112.7(a)(3)). Associated piping and oil-filled manufacturing equipment present at an SPCC-regulated facility may be difficult to clearly present on a facility diagram, due to their relative location, complexity, or design. Therefore, in the October 2007 proposal (72 FR 58378, October 15, 2007), EPA requested comment on whether a rule revision is appropriate to provide further clarification on how complicated areas of piping or oil-filled equipment may be indicated on the facility diagram.

EPA believes that the *SPCC Guidance for Regional Inspectors* adequately addresses the flexibility inherent in the existing SPCC rule related to indicating these areas on a facility diagram, and that no additional rule amendment is necessary.

a. Comments

Several commenters expressed general support for an amendment to the regulations to provide further clarification on how piping or oil-filled equipment can be addressed on the facility diagram. These commenters noted the difficulties associated with including oil-filled equipment or piping detail on a diagram, and requested that EPA offer other options. Suggestions included a table identifying the oil-filled equipment and associated storage capacities; flow charts; piping inventories; summary statements; drawings; PE-required details; electrical one-line diagrams; and other means. One commenter suggested that the clarifications on flexibility provided in the *SPCC Guidance for Regional Inspectors* on the way the facility diagram can be drawn should be made part of the rule itself.

Another commenter stated that oil-filled equipment located in buildings with multiple floors, or in process areas with numerous other pieces of equipment, should not be required to be shown in the facility diagram, because including such detail is impractical for a complex site (such as a petroleum refinery or chemical plant). The commenter recommended that EPA limit the diagram requirements exclusively to fixed bulk oil storage containers. Other commenters expressed difficulties with depicting complex hydraulic and lubricant tubing; older equipment attributes; and indoor and/or outdoor piping (particularly at older facilities) that pose no risk of discharge to navigable waters or adjoining shorelines.

b. Response to Comments

The Agency interprets the requirement at § 112.7(a)(3) to allow an owner or operator of a facility to represent such systems in a less detailed manner on the facility diagram in the SPCC Plan, as long as the information is contained in more detailed diagrams of the systems or is contained in some other form and such information is maintained elsewhere at the facility and this location is referenced in the SPCC Plan. The *SPCC Guidance for Regional Inspectors* describes the Agency's interpretation of the requirements for a facility diagram that allow an owner or operator to determine the scale and level of detail shown on a facility diagram according to the needs and complexity of the facility. Thus, the Agency agrees with those commenters who believe that the guidance adequately addresses the flexibility for complying with these requirements. The guidance document illustrates how the current regulatory requirement allows flexibility in the way the facility diagram is drawn to include complex

designs of oil-filled equipment or pipelines. As noted in the guidance document, schematic representations that provide a general overview of the piping service (for example, supply/return) may provide sufficient information when combined with a description of the piping in the SPCC Plan. Alternatively, overlay diagrams showing different portions of the piping system may be used where the density and/or complexity of the piping system would make a single diagram difficult to read. For areas of complicated piping, which often include different types, numbers, and lengths of pipes, the facility diagram may show a simplified box labeled ''piping'' or show a single line that identifies the service (for example, supply/return), as long as more detailed diagrams are available elsewhere at the facility. Therefore, because the existing regulations already provide adequate flexibility, which is further described in the *SPCC Guidance for Regional Inspectors*, and because the Agency believes that amending the regulatory text will not provide any greater clarity, EPA has decided not to provide further amendment to the rule.

F. Loading/Unloading Racks

Tank car and tank truck loading/unloading racks are subject to specific requirements in § 112.7(h), including sized secondary containment. EPA is finalizing a definition for the term ''loading/unloading rack,'' which governs whether a facility is subject to § 112.7(h). Under this amendment, the requirements described at § 112.7(h) only apply to areas of a regulated facility where a loading/unloading rack, as defined in § 112.2, is located.

A loading/unloading rack can be located at any type of facility; however, the loading and unloading areas associated with oil production tank batteries and farms generally do not have the equipment described in the definition of loading/unloading rack finalized in this action. Therefore, EPA is specifically excluding oil production facilities and farms from the requirements at § 112.7(h).

1. Loading/Unloading Rack Definition

EPA is finalizing the following definition for ''loading/unloading rack'' under § 112.2: ''*Loading/unloading rack* means a fixed structure (such as a platform, gangway) necessary for loading or unloading a tank truck or tank car, which is located at a facility subject to the requirements of this part. A loading/unloading rack includes a loading or unloading arm and may include any combination of the following: Piping assemblages, valves, pumps, shut-off devices, overfill sensors, or personnel safety devices.'' This definition is a slightly modified version of the definition proposed in October 2007. In developing the proposed definition, EPA reviewed information from a number of different sources and reviewed various types of equipment considered components of loading racks (*see* 72 FR 58378, October 15, 2007). The Agency sought comment on the proposed definition of ''loading/unloading rack'' and requested suggestions on any other definitions for ''loading/unloading rack'' that would be more suitable. EPA also requested a description of a ''loading/unloading arm.''

a. Comments

Many commenters expressed general support for the proposed definition of loading/unloading rack. However, other commenters opposed the proposed definition, suggesting that it is too broad and consequently includes many loading/unloading areas or equipment that would not normally be components of ''racks,'' such as storage containers equipped with safety platforms, piping assemblages, valves, pumps, shut-off devices, overfill sensors, or personnel safety devices. One commenter expressed concern that the proposed definition of loading rack could include a facility ''where filling/emptying is accomplished by direct connection to the same tanks.'' Another commenter expressed concern that, by not defining ''loading arm,'' EPA might inadvertently cause hoses used at loading racks to be identified as loading/unloading arms. Still another commenter stated that, in the state of Alaska, many rural facilities do not have a gangway and a fixed loading arm, so the proposed definition would leave these facilities not subject to § 112.7(h).

Several commenters emphasized that a loading arm is an essential component of a loading/unloading rack, and that EPA's definition should be modified to reflect this fact. A commenter recommended that accessories, such as piping assemblages, valves, pumps, shut-off devices, overfill sensors, personnel safety devices be deleted from the definition, as these may or may not be a part of the rack, and one or more of these devices (for example, overfill sensors) are typically present on most tanks. The commenter also recommended that the definition of loading/unloading rack be narrowed to cover only permanently installed platforms, gangways or loading/unloading arms used in the loading or unloading of tack trucks or tank cars.

Other commenters requested that EPA more clearly define the components, such as platforms, gangways, and loading/unloading arms, and confirm that flexible hoses used at a loading/unloading rack should not be considered loading/unloading arms. Two commenters provided a suggested definition for ''loading/unloading arm.'' Specifically, these commenters suggested that ''loading/unloading arm'' be defined as ''consisting of at least two articulated parts that are connected in such a way that relative movement is feasible to transfer product via top or bottom loading/unloading to a transportation vehicle.''

One commenter suggested that the definition of loading/unloading rack be changed to identify examples of what are not loading racks (i.e., a nozzled connection to a tank, connection consisting of a flexible hose, a single connection with a valve, or a loading structure that is not overhead). This commenter also requested that EPA remove references to ''unloading'' from the definition.

Two commenters suggested a definition involving a throughput threshold for an area to be considered a loading rack (for example, limiting ''racks'' to those loading/unloading facilities with an annual average of 100 trucks, on a five-year rolling average; a throughput threshold of 800,000 gallons per month, based on the relatively low likelihood of a spill when petroleum product is transferred only occasionally). Another commenter suggested that EPA narrow the definition of loading/unloading racks by associating the definition with the flow-rate capacities of the associated pump systems, and clarify that loading/unloading racks are not typically associated with oil-filled operating equipment.

One commenter suggested that small tank transfers—that is, using a small transfer hose to fill a shop-built tank, and therefore having the potential of only a small release—should be viewed as a loading area and be subject to § 112.7(c), whereas large tank transfers—that is, using a larger hose equipped with a hose coupler and a stationary pump to transfer product at a rate greater than 50 gallons per minute, with the consequent likelihood of a larger release—should be viewed as a loading rack and be subject to § 112.7(h). Another commenter suggested a definition that would require loading/unloading racks to be used only for transportation-related tank trucks, rail cars, or vessels, not intra-facility vehicles.

Finally, one commenter suggested that EPA clarify that the requirement applies only to tank cars or tank trucks located within the loading/unloading rack and not to tank cars or trucks waiting to enter the loading/unloading rack.

b. Response to Comments

EPA agrees that the proposed definition of ''loading/unloading rack'' should be refined to provide clarity and address the concerns about the scope of the definition. Therefore, EPA has modified the proposed definition to provide more clarity by addressing concerns that a loading/unloading arm is an essential component of a loading rack, while describing other components that may be found at a loading or unloading rack.

The Agency does not intend this definition to include simple loading or unloading configurations, but rather to only include the associated equipment and structure associated with loading/unloading arms as part of a rack. Equipment present at a loading/unloading area where a pipe stand connects to a tank car or tank truck via a flexible hose, which is not equipped with a loading or unloading arm, is not considered a loading/unloading rack as defined in this action. However, the presence of flexible hoses on oil transfer equipment does not always indicate that the equipment is exempt from the definition of loading/unloading rack, as some top and bottom loading/unloading racks are made up of a combination of steel loading arms connected by flexible hosing.

EPA believes that providing the list of equipment usually associated with a loading/unloading rack in the definition will be useful for the owner or operator and the PE in determining the applicability of the rule requirements at § 112.7(h) to the facility. The Agency agrees with commenters that the key to the definition is the presence of a loading or unloading arm in association with a permanent structure and other equipment. Thus, the Agency has added the phrase ''a loading/unloading rack includes a loading or unloading arm'' in the definition to illustrate this point.

A definition for ''loading/unloading arm'' was not proposed. However, EPA understands, consistent with comments, that a loading/unloading arm is typically a movable piping assembly that may include fixed piping or a combination of fixed and flexible piping, typically with at least one swivel joint (that is, at least two articulated parts that are connected in such a way that relative movement is feasible to transfer product via top or bottom loading/unloading to a tank truck or rail car). However, certain loading/unloading arm configurations present at loading racks may include a loading/unloading arm that is a combination of flexible piping (hoses) and rigid piping without a swivel joint. In this case, a swivel joint is not present on the loading arm because flexible piping is attached directly to the rigid piping of the loading arm and the flexible hose provides the movement needed to conduct loading or unloading operations in lieu of the swivel joint.

Commenters raised concerns that, because of the new loading/unloading rack definition, many transfer operations (particularly those at rural facilities with no gangways or fixed loading arms) will not be regulated under the SPCC rule. The Agency disagrees with this assertion. Although the Agency intends the definition of loading/unloading rack to clearly delineate those facilities subject to the § 112.7(h) regulatory requirements (such as sized secondary containment), any otherwise regulated SPCC facility will still be subject to the general secondary containment requirements under § 112.7(c) for all areas where oil is transferred into or out of any regulated container.

EPA received several alternatives to the definition of loading/unloading rack contained in the October 2007 proposal. EPA considered these alternative definitions in developing the definition for loading/unloading rack promulgated in this notice. Specifically, several commenters recommended that the definition of loading/unloading rack be based on throughput, offering various throughput numbers as a method of defining transfer operations that would be subject to the § 112.7(h) requirements. However, these suggestions included limited supporting data. The complexity in determining a rack's throughput for a given time period would add additional burden on the owner and operator of a facility. Furthermore, there is no basis for deciding on a specific time period for this determination. Thus, EPA is not basing its definition of loading/unloading rack on a rack's throughput. Other commenters suggested that the definition provide examples only of equipment that should not be considered a loading or unloading rack. The Agency believes that it is much clearer to define the equipment typically associated with a loading or unloading rack than to provide a list of equipment that are not considered a loading or unloading rack. Most of the suggested definitions, however, focused on the presence of a loading arm as indicative of a loading or unloading rack. Many of the definitions focused on the presence of a structure and a list of related equipment. EPA agrees with many of the concepts illustrated in the alternative definitions received from commenters. Thus, EPA is finalizing an equipment-based definition, as proposed, as a clearer method for identifying transfer activities subject to the requirements of § 112.7(h).

Commenters suggested that EPA delete reference to the accessories, such as piping assemblages, valves, pumps, shut-off devices, overfill sensors, and personnel safety devices from the definition, as these may or may not be a part of the rack, and one or more of these devices (such as overfill sensors) are typically present on most tanks. The definition is not intended to address oil containers (such as tanks); the list of equipment specifically addresses equipment associated with loading/unloading rack structures. EPA believes that providing examples of equipment usually associated with loading/unloading racks would be useful for the owner or operator of a facility, as well as the PE, for determining the applicability of the definition.

EPA also is clarifying in this notice that tank cars and tank trucks are only subject to the requirements of § 112.7(h) when conducting loading or unloading operations associated with a loading/unloading rack as defined in this action. Otherwise, they are subject to the general secondary containment requirements at § 112.7(c). In addition, the definition finalized in this action typically will not include oil-filled equipment; however, transfers associated with oil-filled operational equipment where a rack is not present are still required to meet the general containment requirements of § 112.7(c).

2. Requirements for Loading/Unloading Racks

Although the title of § 112.7(h) refers to ''loading/unloading rack,'' the text of the requirement referred to ''loading/unloading areas.'' Therefore, to provide additional clarity, EPA is changing all references from loading/unloading ''area'' to loading/unloading ''rack.'' For example, § 112.7(h)(1) is modified as follows: ''Where loading/unloading rack drainage does not flow into a catchment basin or treatment facility designed to handle discharges, use a quick drainage system for tank car or tank truck loading/unloading racks. You must design any containment system to hold at least the maximum capacity of any single compartment of a tank car or tank truck loaded or unloaded at the facility.'' Section 112.7(h)(2) is similarly

modified and includes a technical correction of the word ''break'' to ''brake'' to correct a typographical error.

In the preamble to the July 2002 amendments to the SPCC rule (67 FR 47042, July 17, 2002), EPA stated that § 112.7(h) ''applies to containers which are aboveground (including partially buried tanks, bunkered tanks, or vaulted tanks) or completely buried (except those exempted by this rule)'' (67 FR 47110, July 17, 2002). Thus, this statement seems to indicate that § 112.7(h) does not apply to a loading/unloading rack (or any other transfer area) associated with a container that is exempted from the rule, such as an Underground Storage Tanks (USTs) that are subject to all of the technical requirements of 40 CFR part 280 or a state program approved under part 281. As described in the October 2007 proposal (72 FR 58378, October 15, 2007), EPA has reconsidered this position because a transfer to or from such a container at an SPCC-regulated facility is a potential source of discharge of oil into navigable waters or adjoining shorelines. Additionally, because a loading/unloading rack, or other transfer area, associated with an UST is not typically part of the UST system, it is not subject to all of the technical requirements of 40 CFR part 280 or 281. Therefore, EPA believes that such a loading/unloading rack should be regulated under the SPCC regulations in the same manner as any other transfer equipment or transfer activity located at an otherwise regulated SPCC facility.

a. Comments

Two commenters expressed general support for the amendments to § 112.7(h). However, one commenter suggested exempting loading/unloading activity from SPCC regulation, because standard industry practice is to place the connection valve inside a secondary containment area during loading/unloading. Other commenters suggested that EPA eliminate the sized secondary containment requirements for loading/unloading racks. Another commenter requested that EPA codify the settlement language regarding loading/unloading rack (*American Petroleum Institute* v. *Leavitt*, No. 1:02CV02247 PLF and *Marathon Oil Co.* v. *Leavitt, No.* 1:02CV02254 PLF). One other commenter suggested revised text for § 112.7(h) focusing on special control measures for portions of the facility with a higher likelihood of a discharge as described in § 112.1(b) (such as transfer areas where containers are frequently open for filling, or where couplings are frequently connected and disconnected from containers).

With regard to EPA's reconsideration of the applicability of § 112.7(h) to a loading/unloading rack associated with a container that is exempted from the rule, such as USTs that are subject to all of the technical requirements of 40 CFR part 280 or a state program approved under 40 CFR part 281, a commenter disagreed and stated that the provisions associated with 40 CFR 280.30(a) address spill prevention.

b. Response to Comments

EPA did not propose: (1) To exempt (nor does the Agency agree that the final rule should exempt) loading or unloading activities conducted at loading/unloading racks from the SPCC rule or (2) that such loading/unloading racks be exempted from the sized secondary containment requirements. Although the industry practices described by the commenter may be used to meet the rule requirements that exist for loading and unloading activities, these do not provide adequate justification to exempt this equipment from the SPCC regulation.

Commenters also requested that EPA codify the settlement language on this issue. EPA has not done this; however, the modification to change the word ''area'' to ''rack'' in § 112.7(h) is consistent with EPA's notice in the **Federal Register** in May 2004, which noted that § 112.7(h) only applies at facilities with loading and unloading ''racks'' (69 FR 29728, May 25, 2004). EPA also maintains its position, as clarified in a letter to the Petroleum Marketers Association of America (PMAA), that loading and unloading activities that take place beyond the rack area are not subject to the requirements of § 112.7(h), but are subject, where applicable, to the general secondary containment requirements of § 112.7(c) (Letter to Daniel Gilligan, President, Petroleum Marketers Association of America, from Marianne Lamont Horinko, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA, May 25, 2004 and 69 FR 29728, May 25, 2004).

EPA also does not agree with the commenter who suggested that further revisions be made to the rule requirements at § 112.7(h) to address special control measures for portions of the facility with a higher likelihood of a discharge as described in § 112.1(b). The Agency believes the current requirements are appropriate to address a discharge at the loading/unloading rack. The clarifications to the language in § 112.7(h) finalized in this action address the questions that have been raised by the regulated community on how these rule provisions apply to loading/unloading racks and do not apply to areas beyond the ''rack.''

Finally, one commenter stated that the provisions associated with 40 CFR 280.30(a) address spill prevention and thus, the requirements for loading/unloading racks should not apply to exempt USTs. While EPA recognizes that this provision (40 CFR 280.30(a)) describes spill and overfill control requirements when USTs are being filled, EPA still believes that the loading/unloading requirements should apply to these exempted USTs, for the reasons described earlier. However, EPA would note that to the extent that 40 CFR 280.30(a) addresses SPCC requirements, these measures can be described in the SPCC Plan, as appropriate. Therefore, transfers at loading/unloading racks and transfer areas associated with exempted USTs are considered regulated activities at an otherwise regulated SPCC facility. In addition, exempted USTs, at an otherwise regulated SPCC facility, equipped with a loading/unloading rack as defined in this action, are subject to the requirements of § 112.7(h). Also, exempted USTs, at an otherwise regulated SPCC facility, equipped with a transfer area (for example, dispenser or other transfer equipment) are subject to the requirements of § 112.7(c). Non-rack transfer areas are required to provide only general secondary containment for the most likely discharge, as discussed in Section V.H in this action, and may include active containment measures, such as response action or sorbent deployment. This interpretation is consistent with the approach EPA has taken with other exempt containers at an otherwise regulated SPCC facility. For example, in the preamble to the December 2006 amendments, EPA noted that although the amendment provided an exemption for motive power containers, the oil transfer activities to or from motive power containers occurring within an SPCC-regulated facility continue to be regulated (71 FR 77283, December 26, 2006). Consistent with the preamble to the December 2006 amendments, the Agency is therefore clarifying that at an SPCC-regulated facility, § 112.7(h) (including the sized secondary containment provision) applies to transfers at any loading/unloading rack associated with any type of container, including one that is exempted from the rule, as long as the loading/unloading rack meets the definition finalized in this notice. A transfer not associated with a loading or unloading rack is subject to the general secondary containment provision at § 112.7(c). No

rule change is needed to clarify this point, because a rule amendment to exempt a loading/unloading rack associated with an UST was never proposed or finalized. This clarification is intended to correct preamble language that was inconsistent with the Agency's position on other exempt containers and their associated transfer activities.

3. Exclusions

EPA is specifically excluding onshore oil production facilities and farms from the loading/unloading rack requirements at § 112.7(h) because the Agency and commenters alike believe that loading and unloading racks are not typically associated with these types of facilities. EPA is exempting these facilities from the requirements of § 112.7(h) for clarity in order to avoid confusion for owners or operators of oil production facilities or farms. At other facilities that likewise do not have a loading/unloading rack, the provisions at § 112.7(h) similarly do not apply.

Oil transfer areas, such as loading/unloading areas at farms and oil production facilities that are subject to the SPCC rule, nevertheless remain subject to the general secondary containment requirements of § 112.7(c). As EPA states in the *SPCC Guidance for Regional Inspectors*, ''Areas where oil is transferred but no loading or unloading rack is present are subject to § 112.7(c), and thus appropriate containment and/or diversionary structures are required. EPA does not require specifically sized containment for transfer areas; however, containment size must be based on good engineering practice.''

a. Comments

Several commenters expressed general support for the exclusions. In addition, one commenter requested that EPA also exclude agricultural retailers from § 112.7(h) because they are already subject to FIFRA regulations.

b. Response to Comments

The Agency agrees that it is appropriate to exclude onshore oil production facilities and farms from the loading/unloading rack requirements at § 112.7(h). Commenters confirmed EPA's understanding that there are few, if any, loading/unloading racks at oil production facilities, and that agricultural oil and fuel transfers at farms are generally not associated with loading/unloading racks. However, if an agricultural retail facility conducts fuel transfers with equipment that meets the definition of a loading/unloading rack, then this facility would be subject to the loading/unloading rack requirements at § 112.7(h). The Agency disagrees with the commenter who requested that agricultural retailers also be excluded for the loading/unloading requirements of § 112.7(h), because the FIFRA requirements do not provide spill prevention requirements at a level equivalent to the SPCC rule.

4. Alternative Option Considered

EPA considered not providing any amendments to the SPCC rule related to loading/unloading racks. Under this approach, EPA would not provide a regulatory definition for loading/unloading rack or an exclusion for farms and onshore oil production facilities from the loading/unloading rack requirements at § 112.7(h), but would instead continue to follow the interpretation of loading/unloading rack, as stated in the *SPCC Guidance for Regional Inspectors* and the May 2004 **Federal Register** notice. However, EPA did not choose this approach because the Agency believes it was important to address some of the confusion and questions raised by the regulated community.

a. Comments

Several commenters indicated that no rule change is necessary.

b. Response to Comments

As noted above, EPA disagrees with the commenters and has finalized the new definition and associated editorial changes to the rule to provide additional clarity in describing the type of equipment and facilities subject to the loading/unloading rack requirements under § 112.7(h).

G. Tier I Qualified Facilities

In December 2006, EPA finalized an amendment to the SPCC rule to allow the owner or operator of a qualified facility to self-certify his SPCC Plan. The Agency is amending the SPCC rule to provide an additional option for the owners and operators of a subset of qualified facilities that meet an additional criterion to complete and implement a streamlined, self-certified SPCC Plan template (promulgated as Appendix G to 40 CFR part 112), in order to comply with the requirements of the SPCC rule. For clarity, EPA is now using the term ''Tier II qualified facility'' to describe those qualified facilities as identified by and subject to the requirements promulgated in the December 2006 SPCC rulemaking (71 FR 77266, December 26, 2006) and the term ''Tier I qualified facility'' for a new subset of these qualified facilities. To qualify as a Tier I qualified facility in addition to meeting the eligibility criteria for a Tier II qualified facility, a facility must also have no individual aboveground oil storage containers with a capacity greater than 5,000 U.S. gallons.

A Tier II qualified facility is one that meets the criteria described in the December 2006 amendments to the SPCC rule (71 FR 77266, December 26, 2006): a facility that has an aggregate aboveground oil storage capacity of 10,000 U.S. gallons or less; and has had no single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or no two discharges as described in § 112.1(b), each exceeding 42 U.S. gallons within any twelve-month period in the three years prior to the SPCC Plan self-certification date, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years (this criterion does not include discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism). EPA is now further streamlining the SPCC requirements for certain qualified facilities that meet an additional criterion.

The following table illustrates the tiers, criteria, and options for qualified facilities and all others as described in this notice:

Qualified facilities*		All other facilities
Tier I	Tier II	
10,000 U.S. gallons or less aggregate aboveground oil storage capacity; and		More than 10,000 U.S. gallons aggregate aboveground oil storage capacity, or

Qualified facilities*		All other facilities
Tier I	Tier II	
Within any twelve-month period, three years prior to the Plan certification date, or since becoming subject to the SPCC rule if in operation for less than three years, there has been: (1) No single discharge of oil to navigable waters or adjoining shorelines exceeding 1,000 U.S. gallons; and (2) No two discharges of oil to navigable waters or adjoining shorelines each exceeding 42 U.S. gallons**; and		Within any twelve-month period, three years prior to the Plan certification date, or since becoming subject to the SPCC rule if in operation for less than three years, there has been: (1) A single discharge of oil to navigable waters or adjoining shorelines exceeding 1,000 U.S. gallons; or (2) Two discharges of oil to navigable waters or adjoining shorelines each exceeding 42 U.S. gallons**; or
No individual aboveground oil containers greater than 5,000 U.S. gallons;	Has individual aboveground oil containers greater than 5,000 U.S. gallons; or Owner or operator eligible for Tier I qualified facility status, but decides not to take the option or chooses to develop a ''hybrid'' Plan;	Owner or operator eligible for qualified facility status, but decides not to take the option;
Then: Complete and self-certify Plan template (Appendix G to 40 CFR part 112) in lieu of a full PE-certified Plan.	Then: Prepare self-certified Plan in accordance with all applicable requirements of § 112.7 and subparts B and C of the rule, in lieu of a PE-certified Plan.	Then: Prepare PE-certified Plan in accordance with all applicable requirements of § 112.7 and subparts B and C.

* *See* Section V.M of this notice for more information on qualified facility eligibility criteria specific to the oil production sector.

** This criterion does not include discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism. Additionally, the gallon amount described in this criterion addresses the amount of the discharge that actually reaches navigable waters or adjoining shorelines.

1. Eligibility Criteria

As proposed in October 2007, a Tier I qualified facility must meet all of the eligibility criteria for qualified facilities promulgated by EPA in December 2006 (71 FR 77266, December 26, 2006) with an additional criterion: A maximum individual aboveground oil storage container capacity of 5,000 U.S. gallons. EPA developed the Tier I category based on an individual container capacity in order to link any streamlined requirements with a reduced potential for oil discharge. That is, the maximum individual aboveground container capacity threshold is set at 5,000 U.S. gallons because this volume is consistent with industry consensus standards that call for varying levels of stringency based on container size and configuration. For example, the Steel Tank Institute's SP001, *Standard for the Inspection of Aboveground Storage Tanks* allows for periodic visual inspection alone, with no requirement for the inspector to be professionally certified, for containers of 5,000 U.S. gallons or less that are equipped with a spill control measure and a continuous release detection method. Furthermore, a facility with smaller storage containers often has less complicated operations, is typically an end-user of oil (does not distribute the oil further), is involved in few oil transfers, and may have predominantly mobile or portable containers with a few low-capacity fixed oil storage containers. Smaller containers have a smaller potential maximum discharge size, and there may be little or no piping associated with these small containers.

a. Comments

Several commenters expressed general support for the eligibility criterion. However, some commenters suggested increasing the container capacity eligibility criterion to 10,000 gallons, while other commenters suggested various other capacity thresholds. Several commenters expressed support for a three-tiered approach to the eligibility criteria for qualified facilities, with the use of a PE only in cases where the tank capacity is above 20,000 gallons.

One commenter recommended that criteria be introduced that take into consideration a facility's proximity to environmentally sensitive area(s) either by distance or some other logical means. Another commenter suggested using actual oil storage volumes rather than capacity to determine eligibility. Still another commenter suggested that AFVOs that would solidify without heating be excluded from the 5,000 U.S. gallon maximum individual container capacity.

One other commenter requested that EPA confirm that oil-filled operational equipment is eligible for Tier I status. The commenter noted concern that the definition of Tier I qualified facility in § 112.3(g)(1) may cause confusion about whether facilities with oil-filled operational equipment are eligible for the Tier I alternative, and whether the 5,000 gallon cap applies to oil-filled equipment.

Several commenters provided alternative suggestions to the eligibility criteria for both tiers of qualified facilities. One commenter suggested that the criterion for discharge history should be more stringent and require that any discharge during the three-year period prior to the Plan certification date disqualify a facility from the self-certification option as either a Tier I or Tier II qualified facility. The discharge history criterion does not include discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism. One commenter requested that EPA define the term ''terrorism'' in the explanation of the criteria to ensure regional consistency.

Commenters also requested raising the Tier II threshold above the 10,000 U.S. gallons aboveground oil storage capacity promulgated in the December 2006 amendments (71 FR 77266, December 26, 2006).

Finally, commenters suggested that the qualification criteria do not benefit oil and gas production stakeholders because the oil storage capacity thresholds are too low to allow these facilities to qualify to develop either a self-certified Plan or a Plan following the template in Appendix G.

b. Response to Comments

The majority of commenters supported this approach with additional suggestions. Several commenters suggested alternative thresholds to consider for Tier I qualified facilities; however, these commenters did not provide sufficient data to support increasing the thresholds beyond the proposed Tier I threshold of 5,000 U.S. gallons for a single oil storage container. Therefore, EPA is finalizing the Tier I qualified facilities criterion to require a maximum individual oil container of 5,000 U.S. gallons.

One commenter suggested considering proximity to sensitive environments in determining eligibility as a qualified facility. However, consideration of the impact of an oil discharge to the environment is made when determining the applicability of the SPCC regulation to the facility. Because the SPCC rule only applies to a facility when it has a reasonable potential to discharge oil in quantities that may be harmful to navigable waters or adjoining shorelines, EPA does not believe that an additional criterion is appropriate for an SPCC-regulated facility that may impact sensitive environments.

EPA also disagrees with the commenter who suggested that EPA use the operational volumes of oil storage at the facility rather than the shell capacity of the oil storage containers. The applicability of the SPCC regulation to a facility has always been based on shell capacity when calculating total oil storage capacity of the facility and the same oil storage capacity is then considered in determining applicability of the self-certification SPCC Plan for the facility. The operational volume at a facility may change frequently and therefore create confusion on which SPCC requirements apply to the facility and how to certify the SPCC Plan.

Other commenters requested that EPA consider excluding from both qualified facility thresholds—that is, Tier I and Tier II, the capacity of those containers containing AFVOs that would solidify without heating. The Agency disagrees because, similar to AC and other high viscosity oils, these AFVO containers are typically maintained at elevated temperatures to keep the oil in the liquid state. The AFVO could still spill, flow, and, depending on the location of the facility, could potentially reach navigable waters or adjoining shorelines.

One commenter requested clarification as to whether the term ''oil storage container'' included oil-filled operational equipment. To clarify, the maximum individual oil storage container criterion applies to any aboveground container at the facility that contains oil. This includes bulk storage containers, such as tanks and mobile or portable containers, oil-filled operational equipment (such as transformers), and other oil-filled equipment, such as flow-through process equipment. Thus, oil-filled operational equipment is eligible for Tier I status.

EPA disagrees with the commenter suggesting that the criterion for discharge history be more stringent, based on the fact that some discharges result despite adherence to the SPCC Plan. EPA chose a discharge history criterion similar to the reporting requirement in § 112.4(a) because a discharge smaller than what must be reported to the EPA Regional Administrator (RA) under this section may result from normal handling of oil at the facility and may not indicate a recurring problem resulting from a deficiency in the Plan or improper Plan implementation. Therefore, the RA would not likely require the owner or operator to amend the Plan and the facility owner or operator should be eligible to self-certify the SPCC Plan as a qualified facility.

EPA is not defining terrorism in the final rule. However, the Agency notes that the Homeland Security Act of 2002 defines terrorism as ''any activity that involves an act that is dangerous to human life or potentially destructive of critical infrastructure or key resources; and is a violation of the criminal laws of the United States or of any state or other subdivision of the United States; and appears to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion or to affect the conduct of a government by mass destruction, assassination, or kidnapping.'' *See* Section 2(15), Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002). The Agency does not believe that vandalism and sabotage are examples of terrorism. In the December 2006 amendments to the SPCC rule, EPA identified reportable discharges caused by external factors beyond the control of the facility owner or operator such as natural disasters, acts of war, or terrorism. The Agency specifically excluded these events from consideration in the reportable discharge history criterion for qualified facilities and qualified oil-filled operational equipment. At that time, EPA excluded sabotage and vandalism from the list of reportable discharge history extreme events because these are not necessarily beyond the control or planning ability of the facility owner or operator. (*See* 71 FR 77272, December 26, 2006.) The security provisions in § 112.7(g) require consideration for acts of vandalism. The owner or operator of a facility must describe in the Plan how he controls access to the oil-handling, processing and storage areas and the appropriateness of lighting to both prevent acts of vandalism and assist in the discovery of oil discharges.

Additionally, EPA is not changing the Tier II threshold and is not amending the total aboveground oil storage capacity for Tier II qualified facilities in this final rule as requested by some commenters. The Agency maintains that the focus of the qualified facilities alternative is on facilities with simple configurations and small quantities of oil stored or handled. The Agency addressed the eligibility criteria for the Tier II qualified facilities in the December 2006 rulemaking. The Agency recognizes that regardless of the threshold quantity selected, there are likely to be facilities just above that threshold that will be excluded. To the extent that facility owners or operators want to meet the criteria for a qualified facility, they have the option of reducing oil storage capacity at their facility by either removing containers from the facility inventory, or permanently closing containers in accordance with § 112.2.

With regard to the commenter suggesting that the qualified facilities approach does not benefit the oil and gas sector, EPA has estimated that the Tier II approach does allow approximately 13 percent of the smallest oil and gas production stakeholders to qualify to self-certify their SPCC Plans based on oil storage capacities below 10,000 U.S. gallons. In addition, the Agency also is finalizing an alternative set of criteria to qualify for Plan self-certification (Tier II) specific for oil production facilities. *See* Section V.M of this preamble for further discussion on the alternative criteria for the oil and gas production sector.

2. Provisions for Tier I Qualified Facilities

Under this amendment, in lieu of preparing a full SPCC Plan that is PE- or self-certified, an owner or operator of a Tier I qualified facility will have the option to complete the SPCC Plan template found in Appendix G of 40 CFR part 112. The Plan template is designed to be a simple SPCC Plan that includes only the requirements that apply to this tier of regulated facilities. This final rule streamlines the requirements for Tier I qualified facilities by eliminating and/or

modifying several SPCC requirements (for example, facility diagram (§ 112.7(a)(3)) and certain provisions that generally do not apply to facilities that store or handle smaller volumes of oil, such as requirements for transfers taking place at loading racks (§ 112.7(h)).

The list of applicable rule provisions for Tier I qualified facilities is included in § 112.6(a)(3). For an owner or operator of a Tier I qualified facility completing the Plan template included in Appendix G of this part, the following existing requirements under § 112.7 and in subparts B and C continue to apply: (1) Introductory paragraph of § 112.7 [4]; (2) facility description (§ 112.7(a)(3)(i), 112.7(a)(3)(iv), 112.7(a)(3)(vi), 112.7(a)(4), and 112.7(a)(5)); (3) general secondary containment (§ 112.7(c)); (4) inspections, tests and records (§ 112.7(e)); (5) personnel, training, and discharge prevention procedures (§ 112.7(f)); (6) security (§ 112.7(g)); (7) qualified oil-filled operational equipment (§ 112.7(k)); (8) facility drainage (§§ 112.8(b)(1), 112.8(b)(2), 112.12(b)(1), and 112.12(b)(2)); (9) bulk storage containers (§§ 112.8(c)(1), 112.8(c)(3), 112.8(c)(4), 112.8(c)(5), 112.8(c)(6), 112.8(c)(10), 112.12(c)(1), 112.12(c)(3), 112.12(c)(4), 112.12(c)(5), 112.12(c)(6), and 112.12(c)(10)); (10) piping inspections (§§ 112.8(d)(4) and 112.12(d)(4)); (11) oil production facility requirements (§ 112.9(b), 112.9(c)(1), 112.9(c)(2), 112.9(c)(3), 112.9(c)(4), 112.9(c)(5), 112.9(d)(1), 112.9(d)(3), and 112.9(d)(4)); and (12) requirements for onshore oil drilling and workover facilities (§ 112.10(b), 112.10(c) and 112.10(d)). This list of requirements reflects a set of currently existing requirements that apply to facilities subject to the SPCC rule. EPA found no basis to remove or modify these requirements for Tier I qualified facilities. As described below, EPA is finalizing a set of revised, or streamlined, requirements applicable to Tier I qualified facilities in lieu of certain other existing requirements.

In particular:

- In lieu of the full failure analysis requirements in § 112.7(b), under new § 112.6(a)(3)(i), an owner or operator of a Tier I qualified facility must examine areas where there is a reasonable possibility for equipment failure (such as where equipment is loaded or unloaded; where tank overflow, rupture, or leakage is possible; or at the location of any other equipment known to be a source of discharge) and include in the Plan the total quantity of oil that could be discharged and a prediction of the direction of flow. This amendment removes the requirement for an owner or operator of a Tier I qualified facility to predict the rate of flow that could result from an equipment failure.
- In lieu of the separate secondary containment requirements in §§ 112.8(c)(2) and (c)(11) and 112.12(c)(2) and (c)(11), under new § 112.6(a)(3)(ii), EPA is combining mobile/portable container requirements with the other bulk storage container secondary containment requirements, and eliminating the requirement for containment to be ''sufficiently impervious.'' Because EPA expects a Tier I qualified facility to be a small, simple operation, with oil storage containers being inside buildings, inside pre-engineered secondary containment, or a double-walled tank, the requirement for containment to be specifically designed as ''sufficiently impervious'' is unnecessary. Furthermore, the requirement for secondary containment to be capable of containing oil and constructed so that any discharge will not escape the containment system before cleanup occurs (§ 112.7(c)) still applies, and is similar in nature to the ''sufficiently impervious'' requirement. Therefore, combining these requirements streamlines two similar provisions and simplifies the requirements for Tier I qualified facilities.
- In lieu of §§ 112.8(c)(8) and 112.12(c)(8), the overfill prevention requirements, under new § 112.6(a)(3)(iii), the owner or operator of a Tier I qualified facility must ensure each container is provided with a system or documented procedure to prevent overfills of containers, and that containers are regularly tested to ensure proper operation or efficacy. This modification provides more flexibility by allowing the use of alternative methods to prevent container overfills, rather than requiring an owner or operator to meet a prescribed set of overfill prevention procedures.
- As described elsewhere in this notice, EPA is extending the streamlined security and integrity testing requirements that were provided for qualified facilities in the December 2006 SPCC rule amendment (71 FR 77266) to all facilities. Both Tier I and Tier II qualified facilities are subject to the revised security (§ 112.7(g)) and integrity testing (§§ 112.8(c)(6) and 112.12(c)(6)) provisions.

The following requirements are not included in the SPCC Plan template because, for a facility with a smaller oil storage capacity or other facilities with a simple configuration, these requirements are inapplicable or unnecessary: (1) Facility diagram (§ 112.7(a)(3)); (2) facility description (§ 112.7(a)(3)(ii), 112.7(a)(3)(iii), and 112.7(a)(3)(v)); (3) loading/unloading rack (§ 112.7(h)); (4) brittle fracture evaluation (§ 112.7(i)); (5) discussion of conformance with 40 CFR part 112 or other applicable State discharge prevention and containment regulations and guidelines (§ 112.7(j)); (6) facility drainage (§§ 112.8(b)(3), 112.8(b)(4), 112.8(b)(5), 112.12(b)(3), 112.12(b)(4), and 112.12(b)(5)); (7) monitoring internal heating coils (§§ 112.8(c)(7) and 112.12(c)(7)); (8) effluent treatment facilities (§§ 112.8(c)(9) and 112.12(c)(9)); (9) facility transfer operations (§§ 112.8(d)(1), 112.8(d)(2), 112.8(d)(3), 112.8(d)(5), 112.9(d)(2), 112.12(d)(1), 112.12(d)(2), 112.12(d)(3), and 112.12(d)(5)); and (10) produced water container provisions (§ 112.9(c)(6)).

EPA believes no further differentiation is warranted for onshore oil production facilities in § 112.9 (except for the produced water container provisions in § 112.9(c)(6) which require PE certification and therefore do not apply for Tier I qualified facilities) and onshore oil drilling and workover facilities in § 112.10. An onshore oil production facility that qualifies as a Tier I qualified facility will generally have the same type of equipment as an oil production facility with larger oil storage capacity (i.e., a wellhead with a pumpjack, flowlines, oil separation equipment and oil storage containers) and therefore, no further differentiation is warranted. An onshore drilling or workover facility has three requirements under § 112.10. The facility must: position or locate mobile drilling or workover equipment so as to prevent a discharge as described in § 112.1(b); provide catchment basins or diversion structures to intercept and contain discharges of fuel, crude oil, or oily drilling fluids; and install a blowout prevention (BOP) assembly and well control system that is effective to control wellhead pressure. The presence of smaller oil storage containers does not support differentiation of these requirements; however, an onshore oil production, drilling or workover facility that is eligible as a Tier I qualified facility will benefit from the differentiated requirements under § 112.7.

EPA also believes that no further differentiation is warranted for offshore drilling, production, and workover facilities subject to § 112.11. Due to the nature of operations associated with

[4] In the proposal to this rule, EPA inadvertently omitted from this list the introductory paragraph of § 112.7, and for clarity is including it now.

these types of facilities, they are not likely to meet the criterion of a maximum individual container capacity of 5,000 U.S. gallons.

The Agency notes that under the existing SPCC requirements, the Regional Administrator (RA), after reviewing a facility's Plan, has the authority under § 112.4 to require an owner or operator of a facility to amend the SPCC Plan if the RA finds that an amendment is necessary to prevent and contain discharges from the facility. Such an amendment may include requiring PE certification in accordance with § 112.3(d). This provision also applies to Tier I qualified facilities. That is, an RA could, if warranted, require a Tier I qualified facility to prepare a full (i.e., not using the template) SPCC Plan with PE certification.

The Agency also notes that use of the Plan template approach is optional. Under this final rule, an owner or operator of a Tier I qualified facility can choose to prepare and implement either a full PE-certified SPCC Plan or a self-certified SPCC Plan according to all of the requirements of § 112.6(b) in order to comply with the requirements under 40 CFR part 112. In other words, if a Tier I qualified facility owner or operator chooses not to use the Plan template in Appendix G, he could comply with the Tier II qualified facility requirements in § 112.6(b) or choose to prepare a full PE-certified Plan instead of a self-certified one. EPA modified the introductory sentences to § 112.6 and the text of § 112.6(a)(1) slightly from the text that was proposed, in order to make this optional approach more clear.

a. Comments

Many commenters expressed general support for the amended requirements for Tier I qualified facilities. However, a few commenters indicated that more stringent requirements would be appropriate for Tier I qualified facilities. One commenter suggested that a PE certify the SPCC Plan template for Tier I qualified facilities to ensure compliance. Another commenter suggested that EPA require review and approval of the Plan by someone who is familiar with industry standards and is ''certified'' to perform inspections following industry standards; the commenter believes this would address the potential liabilities and environmental impacts associated with self-certification by inexperienced owners and operators. One other commenter suggested that Tier I qualified facilities should be required to have a facility diagram, because if Tier I qualified facilities are small and simple, a diagram should not be an excessive burden. Still another commenter requested that EPA remove the five-year review requirements; instead, the commenter suggested that the Plan should only be updated whenever there is a material change in the facility that may affect discharges.

Many commenters also requested additional relief for Tier I or other regulated facilities. One commenter suggested that ''streamlined'' regulatory provisions should be extended to all regulated facilities. One commenter suggested that Tier I qualified facilities should only be required to meet the general requirements under § 112.7 and the security and integrity testing requirements for qualified facilities. Other commenters requested that EPA confirm that an Appendix G template may be certified by a PE, and that Tier I qualified facilities may complete a full self- or PE-certified Plan should they choose. Finally, one commenter suggested that the owner or operator of a regulated facility certify under oath that he has met the SPCC requirements.

b. Response to Comments

EPA's basis for developing a self-certified Plan template which contains a streamlined set of requirements for facilities that meet the Tier I eligibility criteria is that the Agency believes that implementation of the requirements in the template can provide environmental protection and prevent the discharge of oil into navigable waters or adjoining shorelines. Therefore, EPA does not agree with commenters that a third-party representative (such as a PE or a certified inspector) should confirm compliance with the rule requirements. As stated earlier, due to the simplicity of these facilities and other factors described above, EPA believes it is appropriate to allow a facility owner or operator to self-certify the SPCC Plan. It is the responsibility of the owner or operator of any SPCC-regulated facility to ensure compliance with 40 CFR part 112 and ensure implementation of the Plan.

The Agency also disagrees with the commenter who suggested that EPA require a facility diagram for Tier I qualified facilities. Although the Agency does not intend for a facility diagram to be an excessive burden for an owner or operator to develop, EPA believes the completed template provides the same information that would be available on a facility diagram for a Tier I qualified facility. The SPCC rule requirements for a facility diagram are: (1) To mark the location and contents of each fixed oil storage container (including containers and piping that are otherwise exempted from the rule) and storage areas where mobile or portable containers are located; and (2) to include all transfer stations and connecting pipes. In the case of a Tier I qualified facility, the visual representation of the diagram is not necessary because EPA believes that these facilities would have few aboveground oil storage containers with limited transfer areas and very little piping (if any). The ''Oil Storage Containers and Capacities'' table in Appendix G, Section III (Table G–2) of the template requires that all oil storage containers (such as aboveground containers, completely buried tanks, and oil-filled equipment) be listed, including the contents and oil storage capacity of each container. The ''Containers with Potential for an Oil Discharge'' table in Appendix G, Section III (Table G–4) requests the following information for transfer areas and piping: the volume of oil that could potentially be discharged and the flow direction of an uncontained discharge (i.e., a description of where the discharge would flow if secondary containment fails). A facility diagram for a Tier I qualified facility would provide minimal additional planning benefit to prevent an oil discharge from the facility.

EPA also disagrees that it should delete the five-year review requirements. The Agency agrees that the SPCC Plan should be updated whenever there is a material change in the facility that may affect discharges. However, Tier I qualified facilities should remain subject to the same requirement to periodically review and update the Plan to include more effective prevention and control technology in order to reduce the likelihood of a discharge as described in § 112.1(b).

A commenter suggested that all facilities should be eligible for streamlined provisions. While the Agency has amended the SPCC regulations in the past (71 FR 77266, December 26, 2006) and in this action to streamline certain SPCC rule requirements (for example, security and integrity testing) for all facilities, the streamlined provisions included in the Plan template in Appendix G are limited to Tier I qualified facilities based on the Agency's judgment that eliminating and/or modifying certain SPCC requirements was appropriate for facilities that store or handle smaller volumes of oil and that meet the eligibility criteria. Other facilities contain larger volumes of oil, have large oil storage containers on-site, or are more complex, and thus, applying the streamlined requirements adopted for

Tier I qualified facilities would be inappropriate.

Another commenter suggested that EPA simplify the Plan requirements for a Tier I qualified facility to include only the general requirements under § 112.7 and the security and integrity testing requirements. However, the commenter did not provide any data to support eliminating the specific requirements under Subparts B and C, such as those pertaining to facility drainage and bulk storage containers. Therefore, EPA did not incorporate this change into the final action.

One commenter requested that EPA confirm that an Appendix G template may be certified by a PE. EPA recognizes that the owner or operator of a Tier I qualified facility may decide to obtain assistance in the development of an SPCC Plan and want to have a PE certify the Plan; however, the only required certification for a Plan following Appendix G is the self-certification completed by the owner or operator of the facility. EPA is not making the PE certification an additional option for compliance for Tier I qualified facilities because the Agency believes that this may suggest that it expects PE-certified Plans for this subset of qualified facilities. In addition, because the purpose of establishing the ''Tier I category'' was to allow facilities that met the Tier I eligibility criteria to meet the requirements of the SPCC rule in a streamlined manner, EPA believes it would complicate the rule, particularly if the owner or operator of the facility wants to request that environmental equivalence determinations be allowed for Tier I qualified facilities, such as allowed for Tier II facilities under the Tier II hybrid Plan. However, as EPA has noted previously, completion of the Appendix G template is optional. The owner or operator of a Tier I qualified facility may choose to have a PE-certified SPCC Plan following all the requirements in § 112.7 and subparts B and C, as applicable, or prepare a hybrid Plan that includes all applicable provisions under Tier II.

Another commenter suggested requiring that the owner or operator of a regulated facility certify under oath that he has met the SPCC requirements. Section § 112.6(a)(1) requires the owner or operator certify that: (i) He is familiar with the applicable requirements of 40 CFR part 112; (ii) he has visited and examined the facility; (iii) he has prepared the Plan in accordance with accepted and sound industry practices and standards; (iv) he has established procedures for required inspections and testing in accordance with industry inspection and testing standards or recommended practices; (v) he will fully implement the Plan; (vi) the facility meets the qualification criteria in § 112.3(g)(1); (vii) the Plan does not deviate from any requirement of this part as allowed by § 112.7(a)(2) and § 112.7(d) or include an exemption/measures pursuant to § 112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container; and (viii) the Plan and individual(s) responsible for implementing this Plan have the approval of management, and the facility owner or operator has committed the necessary resources to fully implement this Plan. EPA believes that inclusion of the self-certification statements in the Plan and signature of the owner or operator is sufficient to demonstrate that he understands his responsibilities under 40 CFR part 112.

3. SPCC Plan Template

The SPCC Plan template for Tier I qualified facilities is found in Appendix G in this final rule. To facilitate the development of SPCC Plans at Tier I qualified facilities, EPA intends to make the Plan template available on its Web site, *http://www.epa.gov/emergencies.* Once completed and certified by the owner or operator, the Plan template serves as the SPCC Plan for the facility. As for any facility subject to the SPCC rule, the owner or operator must maintain a written copy of the Plan—which in this case would be the completed and self-certified SPCC Plan template—at the facility or at the nearest field office if the facility is attended less than four hours per day (§ 112.3(e)).

The Agency emphasizes that use of the Plan template approach is optional. An owner or operator of a Tier I qualified facility can choose to prepare and implement either a full PE-certified SPCC Plan or a self-certified SPCC Plan according to all of the requirements of § 112.6(b) (for a Tier II qualified facility) in order to comply with the requirements under 40 CFR part 112.

In the October 2007 proposal, EPA sought comments on whether the SPCC Plan template addressed the concerns of owners and operators of facilities with relatively smaller volumes of oil, while maintaining the environmental protection intended by the regulation. The Agency also sought comments on the clarity and ease-of-use of the Plan template. The Agency has modified the Plan template based on specific comments received.

a. Comments

Several commenters were generally supportive of the template format and/or content. However, one commenter indicated that the template is too easy to use, provides no assurance of compliance, and will be ignored by small facilities. Another commenter suggested that the template does not provide enough instruction and will encourage facility operators that have little knowledge of part 112 to develop SPCC Plans that are meaningless. On the other hand, several commenters expressed concern that the Appendix G template would be too burdensome.

Other commenters suggested that EPA allow for a flexible Tier I qualified facility Plan format rather than require the owner or operator to use the template in Appendix G. Several other commenters suggested that EPA allow, as part of the Appendix G template, the Plan to take a ''hybrid'' approach, as allowed for Tier II qualified facilities, to provide flexibility to Tier I qualified facilities that need to deviate from the rule requirements when the owner or operator determines that secondary containment is impracticable or when there is an alternative measure that provides equivalent environmental protection to an SPCC rule requirement.

A commenter suggested that operators preparing multi-facility SPCC Plans covering multiple facilities that are individually eligible for Tier I status should also be allowed to use the template, and that the rule should be specifically modified to reflect this. Another commenter suggested that EPA publish the template as guidance or an educational primer for Tier I qualified facilities, and make it readily available on the EPA Web site. Another commenter requested that EPA provide for an online submission of the template-based Plan for increased compliance.

Finally, several commenters pointed out a number of areas where minor formatting, wording, or other corrections could be made to the template for simplification, clarity, or improved accuracy (as described in the response to comments section below).

b. Response to Comments

EPA received several comments that the Plan template in Appendix G is too burdensome for Tier I qualified facilities, while other commenters argued that it is too easy to use. The Plan template is designed to be a simple and straightforward SPCC Plan that includes only the requirements that should apply to Tier I qualified facilities. EPA intends to provide supplementary guidance on the Agency's Web site to assist owners and operators of Tier I (and Tier II) qualified facilities in the development of an SPCC Plan for these facilities. Thus, EPA

expects that such additional guidance will help those facilities that choose to utilize the Appendix G template to comply with the SPCC Plan requirement.

Several commenters suggested that EPA allow for a flexible Plan format rather than require the owner or operator to use the template in Appendix G. EPA agrees that it is appropriate to allow the use of a flexible Plan format for qualified facilities that, for example, want to combine multiple local, state or Federal regulatory requirements into one Plan, as long as a cross-reference is provided. Therefore, EPA is amending the rule language in § 112.6(a)(1) to allow for a flexible Plan format for owners or operators of Tier I qualified facilities that do not choose to use the template provided in Appendix G of the rule. The amended rule text states that the template in Appendix G may be used as the SPCC Plan to meet the 40 CFR part 112 requirements. However, if the Appendix G template is not used, then an equivalent Plan must be prepared in writing, and must be supplemented with a section that cross-references the location of requirements listed in this part. For example, the owner or operator of a facility that has developed a Stormwater Pollution Prevention Plan (SWPPP) under the National Pollutant Discharge Elimination System (NPDES) that meets all of the applicable SPCC regulatory requirements in § 112.6(a)(3) and Appendix G may use the SWPPP as the SPCC Plan. However, the SWPPP must include a cross-reference and the self-certification statements in § 112.6(a)(1) and Appendix G. An owner or operator of a Tier I qualified facility may use the template in Appendix G to comply with the regulation or use it as a model and modify it as necessary to meet the facility-specific needs, as long as all applicable rule requirements are included in the SPCC Plan. The following sample cross-reference is intended to be an example of the owner/operator's development of such a cross-reference.

SAMPLE CROSS-REFERENCE FOR PLANS USING LOCAL, STATE, OR OTHER FEDERAL REGULATIONS TO SATISFY SPCC REQUIREMENTS

SPCC provision	Description of requirement	Plan page
§ 112.4	Spill reporting requirements	
§ 112.5(b)	Five-year Plan review	
§ 112.6(a)(1)	Preparation and self-certification of the Plan	
§ 112.6(a)(2)	Certification of technical amendments	
§ 112.6(a)(3)(i)	Failure analysis	
§ 112.6(a)(3)(ii)	Bulk storage container secondary containment	
§ 112.6(a)(3)(iii)	Overfill prevention	
§ 112.7(a)(3)(i)	Address the type of oil in each container and its storage capacity	
§ 112.7(a)(3)(iv)	Address countermeasures for discharge discovery, response, and cleanup	
§ 112.7(a)(3)(vi)	Provide contact list and phone numbers for those to be contacted in case of a discharge	
§ 112.7(a)(4)	Provide NRC notification information	
§ 112.7(a)(5)	Describe procedures you will use when a discharge occurs	
§ 112.7(c)	Provide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in § 112.1(b).	
§ 112.7(e)	Conduct inspections and tests in accordance with written procedures that you develop for the facility	
§ 112.7(f)	Train oil-handling personnel in the operation and maintenance of equipment to prevent discharges; discharge procedure protocols; applicable pollution control laws, rules, and regulations; general facility operations; and the contents of the facility Plan.	
§ 112.7(g)	Implementation of security measures to prevent unauthorized access to oil handling, processing, and storage area.	
§ 112.7(k)	Requirements related to oil-filled operational equipment	
§§ 112.8(b)(1), 112.12(b)(1).	Restrain drainage from diked storage areas	
§§ 112.8(b)(2), 112.12(b)(2).	Use valves of manual, open-and-closed design for the drainage of diked areas; if facility drainage drains into a watercourse, inspect and drain uncontaminated retained stormwater.	
§§ 112.8(c)(1), 112.12(c)(1).	Do not use a container for oil storage unless its material and construction are compatible with the material stored and conditions of storage such as pressure and temperature.	
§§ 112.8(c)(3), 112.12(c)(3).	Drainage of uncontaminated rainwater from the diked area into a storm drain or discharge of an effluent into an open watercourse.	
§§ 112.8(c)(4), 112.12(c)(4).	Protect completed buried storage tanks from corrosion and regularly leak test buried metallic storage tanks.	
§§ 112.8(c)(5), 112.12(c)(5).	Do not use partially buried or bunkered metallic tanks for the storage of oil unless protected from corrosion.	
§§ 112.8(c)(6), 112.12(c)(6).	Administer integrity testing for storage tanks	
§§ 112.8(c)(10), 112.12(c)(10).	Promptly correct visible discharges which result in a loss of oil from the container	
§§ 112.8(d)(4), 112.12(d)(4).	Regularly inspect all aboveground valves, piping and appurtenances	
§ 112.9(b)	Requirements for oil production facility drainage	
§ 112.9(c)(1)	Material compatibility requirements for containers at oil production facilities	
§ 112.9(c)(2)	Secondary containment requirements for tank battery, separation, and treating facility installations at oil production facilities.	
§ 112.9(c)(3)	Container inspection requirements at oil production facilities	
§ 112.9(c)(4)	Overfill prevention requirements at oil production facilities	
§ 112.9(c)(5)	Requirements for flow-through process vessels at oil production facilities	
§ 112.9(d)(1)	All aboveground valves and piping associated with transfer operations are inspected periodically and upon a regular schedule.	

SAMPLE CROSS-REFERENCE FOR PLANS USING LOCAL, STATE, OR OTHER FEDERAL REGULATIONS TO SATISFY SPCC REQUIREMENTS—Continued

SPCC provision	Description of requirement	Plan page
§ 112.9(d)(3)	For flowlines and intra-facility gathering lines that do not have secondary containment in accordance with § 112.7(c), prepare an oil spill contingency plan and a written commitment of resources (except when the facility has submitted a Facility Response Plan in accordance with § 112.20).	
§ 112.9(d)(4)	Prepare and implement a written program of flowline/intra-facility gathering line maintenance	
§ 112.10(b)	Position or locate mobile drilling or workover equipment so as to prevent a discharge as described in § 112.1(b).	
§ 112.10(c)	Provide catchment basin or diversion structures to intercept and contain discharges	
§ 112.10(d)	Install a blowout prevention assembly and well control system before drilling	

Commenters also suggested that EPA allow Tier I qualified facilities, as part of the Appendix G template, to use the ''hybrid'' approach, as is currently allowed for Tier II qualified facilities to provide flexibility to Tier I qualified facilities that need to deviate from the rule requirements when the owner or operator determines that secondary containment is impracticable, when there is an alternative measure that provides equivalent environmental protection to an SPCC rule requirement, or when an owner or operator wants to include an exemption/measures pursuant to § 112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container. EPA has decided not to allow Tier I facilities to utilize a ''hybrid approach,'' because the primary purpose of developing the ''Tier I'' category is to allow those facilities with simple oil storage configurations to have a relatively simple means to comply with the SPCC requirements. Allowing Tier I facilities to use a hybrid approach would seem to defeat that purpose. If a facility qualifies to use the Appendix G template but has site-specific factors that make it difficult to use the template as written, then the Appendix G Plan template may not be an appropriate tool for the facility to address the oil spill planning elements for the facility. Instead, the facility could elect to comply with the SPCC requirements as a Tier II qualified facility—that is, self-certify that they comply with the full set of rule requirements in § 112.7(c) and subparts B and C, as applicable, rather than the differentiated requirements designed specifically for facilities with simple oil storage configurations. For example, if the owner or operator cannot provide secondary containment for a bulk storage container at a Tier I qualified facility because it is impracticable, then it is appropriate that the Plan include a facility diagram (§ 112.7(a)(3)) to show where the container is located at the facility and a prediction of the direction, rate of flow and quantity of oil that may be discharged from the container (§ 112.7(b)). EPA believes it is appropriate to require the owner or operator to comply with requirements that would not otherwise apply to Tier I qualified facilities because this information may be necessary as part of the spill prevention practices for the facility. Therefore, the owner or operator of the facility may choose to develop a hybrid Plan following the Tier II qualified facility requirements in § 112.6(b) or a PE-certified SPCC Plan following § 112.7 and subparts B and C, as applicable.

Commenters also requested that EPA allow the owner or operator of several facilities that each individually meet the criteria for a qualified facility to develop a multi-facility SPCC Plan in accordance with the Tier I requirements. EPA agrees that this is appropriate and the final rule allows flexibility in the Plan format to accommodate a multi-facility Plan approach for Tier I qualified facilities. The owner or operator of the facility is still required to meet all applicable requirements of the rule in the Plan as described in § 112.6(a)(3) and Appendix G.

With respect to the comment that EPA allow such SPCC Plans to be submitted online, EPA does not believe that online submission of the template-based Plan will increase compliance with the SPCC regulation because there is currently no requirement for the owner or operator of a regulated facility to submit an SPCC Plan to the Agency, unless requested to do so by the Regional Administrator. The Agency requires that owners and operators maintain a copy of the Plan at the facility, in accordance with § 112.3(e).

EPA has amended the text that was proposed as Appendix G of 40 CFR part 112 to incorporate many of the suggested recommendations in the final rule. To simplify or clarify use of the template, these amendments will:

- Ensure the Table in Attachment 3.2 of Appendix G is consistent with the STI–SP001 requirements for Category I Tanks.
- Clarify which oil storage containers at the facility must be included when calculating the total facility oil storage capacity to determine eligibility of the facility for Tier I and II requirements—that is, any aboveground container at the facility that contains oil and that is not otherwise exempt from the rule. This includes bulk storage containers, such as tanks and mobile or portable containers; oil-filled operational equipment (such as transformers); and other oil-filled equipment, such as flow-through process equipment.
- Include formatting suggestions that make the template easier to use and technical corrections, such as providing letter references for the owner or operator's obligations in the certification statement; numbering tables; using numbered or lettered superscripts; identifying acronyms when they are first used in the document (for example, Regional Administrator (RA) in Section III, Part 6); and moving the spill reporting requirements to the correct section in the template (from Section III, Part 6 to Section III, Part 8.)
- Clarify that EPA means aboveground oil storage capacity in Section I, Part 6.a and 6.c of Appendix G.
- Clarify that the NRC Notification Procedures in Section III, Part 7 must be conducted immediately following identification of a discharge to navigable waters or adjoining shorelines.
- Clarify which containers are exempt from the regulation and not required to be included in the table in Section III, Part 1. Exempt containers that are not included in the capacity calculation include: Any container with a storage capacity of less than 55 U.S. gallons of oil; storage containers used exclusively for wastewater treatment; permanently closed containers; motive power containers; hot-mix asphalt containers; heating oil containers used solely at a single-family residence; and pesticide application equipment or related mix containers. Although the criteria to determine eligibility for qualified facilities focuses on the aboveground oil

storage containers at the facility, completely buried tanks at a qualified facility, unless they are otherwise exempt, such as USTs that are subject to all of the technical requirements of 40 CFR part 280 or a state program approved under 40 CFR part 281, are still subject to the rule requirements and must be addressed in the template. They are not counted towards the qualified facility threshold because they are not aboveground containers. Finally, certain produced water containers may be exempt from the rule; however, this exemption is based on certification by a PE and therefore produced water containers at a Tier I qualified facility SPCC Plan would not be eligible for the exemption. In other words, the owner or operator of a Tier I qualified facility would not be eligible to develop a self-certified SPCC Plan using the template in Appendix G and have a produced water container exempt from the regulation, because the exemption requires a PE certification. (See section V.M of this preamble for further discussion on produced water containers.)

- Amend the Onshore Facility Checklists to indicate that not all provisions may be applicable to all owners or operators, and provide instructions to indicate on the checklist when a provision is not applicable.
- Clarify the scope of the inspection requirements for bulk storage containers in the Inspection Log in Attachment 3 of Appendix G.
- Revise the discussion in Section III, Part 2 to include the word ''secondary.''

Finally, EPA considered, but did not adopt the following recommendations to amend the template to:

- *Revise the template in Appendix G to change ''navigable waters or adjoining shorelines'' to ''discharges as described in § 112.1(b).''* EPA refers to navigable waters or adjoining shorelines in the template to make the document easier to understand and more user-friendly; the Agency does not consider this to be a limitation in the scope of the rule. The language in § 112.7 also applies to these facilities and uses the term ''discharges as described in § 112.1(b).''
- *Include a section for state and local requirements.* The Agency does not believe that it is necessary for the owner or operator of a facility to address state or local requirements as part of the SPCC Plan. However, the Agency is amending the rule language to allow for a flexible Plan format for Tier I qualified facilities. This will allow a facility owner or operator to address local, state and/or other Federal requirements in one Plan for oil spill prevention planning purposes if he so chooses. The Agency will also clarify in rule text that § 112.7(j) does not apply to Tier I qualified facilities.
- *Remove mode of failure in the Secondary Containment table in Appendix G.* This table addresses rule requirements for both § 112.7(b) and (c) along with the more specific secondary containment requirements under Subparts B and C. Therefore, the Agency believes it is appropriate to have the owner or operator identify 'the mode of failure; the flow direction and quantity of the discharge; and the secondary containment method and containment capacity' for the containers listed. The owner or operator may use either active or passive approaches for complying with the secondary containment requirements (for more information, *see* the *SPCC Guidance for Regional Inspectors*).
- *Refer to the Plan format in Appendix G as document rather than ''template.''* Once the owner or operator completes the Appendix G template to include site-specific information, the resulting document is an SPCC Plan for the facility.
- *Amend the self-certification statement to specifically highlight the owner or operator's responsibility to provide secondary containment.* The elements of the Tier I self-certification requirement are similar in scope to those required for an owner or operator of a Tier II qualified facility who chooses to self-certify a Plan (as promulgated in December 2006, 71 FR 77266). Additionally, the Agency has described the secondary containment requirements of the regulation in more detail in the *SPCC Guidance for Regional Inspectors.*
- *Amend the table heading.* ''Secondary containment capacity (gallons)'' with the superscript that identifies the secondary containment requirements for bulk storage containers. The Agency believes that the table appropriately identifies the secondary containment requirements for bulk storage containers and mobile/portable containers. Additionally, the Agency has described the secondary containment requirements of the regulation in more detail in the *SPCC Guidance for Regional Inspectors.*
- *Move footnotes to the discussion preceding the tables in the Appendix.* The Agency believes it is appropriate to provide guidance to assist in the development of the SPCC Plan template in a separate document, if necessary, rather than increase the length of the template.
- *Simplify secondary containment information (Section III, Tables 1 and 2).* The Agency disagrees that additional simplification is appropriate for these tables. The tables are designed to address the various oil storage containers, equipment and oil-handling areas where secondary containment is required. For Tier I qualified facilities with only one or two oil storage containers, the tables should be easy to complete.
- *Amend the information that must be reported to the NRC in Section III, Part 7.* The bullets in the table cite the current regulatory requirements in § 112.7(a)(4), which also conforms with the type of information that is collected by the NRC.
- *Amend the Contingency Plan checklist included as an attachment to Appendix G.* EPA did not propose to amend the contingency plan requirements under 40 CFR part 109 and the checklist is intended as a reminder for the owner or operator to address these requirements when developing the contingency plan for the facility (when applicable). This contingency plan checklist is intended as a guide to assist the owner or operator of a Tier I qualified facility to prepare a contingency plan in lieu of the general secondary containment requirements for qualified oil-filled operational equipment or as an alternative to sized secondary containment for specific equipment at an oil production facility (such as flowlines).

4. Self-Certification and Plan Amendments

The elements of the Tier I self-certification requirement are similar in scope to those required for an owner or operator of a Tier II qualified facility who chooses to self-certify an SPCC Plan (as promulgated in December 2006, 71 FR 77266). An owner or operator of a Tier I qualified facility who chooses to complete an Appendix G template Plan (or some other equivalent Plan) is required to certify that: (1) He is familiar with the applicable requirements of the SPCC rule; (2) he has visited and examined the facility; (3) the Plan has been prepared in accordance with accepted and sound industry practices and standards; (4) the procedures for required inspections and testing have been established in accordance with industry inspection and testing standards and recommended practices; (5) the Plan is being fully implemented; (6) the facility meets the qualification criteria set forth under § 112.3(g)(1); (7) the Plan does not utilize the environmental equivalence or impracticability provisions under § 112.7(a)(2) and 112.7(d), or include an

exemption/measures pursuant to § 112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container; and (8) the Plan and the individual(s) responsible for implementing the Plan have the full approval of management and the facility owner or operator has committed the necessary resources to fully implement the Plan.

Under § 112.5 of the SPCC rule, an owner or operator must review and amend the SPCC Plan following any change in facility design, construction, operation, or maintenance that materially affects its potential for a discharge as described in § 112.1(b). Consistent with the current requirement for qualified facilities, the owner or operator of a Tier I qualified facility is allowed to self-certify any of these technical amendments to the Plan under § 112.6(a)(2), and document this certification in the Plan template (or some other equivalent Plan).

If the owner or operator of a Tier I qualified facility makes changes to the facility such that the maximum individual aboveground oil storage container capacity is greater than 5,000 U.S. gallons, the facility no longer qualifies as a Tier I facility, even if the total oil storage capacity is less than 10,000 U.S. gallons, and is not eligible to implement the self-certified Appendix G template Plan (or some other equivalent Plan). The facility owner or operator must determine whether the facility still meets the eligibility criteria for a Tier II qualified facility (i.e., total aboveground storage capacity remains below 10,000 U.S. gallons). If the facility meets the Tier II qualified facility criteria, within six months following the change in the facility, the owner or operator is required to prepare and implement an SPCC Plan in accordance with § 112.6(b) or prepare and implement an SPCC Plan in accordance with the general Plan requirements in § 112.7, and the applicable requirements in subparts B and C, including having the Plan certified by a PE, as required under § 112.3(d). If, on the other hand, the facility is no longer a qualified facility, the owner or operator is required to, within six months following the change in the facility, prepare and implement an SPCC Plan in accordance with the general Plan requirements in § 112.7, and the applicable requirements in subparts B and C, including have the Plan certified by a PE.

a. Comments

A commenter noted that the self-certification statement ''should not be modeled after what EPA desires to see a licensed PE provide.'' The commenter noted that promoting or encouraging development of qualified facility SPCC Plans by non-licensed engineers violates codes in many states.

b. Response to Comments

While the owner or operator of a qualified facility may choose to self-certify the SPCC Plan in lieu of a PE certified Plan, he is still required to comply with all of the SPCC requirements and to develop and implement a spill prevention program in accordance with good engineering practices. The owner or operator may do so by following guidance, industry standards, industry design specifications or industry recommended or best management practices. This is analogous to how a person with no accounting experience is expected to comply with applicable state and Federal tax laws. Many people choose to have a Certified Public Accountant (CPA) prepare their annual tax documents; however, the Internal Revenue Service (IRS) does not require that a CPA conduct this activity. A person that chooses to complete the tax forms on his own is not relieved from the liability to do so in accordance with all Federal and state requirements. That person is expected to understand the tax laws and regulations and prepare the documents following all applicable requirements. He may choose to use the forms and guidance provided by the IRS or state agency, or use software or other publicly available guidance to aid him in the correct completion of the tax forms.

For SPCC, the Agency believes that an owner or operator who follows guidance; standard design and operational protocols; industry standards or recommended practices; or guidance developed by professional associations is following ''good engineering practices'' to comply with the SPCC rule requirements. Where operational changes at a facility are necessary to comply with the rule requirements, the owner or operator must follow all appropriate state and local requirements (such as for permitting and construction) and, if necessary, obtain the appropriate professional assistance. However, in the case of a qualified facility, EPA believes that the development of the SPCC Plan itself is not an engineering function and an owner or operator can prepare an SPCC Plan that describes how the facility complies with the SPCC rule requirements. For a qualified facility, the Agency believes it is appropriate for the owner or operator to attest that the information in the SPCC Plan is true and accurate following the self-certification language in § 112.6. EPA modeled the certification statements after the PE certification provision in § 112.3(d) with amendments to remove language specific to engineering certification. Although EPA agrees that the owner or operator of a facility should not be making engineering determinations without proper credentials, the Agency believes that there are elements of those attestations that are appropriate for an owner or operator, such as acknowledging that they are familiar with the requirements of this part. EPA also included additional attestations for the owner or operator of the facility pertaining to the qualification criteria and management approval of the SPCC Plan.

Finally, to the extent that a state has adopted a law, regulation, or policy, such as one based on the National Council of Examiners for Engineering and Surveying, that requires a PE to perform certain functions, including certifying Plans, nothing in this action affects whether a facility owner or operator would be required to utilize a PE to meet the state or local requirements because this action does not preempt any state or local requirements. Therefore, in states where the engineer licensing boards have prohibited SPCC Plan self-certification, the owner or operator may not be able to utilize the Tier I and Tier II options to self-certify the Plan to comply with the SPCC requirements.

5. Tier II Qualified Facility Requirements

EPA is designating qualified facilities that do not meet the additional criterion for Tier I qualified facilities (i.e., no individual aboveground oil storage container with a capacity greater than 5,000 U.S. gallons) as Tier II qualified facilities. Although the organization of the regulatory text in § 112.6 has changed in order to accommodate the tiered approach, the requirements for Tier II qualified facilities remain the same as they were when these requirements were promulgated on December 26, 2006 (71 FR 77266). Tier II qualified facilities may choose to comply with the requirements in § 112.6(b) by completing and implementing a self-certified SPCC Plan, in lieu of having a PE-certified Plan. The self-certified SPCC Plan must comply with all of the applicable requirements of section § 112.7 and subparts B and C of the rule; any deviations as allowed pursuant to § 112.7(c)(2) and (d) must be certified by a licensed PE (''hybrid Plan''). Also see

section V.M.7.d of this preamble, *Overlap Between Produced Water Container Alternatives and Qualified Facilities,* for information on using the ''hybrid Plan'' approach to self-certify an SPCC Plan using one of the alternative approaches for produced water containers (exempt a produced water container or take advantage of the alternative requirements in § 112.9(c)(6)). Owners and operators of Tier II qualified facilities are not able to use the Appendix G template because it does not include all of the SPCC requirements that may apply for these facilities.

Additionally, in order to address the concerns of the oil and gas sector, EPA is finalizing an alternative set of qualified facility eligibility criteria specific for onshore oil production facilities that does not rely on facility oil storage capacities. EPA believes these alternative criteria are more appropriate to qualify the oil production facilities for Plan self-certification. See Section V.M of this document for further discussion on the alternative criteria for the oil and gas production sector.

a. Comments

Two commenters suggested that EPA allow Tier II qualified facilities to self-certify Plans. Additional commenters requested that Tier II qualified facilities be allowed to use the template.

b. Response to Comments

EPA is designating qualified facilities that do not meet the additional criterion for Tier I qualified facilities (i.e., no individual aboveground oil storage container with a capacity greater than 5,000 U.S. gallons) as Tier II qualified facilities. The requirements for Tier II qualified facilities remain the same as they were when they were promulgated in December 2006. Only Tier I qualified facilities will be able to use the template in Appendix G of 40 CFR part 112 to comply with the SPCC rule. The streamlined provisions included in the Plan template in Appendix G are limited to Tier I qualified facilities because they were specifically analyzed and designed for facilities that store limited quantities of oil, in small oil storage containers and generally have simple configurations. Other facilities contain larger volumes of oil, have large oil storage containers on-site, or are more complex and thus, applying the streamlined requirements adopted for Tier I qualified facilities would be inappropriate.

6. Alternative Option Considered

In the October 2007 proposal (72 FR 58378, October 15, 2007), EPA described an option wherein the Agency would exempt a certain subset of qualified facilities from the SPCC requirements altogether, based on a lower facility storage capacity threshold (such as 5,000 U.S. gallons).

a. Comments

One commenter supported this option.

b. Response to Comments

EPA did not receive any data to support an exemption of a subset of qualified facilities. Therefore, the Agency is not finalizing this amendment.

H. General Secondary Containment

At a facility subject to the SPCC rule, all areas with the potential for a discharge as described in § 112.1(b) are subject to the general secondary containment provision, § 112.7(c). These areas may have loading/unloading areas (also referred to as transfer areas), piping, and/or mobile refuelers, and may include other areas of a facility where oil is present. The general secondary containment requirement requires that these areas be designed with appropriate containment and/or diversionary structures to prevent a discharge of oil in quantities that may be harmful (that is, as described in 40 CFR part 110; *see* § 112.1(b)). EPA is amending the general secondary containment provision to provide additional clarity, consistent with the guidance published in the *SPCC Guidance for Regional Inspectors.* EPA is also amending § 112.7(c) to provide an alternative to the sized secondary containment requirements for flowlines and intra-facility gathering lines at oil production facilities, as described in Section V.M of this notice.

1. Revisions to the General Secondary Containment Requirement

EPA is amending the general secondary containment requirement at § 112.7(c) in three ways: (1) By adding text regarding the method, design and capacity of secondary containment; (2) by specifically allowing both active and passive measures of secondary containment; and (3) by including additional examples of prevention systems. Section V.M of this notice describes an additional modification to the provision to address flowlines and intra-facility gathering lines at oil production facilities.

Specifically, EPA is amending § 112.7(c) by adding the text ''In determining the method, design, and capacity for secondary containment, you need only to address the typical failure mode, and the most likely quantity of oil that would be discharged. Secondary containment may be either active or passive in design.'' This addition is intended to make clear that the scope of the general secondary containment requirement takes into consideration the typical failure mode, and most likely quantity of oil that would be discharged, consistent with current EPA guidance *(SPCC Guidance for Regional Inspectors).*

EPA is also amending § 112.7(c) to make it clear that the requirement allows for the use of both active and passive secondary containment measures to prevent a discharge to navigable waters or adjoining shorelines. Active containment measures are those that require deployment or other specific action by the operator. These measures may be deployed either before an activity involving the handling of oil starts, or in reaction to a discharge, so long as the active measure is designed to prevent an oil discharge from reaching navigable waters or adjoining shorelines. Passive measures are permanent installations and do not require deployment or action by the owner or operator.

EPA is further amending the general secondary containment provision at § 112.7(c)(1) to include the following additional examples of prevention systems for onshore facilities: Drip pans, sumps, and collection systems. Drip pans are typically used to isolate and contain small drips or leaks until the source of the leak is repaired. They are commonly used with product dispensing containers (such as drums), uncoupling of hoses during bulk transfer operations, and for pumps, valves, and fittings. Sumps and collection systems generally involve a permanent pit or reservoir and the connected troughs/trenches that collect oil. By expanding the list of examples of secondary containment methods found in § 112.7(c)(1), EPA intends to increase the clarity and better represent current prevention practices. EPA emphasizes that the list of prevention systems are examples only; other containment methods may be used, consistent with good engineering practice.

a. Comments

Many commenters expressed general support for the amendments to § 112.7(c). However, one commenter suggested that allowing secondary containment for the most likely quantity of oil discharged instead of worst case discharge contradicts § 112.7(c) and is inconsistent with 33 U.S.C. 1321(j)(5)(D).

In addition, some commenters indicated that this amendment would increase the number of calculations

necessary to determine likely release scenarios. The commenter requested that EPA provide latitude to the certifying PE in developing the different release scenarios and secondary containment requirements that are appropriate for the facility, stating that calculations should not have to be included. A commenter also suggested that EPA allow the use of a common collection area or containment area, rather than individual containment when there are several tanks located in close proximity to each other. Another commenter suggested that EPA should clarify in the rule text whether general secondary containment is required for buried piping. Other commenters suggested changes to a sentence in § 112.7(c) to replace the word ''tank'' with ''piping or oil-filled equipment.''

Additionally, a commenter requested further examples on the elements that can comprise an acceptable secondary containment system, and commenters suggested that EPA clarify that the list of examples is not all-inclusive.

b. Response to Comments

The Agency's authority to promulgate the SPCC rule is found in 33 U.S.C. 1321(j)(1)(C) and requires the Agency to promulgate regulations establishing procedures, methods, equipment and other requirements for equipment to prevent discharges of oil and to contain those discharges. The statutory provision gives the Agency broad discretion to establish the requirements under the SPCC rule. Nowhere in this statutory provision is a requirement that the SPCC regulations address worst case discharges. Section 1321(j)(5)(D), however, directs the Agency to issue regulations to require owners or operators to prepare and submit plans to respond to worst case discharges. Consistent with this statutory provision, EPA has promulgated facility response plan regulations in 40 CFR part 112 Subpart D. Therefore, EPA does not agree with the commenter who suggested that this amendment is inconsistent with 33 U.S.C. 1321(j)(5)(D).

Commenters also requested clarification on how much supporting documentation is necessary (for example, calculations) to demonstrate compliance with the general secondary containment requirements. In order to determine that the facility has provided appropriate secondary containment that complies with § 112.7(c), an EPA inspector may review the supporting documentation in the SPCC Plan (*see* the *SPCC Guidance for Regional Inspectors*, Chapter 4). If calculations are not included with the SPCC Plan, and the inspector suspects the general secondary containment is inadequate, the inspector may request supporting documentation from the owner or operator. Industry guidance recommends that facility owners or operators include any secondary containment capacity calculations and/or design standards with the Plan. API Bulletin D16, ''Suggested Procedure for Development of Spill Prevention Control and Countermeasure Plans,'' contains example calculations to which inspectors may refer (see Exhibit E of ''Suggested Procedure for Development of Spill Prevention Control and Countermeasure Plans,'' API Bulletin D16. Third Edition, December 2002). Calculations may be provided as part of the documentation to support the adequacy of containment measures employed at the facility, although they are not required. Nevertheless, the Plan preparer must include enough detail in the SPCC Plan to describe the efficacy of the measures used to comply with the general secondary containment requirements in § 112.7(c).

With respect to the use of common containment systems, the Agency wants to make clear that it is not necessary to provide separate containment systems for each individual container or equipment. Instead, the Plan preparer may choose to design facility drainage to provide a common collection area for multiple containers, piping or oil-filled equipment located at the facility. In order to comply with the general secondary containment requirements, the owner or operator must first identify the typical failure mode and quantity of oil that could be discharged. Based on site-specific conditions, he can determine what capacity is needed and design the secondary containment system accordingly.

Commenters also requested clarification on the type of equipment subject to the general secondary containment requirements. The general secondary containment provision in § 112.7(c) is intended to address the potential for oil discharges from all regulated parts of a facility. Containment method, design, and capacity are determined by good engineering practice to contain an oil discharge until cleanup occurs. This determination should consider all areas of the facility with a potential to discharge oil, including, but not limited to, piping (both aboveground and buried), transfer areas and oil-filled operational equipment.

The Agency does not agree that it is necessary to replace the word ''tank'' with ''piping or oil-filled equipment'' in § 112.7(c), as suggested. Tanks, piping and oil-filled equipment are all examples of primary containment systems and the Agency does not believe it is necessary to replace one example with another in the rule language. However, the word ''secondary'' is being added for clarity and accomplishes the point raised by the commenter.

EPA also is amending the language in § 112.7(c)(1) to include additional examples of secondary containment methods, as proposed. One commenter requested additional clarification on other methods that may be used to comply with the secondary containment requirements, such as surface impoundments, on their own, or in connection with other elements, such as oil/water separators or water treatment. Section 112.7(c) states that ''at a minimum, you must use one of the following prevention systems or its equivalent * * *.'' EPA clarified in Chapter 4 of the *SPCC Guidance for Regional Inspectors* that the list of secondary containment methods in § 112.7(c) are examples only and not meant to be all-inclusive. Other containment methods may be used, consistent with good engineering practice. For example, a facility could use an oil/water separator, combined with a drainage system, to collect and retain discharges of oil within the facility. Surface impoundments, oil/water separators, and wastewater treatment systems that are designed and maintained in a way to meet the requirements of § 112.7(c) to prevent a discharge as described in § 112.1(b) would also serve as equivalent prevention systems. Additionally, certification of the SPCC Plan verifies that secondary containment methods are appropriate for the facility and that they follow good engineering practice.

I. General Secondary Containment for Non-Transportation-Related Tank Trucks

In the December 2006 amendments to the SPCC rule (71 FR 77266, December 26, 2006), EPA exempted mobile refuelers from the sized secondary containment requirements applicable to bulk storage containers. EPA recognizes that other non-transportation-related tanker trucks may operate similarly to mobile refuelers, though not specifically transferring fuel (*i.e.*, transformer oils, lubrication oils, or certain AFVOs). Therefore, they may have the same difficulty in complying with the sized secondary containment requirements. EPA is now extending the amendment provided to mobile refuelers in the December 2006 amendments (*i.e.*, an exemption from the sized secondary

containment requirements) to non-transportation-related tank trucks at a facility subject to the SPCC rule. Specifically, §§ 112.6(a)(3)(ii), 112.8(c)(2), 112.8(c)(11), 112.12(c)(2), and 112.12(c)(11) have been amended to include the phrase ''except mobile refuelers and other non-transportation-related tank trucks.'' Such non-transportation-related tank trucks include those used to store (for short periods of time) and transport fuel, crude oil, condensate, non-petroleum, or other oils for transfer to or from bulk storage containers; for example, a truck used to refill oil-filled equipment at an electrical substation or a pump truck at an oil production facility. Under this approach, the general secondary containment requirements at § 112.7(c) will still apply.

1. Comments

Commenters generally supported extending the exemption for mobile refuelers from the sized secondary containment requirements in §§ 112.8(c)(6) and 112.12(c)(6) to non-transportation-related tank trucks. However, a number of commenters requested that EPA expand the scope of the relief or clarify its applicability. Specifically, commenters requested that the relief be given to various other types of vehicles and equipment, including tank cars or rail cars; mobile refueling tank trucks at drilling and workover facilities; vehicles associated with oil-filled electrical/operational equipment; mobile/portable tanks used for maintenance activities associated with oil-filled electrical equipment; vehicles involved in transloading (as defined in 49 CFR 171.8); and small truck-mounted refueling and oil tanks, up to 220 gallons, that are used to transport oils and fuels to various remote facilities and construction sites.

One commenter opposed extending the regulatory relief to non-transportation-related tank trucks because there are technically-feasible methods for facility owners or operators to conform with the requirements, such as double-lined tanks, and that regulatory relief would effectively punish those facilities that have already incurred the costs of conforming with the sized secondary requirements for tank trucks. The commenter further stated that tank trucks are high-risk oil containers and that to relax the SPCC requirements would not serve to protect the environment.

2. Response to Comments

EPA agrees with the commenters who argued that non-transportation-related tank trucks at a facility subject to the SPCC rule should be exempted from the sized secondary containment requirements, but should remain subject to the general secondary containment requirements. EPA also agrees with commenters who suggested that the exemption from the sized secondary containment requirements should cover small truck-mounted oil tanks and other tank trucks, such as bulk chemical trucks and vacuum trucks. These trucks are similar to mobile refuelers and are included in the exemption from sized secondary containment when the truck-mounted oil tank is used to refill a fuel container, an electrical transformer, or a hydraulic reservoir on a combine or piece of mining equipment. Similarly, mobile refueling tank trucks at drilling and workover facilities are included in the exemption from the sized secondary containment requirements.

However, EPA disagrees with commenters that the exemption should be extended to tank cars or rail cars. EPA believes that tank cars and rail cars typically operate in fixed areas of a facility where sized secondary containment can be provided, given the land area that is generally dedicated to a rail spur. Similarly, the exemption is not being extended to mobile/portable containers because the Agency believes that sized secondary containment can be provided for containers that generally operate in fixed locations at a facility, but are occasionally moved to other fixed locations within the facility for similar service.

One commenter suggested that transloading activities, as defined by DOT at 49 CFR 171.8, should be exempted from the sized secondary containment requirements. ''Transloading'', which for the purposes of hazardous materials regulations means the transfer of a hazardous material from one packaging to another packaging for contained shipment of the material (see 49 CFR 171.8). This rulemaking, however, focuses on clarifying SPCC requirements applicable to non-transportation-related trucks and the specific topic of ''transloading'' falls outside this scope.

EPA also disagrees with the commenter who opposed extending regulatory relief to non-transportation-related tank trucks. EPA believes that sized secondary containment is not necessary, and in some cases, not appropriate, for the same reasons the Agency exempted mobile refuelers from the sized secondary containment requirements. In addition, the general secondary containment requirement in § 112.7(c) still applies, which provides adequate flexibility for the prevention of oil discharges as described in § 112.1(b). For example, active measures to respond to an oil discharge from a vehicular accident may be used to comply with the general secondary containment requirement.

J. Security

EPA is amending the facility security requirements at § 112.7(g) to allow an owner or operator of a facility to tailor his security measures to the facility's specific characteristics and location. Thus, this amendment extends the streamlined security requirements that EPA provided to qualified facilities in the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006) to all facilities subject to the security requirements.

1. Revisions to the Security Requirements

The application of the SPCC security requirements is often determined by the facility's geographical/spatial factors, such that there is no ''one-size-fits-all'' method to comply with this requirement. Therefore, EPA is modifying the security requirements at § 112.7(g) to allow the owner or operator to design the security arrangements at the facility to address the specific circumstances that apply. Thus, this amendment allows an owner or operator to describe in his SPCC Plan how he will:

- Secure and control access to all oil handling, processing and storage areas;
- Secure master flow and drain valves;
- Prevent unauthorized access to starter controls on oil pumps;
- Secure out-of-service and loading/unloading connections of oil pipelines; and
- Address the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges.

A facility owner or operator is required to document in his SPCC Plan how these security measures are implemented. These requirements replace the more prescriptive fencing and other requirements, previously found in § 112.7(g)(1) through (5), and allow the facility owner or operator to determine how best to secure and control access to areas where a discharge to navigable waters or adjoining shorelines may originate.

EPA believes that this amendment will eliminate the need for PE-certified environmentally equivalent alternatives to the specified security requirements, because the provision provides the flexibility for the owner or operator to provide whatever measures are most appropriate for the facility, as long as

they accomplish the stated security goals. For example, with this rule revision, the Agency allows the facility owner or operator to determine how lighting and/or fencing can be used to deter intruders and to assist in the discovery of oil discharges, or whether taking a different, site-specific approach is most appropriate. The Agency believes the added flexibility will not have a negative impact on the protection of the environment, and that it will assist the regulated community to better tailor the security requirements to their particular situation.

Because the revised requirements at § 112.7(g) apply to all facilities (excluding oil production facilities), EPA is removing the security requirements previously found at § 112.6(c)(3) for qualified facilities; the provision would be redundant.

a. Comments

Many commenters expressed general support for the amendments to the security requirements. One commenter noted that it is important to allow the operator to determine the security and lighting needs for safety reasons. Another commenter agreed that flexibility is warranted given increased security measures due to the requirements from the Department of Homeland Security (DHS) or DOT.

Still another commenter suggested that EPA should not establish security requirements because DHS has recently published a rule affecting the security of farms and is expected to promulgate additional rules; EPA's efforts may be duplicative. Several other commenters suggested that EPA avoid duplication of security requirements if existing security plans are in place as required by other Federal or state regulations. Finally, one commenter requested that EPA provide additional clarification to identify the security benefits of fencing.

b. Response to Comments

The Agency agrees with the commenters' general support for the amendment and is finalizing the amendment to the security requirements, as proposed. With this amendment, the Agency recognizes that there is no one single approach to ensure proper facility security. The Agency believes that replacing the more prescriptive fencing and other security requirements, previously found at § 112.7(g), will allow the facility owner or operator to determine how best to secure and control access to oil handling and storage areas at the facility. This approach provides the flexibility suggested by several commenters to prevent unauthorized access to the facility using whatever method is most appropriate. Thus, the owner or operator of the facility can comply with DHS security requirements, other existing Federal, state or local security requirements, or an industry recommended practice and describe these measures in the Plan to comply with the SPCC security requirement.

The Agency does not believe it needs to provide additional clarification to identify the security benefits of fencing, as the flexibility in this rule allows that determination to be made by the owner or operator based on his facility's specific circumstances.

K. Integrity Testing

EPA is amending the requirements at §§ 112.8(c)(6) and 112.12(c)(6) to provide flexibility in complying with the bulk storage container integrity testing requirements. Specifically, EPA is modifying the provision to allow an owner or operator to consult and rely on industry standards to determine the appropriate qualifications for tank inspectors/testing personnel and the type and frequency of integrity testing required for a particular container size and configuration. Thus, this action extends the streamlined bulk storage container integrity testing requirement that EPA provided to qualified facilities in the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006) to all facilities subject to the integrity testing provision.

1. Amendments to Integrity Testing Requirements

EPA is replacing the previous regulatory requirements at §§ 112.8(c)(6) and 112.12(c)(6) with the integrity testing requirements promulgated in December 2006 for qualified facilities (§ 112.6(c)(4)). This amendment requires a facility owner or operator to:

- Test/inspect each aboveground container for integrity on a regular schedule and whenever material repairs are made.
- Determine, in accordance with industry standards, the appropriate qualifications of personnel performing tests and inspections and the frequency and type of testing and inspections, which take into account container size, configuration, and design.

Because the revised requirements at §§ 112.8(c)(6) and 112.12(c)(6) apply to all facilities (excluding oil production facilities), EPA is removing the integrity testing requirements previously found at § 112.6(c)(4) for qualified facilities; this provision is redundant. These revised provisions allow, for example, an owner or operator to adopt integrity testing requirements that are outlined in industry standards in lieu of integrity testing without the need for environmental equivalence determinations certified by a PE. An owner or operator is still required to keep comparison records (records of inspections and tests kept under usual and customary business practices will suffice) and to inspect the container's supports and foundations. The owner or operator also is still required to conduct frequent inspection of the outside of the container for signs of deterioration, discharges, or accumulation of oil inside diked areas.

Under the revised provision, a facility owner or operator may still deviate from the rule provision, or from an industry standard, if the alternate measure is equivalent to the environmental protections provided by the rule requirement (as provided in § 112.7(a)(2)). In this case, a PE would need to certify the reason for the deviation and that the alternate measures are environmentally equivalent.

These amendments apply only to the integrity testing requirements in §§ 112.8(c)(6) and 112.12(c)(6). The bulk storage container inspection requirements for onshore oil production facilities in § 112.9(c)(3) are not affected by this amendment.

a. Comments

Many commenters expressed general support for the amendments to the integrity testing provisions. Some commenters suggested that a requirement for visual inspections with weekly or monthly frequency would be inappropriate because such a schedule is impracticable; they agreed that the frequency and documentation of visual inspections should be based upon PE judgment and site-specific conditions. Other commenters agreed that the PE should determine the appropriate testing/inspection requirements for each container and that industry standards should be used as appropriate.

Two commenters suggested that the amendments are too prescriptive, and not performance-based, and that the amendment detracts from a PE's ability to assess site-specific conditions. Other commenters disagreed with EPA's reference to industry standards in setting environmental regulations and objected to the use of the term ''industry standards'' for inspector qualifications and integrity testing methods because these standards are unnecessarily strict.

In addition, several other approaches were suggested by commenters. One commenter suggested that tank integrity testing criteria should be limited to

visual inspections. One commenter suggested extending ''environmental equivalence of visual-only testing to all elevated tanks and tanks on release prevention barriers (RPBs), regardless of volume.'' One commenter suggested that EPA should allow the owner or operator of a facility with indoor tanks to adopt different inspection requirements (not outlined by industry standards); the facilities would still have to keep records and perform monthly visual inspections, but not be required to hire third-party inspectors.

One commenter suggested that EPA should codify the PMAA standards; these standards allow operators, who are not certified tank inspectors, but who have training and experience to visually inspect tanks at petroleum production facilities, refineries, and terminals, to conduct such inspections. Several other commenters specifically recommended using standards, such as Steel Tank Institute (STI) SP001 and American Petroleum Institute (API) Standard 653. One commenter suggested that EPA should eliminate the phrase ''qualified personnel'' from the amended rule text. A few other commenters recommended that EPA incorporate API/EPA litigation settlement language concerning inspection requirements for smaller containers, specifically allowing visual inspection in certain site-specific circumstances, into the regulation at § 112.12(c)(6).

b. Response to Comments

EPA agrees with those commenters who supported amending the integrity testing requirements at §§ 112.8(c)(6) and 112.12(c)(6). EPA disagrees that the amendments are too prescriptive. The amended integrity testing requirements are intended to provide more flexibility to the owner or operator of an SPCC-regulated facility in the selection of the appropriate scope and frequency of integrity testing for all classes of bulk storage containers, including indoor and outdoor tanks and portable containers (such as 55-gallon drums and totes). The July 2002 rule revisions (67 FR 47042, July 17, 2002) amended the integrity testing requirements in §§ 112.8(c)(6) and 112.12(c)(6) to require visual inspections, plus some other form of testing, for each bulk storage container 55 U.S. gallons or greater; this amendment modifies this requirement to allow the owner or operator to determine the frequency and type of testing and inspections that are appropriate, according to site-specific conditions (for example, type and age of tanks, condition of tanks, and overall tank/secondary containment configuration), while also considering relevant integrity testing standards.

EPA maintains that inspection of containers storing oil in accordance with recognized industry inspection (integrity testing) standards is an important aspect of oil spill prevention. Industry standards are technical guidelines created by experts in a particular industry for use throughout that industry. These guidelines assist in establishing common levels of safety and common practices for manufacture, maintenance, and repair. Created by standard-setting organizations using a consensus process, the standards establish the minimum accepted industry practice. EPA recognizes that some industry standards now provide differentiated inspection requirements for various container sizes and configurations that may allow for visual inspection of certain types of oil storage containers, such as drums and totes and certain tanks up to 5,000 U.S. gallons. EPA's amendments to the integrity testing requirements are intended to allow the use of these industry standards without the need for environmental equivalence discussions in an SPCC Plan when a recognized industry standard is followed. EPA notes that use of a particular standard is voluntary; however, when a standard (or any part of a standard) is incorporated into a facility's SPCC Plan, then adherence to that standard (or part of a standard) is mandatory for implementation of the SPCC Plan.

It should also be noted that these amendments do not restrict the use of environmental equivalence, including establishing differentiated inspection requirements for shop-built tanks versus field-erected tanks, and other alternatives suggested by commenters. Owners or operators still have the ability to develop alternative, environmentally equivalent integrity testing procedures for bulk storage containers in accordance with § 112.7(a)(2). These equivalent measures must be in accordance with good engineering practice and are subject to certification by a PE.

EPA described the environmental equivalence flexibility available to a PE with respect to integrity testing in a letter to the PMAA.[5] While the policy and approach for the use of environmental equivalence described in this letter is still valid, the approach taken in this final rule amending the integrity testing requirements allows inspection requirements outlined in industry standards to be used without the need for environmental equivalence determinations certified by a PE. A major industry standard for integrity testing (STI SP001) was modified since the letter to PMAA was written to outline ''good engineering practice'' for integrity testing of shop-built containers. This may affect a PE's decision whether to certify an environmentally equivalent approach as described in the PMAA letter, or to follow the industry standard as provided by the amendment finalized in this rule.

In response to the comment that EPA should clarify acceptable industry standards for all integrity testing procedures, the Agency provided a list of organizations that may be helpful in the identification and explanation of industry standards in the **Federal Register** notice for the July 2002 SPCC rule revisions (67 FR 47058, July 17, 2002). In addition, EPA also provided an overview and description of the scope and key elements of pertinent industry standards in Chapter 7 of the *SPCC Guidance for Regional Inspectors*. While the Agency is allowing industry to rely on industry standards to assess the inspection and integrity testing scheme, EPA does not believe that any specific industry standards should be incorporated, by reference, into the rule. As EPA noted in the preamble to the July 2002 SPCC rule revisions (67 FR 47070, July 17, 2002), while facility owners or operators should look to specific industry standards as a guide for preparing SPCC Plans, EPA does not believe that incorporating specific standards into this rule is appropriate. Such incorporation freezes standards into rules, which may become outdated or obsolete. The decision in every case as to the applicability of any industry standard will be one for the PE, or the owner or operator of the facility who self-certifies an SPCC Plan.

Finally, commenters suggested allowing the use of alternative inspection techniques and the qualification requirements for inspectors; however EPA believes that these amendments are consistent with industry standards related to integrity testing.

L. Animal Fats and Vegetable Oils

Under this final rulemaking, EPA is differentiating the integrity testing requirements at § 112.12(c)(6) for an owner or operator of a facility that handles certain types of AFVOs.

EPA is providing the PE or an owner or operator self-certifying an SPCC Plan with the flexibility to use a visual

[5] Letter to Daniel Gilligan, President, Petroleum Marketers Association of America, from Marianne Lamont Horinko, Assistant Administrator, Office of Solid Waste and Emergency Response, EPA, May 25, 2004.

inspection program for integrity testing that is appropriate for containers that store AFVOs that meet certain criteria. This flexibility applies to those bulk storage containers that are subject to the applicable sections of the Food and Drug Administration (FDA) regulation 21 CFR part 110, *Current Good Manufacturing Practice in Manufacturing, Packing or Holding Human Food*, and that meet the following additional criteria: (1) The containers are elevated; (2) the containers are made from austenitic stainless steel; (3) the containers have no external insulation; and (4) the containers are shop-built. That is, an owner or operator with containers meeting these criteria can use visual inspection of these containers equivalent to industry standards, in lieu of the revised integrity testing requirements found at § 112.12(c)(6), without having to make an environmental equivalence determination in accordance with § 112.7(a)(2). The owner or operator is required to document the procedures for inspections and testing in their SPCC Plan, including those for AFVO bulk storage containers that are eligible for the differentiated requirements described in this amendment.

1. Differentiated Requirements for AFVOs

Stakeholders have commented that AFVOs merit differentiated requirements under the SPCC regulation. In particular, the regulated community has pointed to differences between the toxicity and biodegradation profiles of AFVOs and those of petroleum oils. Because of these claims, and in response to the Edible Oil Regulatory Reform Act (EORRA), the Agency has on several occasions formally requested information and supporting scientific data that would inform such a determination. (*See* 72 FR 58400, October 15, 2007, for a discussion of EPA's data review.) EPA then considered whether an alternative approach to differentiation that is not based on the oil's toxicity and its inherent physical/chemical properties, but rather based on the way these oils are stored and handled at a facility would be appropriate. EPA focused specifically on the integrity testing requirements for bulk storage of AFVOs to address concerns raised by the regulated community. As a result, this final rule establishes differentiated integrity testing requirements for certain bulk storage containers that store AFVOs and that meet specific design and operational criteria.

Because this is an alternative, EPA is not requiring that an owner or operator use this option. The alternative provides additional flexibility in meeting the provisions set forth in § 112.12(c)(6) to address stakeholder concerns. In addition, an owner or operator may make an environmental equivalence determination, in accordance with § 112.7(a)(2) for integrity testing of a bulk storage container.

a. Comments

Several commenters expressed support for EPA's efforts to reduce the regulatory burden to facilities storing AFVOs because these substances are different from petroleum oils. One commenter appreciated EPA's clarification regarding reasonable expectation of discharge for AFVOs that are solid or semi-solid at ambient temperature and pressure. However, one commenter suggested the current criteria are too limiting to provide relief, because many AFVO storage containers would not meet the criteria and thus, would not be eligible. Another commenter, on the other hand, indicated the proposal was overly lax and should be reconsidered.

b. Response to Comments

EPA notes that this alternative option is based not on the differences between petroleum oil and AFVOs, but on the way these oils are stored and handled at a facility. With regard to the comment about certain AFVOs solidifying at room temperature, EPA notes that the applicability of the SPCC rule must be made in accordance with the provisions set forth in § 112.1. The Agency notes that the SPCC rule only applies to facilities that, due to their location, can reasonably be expected to discharge oil to navigable waters or adjoining shorelines. In determining whether there is a reasonable expectation of discharge, an owner or operator of a facility may consider the nature and flow properties of the oils handled at the facility. However, if a facility owner or operator determines that there is a reasonable expectation to discharge oil to navigable waters or adjoining shorelines for any single oil container, all oil containers at the facility are subject to the rule's requirements, except as otherwise exempted.

The Agency acknowledges comments on the criteria being both too limiting and also overly lax, but EPA believes that the criteria developed strikes the appropriate balance between regulatory requirements and environmental protection.

2. Differentiation Criteria: Containers Subject to FDA Regulations—21 CFR Part 110

The differentiated integrity testing requirements finalized in this action are available only to those bulk storage containers that are subject to the applicable sections of the FDA regulation at 21 CFR part 110. When developing an integrity testing program for AFVO bulk storage containers, FDA rule requirements may substitute for an industry standard. Applicable requirements within 21 CFR part 110, when taken together with the additional criteria in this amendment, serve as equivalent alternative measures that include the main elements of an integrity testing program under the SPCC regulation. The minimal elements for an integrity testing program can be separated into three main structural integrity areas: (1) Container foundations, (2) container support structures, and (3) the container itself.

- *Container foundations.* FDA requires that facilities be constructed in such a manner that the floor, walls, and ceilings be adequately cleaned and kept clean and in good repair (21 CFR 110.20(b)(4)). Bulk storage containers that sit atop floors that fall under this requirement are expected to be maintained and kept in good repair.
- *Container support structure.* FDA requires all plant equipment, including the container's structural supports, to be designed of such material and workmanship as to be adequately cleanable, and for it to be properly maintained (21 CFR 110.40(a)). Periodic maintenance of the structural support(s) of a bulk storage container is also an oil spill preventive measure.
- *Container itself.* FDA requires the design, construction, and use of equipment to preclude the adulteration of food with, among other potential contaminants, metal fragments (21 CFR 110.40(a)). FDA further requires that food contact surfaces be corrosion resistant when in contact with food. FDA also requires equipment that is in the manufacturing or food-handling area and that does not come into contact with food must be constructed and kept in a clean condition (21 CFR 110.40(c)). The exterior surface of bulk storage containers that are located in the manufacturing or food-handling area and that are subject to this requirement are expected to be maintained to a higher standard than other bulk storage containers, which are not subject to a similar requirement.

a. Comments

One commenter agreed with the logic that container foundations and support structures meeting the FDA requirements may also meet the intent and practicality of the SPCC requirements. Another commenter agreed that offering options for environmental equivalence is a good step, but suggested that the options should go beyond the FDA standards and include other industry standards that offer equivalent protection.

b. Response to Comments

EPA agrees with those comments supporting the use of FDA's regulations as a basis for establishing a qualifying criterion for differentiated integrity testing requirements for AFVOs. The Agency also agrees that compliance with industry standards and requirements other than 21 CFR part 110 may also meet the SPCC inspection, evaluation, and testing requirements. In the preamble to the July 2002 SPCC rule amendments, EPA provided examples of industry standards that may constitute good engineering practice for assessing the integrity of different types of containers for oil storage (67 FR 47120, July 17, 2002). Additionally, the SPCC rule provides flexibility regarding the integrity testing requirements of bulk storage containers, as long as the alternatives provide equivalent environmental protection per § 112.7(a)(2).

3. Differentiation Criteria: Elevated Bulk Storage Containers

The differentiated integrity testing requirements finalized in this action are available only to those bulk storage containers that are elevated. Food equipment, by design, is generally elevated above the floor using legs or another means of support so that the space between the equipment and the floor can be cleaned. For the purposes of oil spill prevention, elevated bulk storage containers allow visual inspections for oil discharges all around the container. An elevated bulk storage container used for food oils also facilitates complete drainage because they are designed such that the oil is withdrawn from the lowest point in the container, so that foreign substances or materials do not accumulate and contaminate the food oil. For the purposes of oil spill prevention, self-draining containers operating using gravity flow allows complete drainage and prevents substances other than oil (such as water) from accumulating at the bottom of the container, thus minimizing corrosion. EPA believes that the self-drainage design, in conjunction with the applicable regulatory requirements, is likely to prevent the corrosion of the internal contact surface in food-grade AFVO bulk storage containers.

a. Comments

Several commenters suggested including non-elevated containers in EPA's criteria for the integrity testing provision. Commenters reference non-elevated food industry tanks that are positioned on pads so long as the area can be adequately cleaned and kept in good repair, and vessels that incorporate a bottom-discharge design which eliminates the build-up of water and materials in the bottom of the tank and prevents corrosion.

b. Response to Comments

While EPA recognizes similarities between elevated and bottom-discharge designs, the Agency does not agree with the request to expand the scope of the AFVO alternative criterion to include non-elevated bulk storage containers. Although some food industry facilities may use non-elevated tanks, food equipment is generally designed to be elevated (for example, to stand on legs); this elevated design allows the space between the plant equipment and the floor to be easily cleaned. FDA also recommends that all equipment should be so installed and maintained so as to facilitate cleaning of the equipment and of all adjacent spaces.

Bottom-discharge designs similarly eliminate the build-up of water and materials in the bottom of the tanks. However, the Agency believes that having the tanks elevated facilitates maintenance, inspections, and monitoring for oil discharges all around the bulk storage container, all of which are critical in allowing for the differentiated integrity testing requirements. It is important to note that the differentiated requirements are an available alternative. The owner or operator may choose to include bulk storage container designs that provide equivalent environmental protection in their SPCC Plan, in accordance with § 112.7(a)(2). For example, bulk storage containers built according to industry standards (such as 3–A Sanitary Standards) may provide additional features that facilitate visual inspection (such as manholes for internal inspection) that may provide comparable environmental protection.

4. Differentiation Criteria: Containers Made From Austenitic Stainless Steel

The differentiated integrity testing requirements finalized in this action are available only for those bulk storage containers that are made of austenitic stainless steel. EPA believes that non-homogenous container systems (for example, containers with external insulation, an external coating, a mild-carbon steel shell, an internal liner) are more complex than homogenous container systems (such as containers constructed solely of austenitic stainless steel) and may require additional inspection measures to ensure the integrity of the container. Furthermore, austenitic stainless steel containers are often used because cleaning agents and acidic detergents used to clean food and non-food contact surfaces can be corrosive if used on incompatible surfaces. Therefore, EPA is limiting this alternative approach for integrity testing to AFVO bulk storage containers made of austenitic stainless steel.

a. Comments

A commenter agreed with EPA to limit the alternative integrity testing requirements to austenitic stainless steel tanks and vessels. However, several commenters suggested that EPA consider including carbon steel tanks in the eligibility criteria for the flexibility to determine the scope of integrity testing, especially considering the widespread use of these containers and the consistency with EPA's current SPCC guidance. A commenter also cited the cost difference between a mild steel tank (commonly used in the industry) and a stainless steel tank.

b. Response to Comments

EPA agrees with the commenter who supported limiting the alternative integrity testing requirements to bulk storage containers made of austenitic stainless steel for the reasons stated above. As one commenter noted, carbon steel tanks that are interior-lined may pose more significant inspection requirements because the interior lining may fail to adhere to the tank, and not provide the intended protection of the carbon steel. Other commenters believed that limiting alternative testing requirements to austenitic stainless steel would limit the usefulness of the alternative option. While this assertion may be correct, the Agency nevertheless believes that expanding this alternative to include carbon steel containers is not appropriate, because non-austenitic stainless steels, including but not limited to carbon steel, are not as inherently corrosion resistant as austenitic stainless steel to the materials stored or handled in them (that is, they are more susceptible to internal corrosion) or to the operating environment (that is, they are more

susceptible to external corrosion). Furthermore, non-austenitic stainless steel containers may require a liner; these liners can fail or delaminate, promoting the potential for internal or external corrosion. Thus, the Agency believes the austenitic stainless steel criterion is an integral part of the criteria for differentiated requirements. Again, these differentiated requirements are an available alternative that the owner or operator may choose to include in their SPCC Plan. The owner or operator may choose to make an environmental equivalence determination, in accordance with § 112.7(a)(2), for similar corrosion resistant materials.

5. Differentiation Criteria: Containers With No External Insulation

The differentiated integrity testing requirements finalized in this action are available only to those bulk storage containers with no external insulation. The Agency believes that inspections based on frequent monitoring of the exterior surface of a bulk storage container for corrosion and/or other mechanisms that can threaten a container's integrity is a minimum criterion for an alternative measure that provides equivalent environmental protection. External insulation covering the outside of a bulk storage container acts as a physical barrier to effective visual examination of the exterior surface. If not properly sealed, insulating materials covering the exterior surface of a bulk storage container and/or any associated equipment and piping can become damp. Insulation that retains moisture and that is adjacent to a container's exterior surface can cause significant corrosion, which may threaten the integrity of the container.

EPA is unaware of any sanitation provision or regulatory requirement that requires an inspection between the insulation and the exterior surface of a bulk storage container. Furthermore, the Agency does not know of any established industry methods or procedures, or industry standards specific to AFVOs, to evaluate the exterior surface of a bulk storage container that is covered by insulation. Therefore, EPA believes only containers with no external insulation should be eligible for this alternative for integrity testing.

a. Comments

One commenter stated that effective visual examination is difficult for tanks with external insulation; therefore, the commenter agreed that the alternative integrity testing requirements should only be applied to tanks with no external insulation. However, several commenters suggested that EPA revise its AFVO alternate integrity testing criteria to allow insulated or jacketed tanks to be used under this amendment, as long as there are sufficient access ports installed in key locations to observe an appropriate quantity of the exterior of the tank. Commenters cite the need for this type of tank to maintain product viscosity. Commenters also note that there is an established industry practice allowing for visual inspection of insulated tanks. In addition, one commenter suggested insulation is very prevalent in the industry and the increased energy cost for non-insulated containers would be prohibitive.

b. Response to Comments

The Agency agrees with those commenters that supported limiting the alternative criterion to bulk storage containers that have no external insulation because external insulation is a barrier to visual examination, making effective visual inspection difficult. At the same time, EPA recognizes that some AFVO bulk storage containers need insulation to maintain temperatures. However, the Agency disagrees with the commenters that suggested this criterion should be expanded to include jacketed tanks that have sufficient access ports installed at key locations.

The Agency believes it is important that the criteria for differentiated requirements account for the effect of corrosion under the thermal insulation, including but not limited to, the effect of moisture, chloride leaching, and/or temperature. The effects of corrosion under thermal insulation are well documented in the technical literature. (*See*, for example, National Association of Corrosion Engineers (NACE) Standard RP0198–2004.) Thus, because external insulation covering the outside of a bulk storage container acts as a barrier to effective visual examination, EPA believes this is a minimum criterion for this alternative, the Agency is limiting the alternative criterion to those containers that have no external insulation. However, bulk storage containers that store food oil and are built according to industry standards (such as 3–A Sanitary Standards) may have additional design features that provide equivalent environmental protection and thus meet the intent of the criteria. For example, container configurations built according to 3–A Sanitary Standards typically include ''manholes'' that facilitate complete access for examination of the entire internal surface. These containers also typically have an outer shell (that is, a double wall) that is sealed completely (for example, with completely welded seams) so that the container integrity is maintained by removing any potential for the insulation to be exposed to moisture. In addition, some AFVO bulk storage containers that are refrigerated may suppress corrosion potential, whereas containers that are heated to facilitate oil flow may promote corrosion potential. The Agency believes the rule provides the facility owner or operator with significant flexibility to make an environmental equivalence determination, in accordance with § 112.7(a)(2), which may be used to address those insulated bulk storage containers that have alternative configurations, including access ports.

Finally, the Agency disagrees with those commenters who suggested that the alternative criterion should include insulated containers because they are prevalent in the industry or because the increased energy cost for non-insulated containers would be prohibitive. The Agency is not mandating the use of any type of container, but rather is allowing flexibility for the owner or operator of facilities that have containers that meet the alternative criterion.

6. Differentiation Criteria: Shop-Fabricated Containers

The differentiated integrity testing requirements finalized in this action are available only to shop-fabricated containers (i.e., shop-built). Shop-fabricated containers are those containers that are shop-assembled in one piece before they are transported to the installation site; this limits the maximum capacity of the container so that it can be transported over the road by truck. Shop-fabricated containers generally have lower volume capacities, smaller tank diameters, and a fewer number of welds than field-erected containers, and they are typically comprised of a single type of material with a single wall thickness.

Field-erected (i.e., field-constructed) containers, on the other hand, can store much larger volumes of oil. They have larger container capacities because individual pieces of the container can be transported to and assembled at the installation site. Because of their greater size and complexity, field-erected containers generally have more stringent engineering requirements than shop-fabricated containers, which would need to be considered in developing an appropriate integrity testing program. For example, field-erected containers may have variable shell-wall

thicknesses, and/or be comprised of different materials to account for variations in the stresses caused by hydrostatic pressure. These field-erected containers generally have a significantly greater number of welds as compared to a shop-fabricated container because they are fabricated on-site from individual pieces. The stress on the container walls and joints is greater as the diameter and/or height of the container increases. A brittle fracture evaluation of a field-erected container may be necessary if the thickness of the shell wall is above a certain value and the container undergoes a repair, alteration, reconstruction, or a change in service that might affect the likelihood of a discharge or failure (§ 112.7(i)).

This option, therefore, is limited to shop-fabricated containers because they are simpler in design and construction (they are typically subject to less stress, have fewer welds, and are less likely to be subject to brittle fracture failure) than field-erected containers. The Steel Tank Institute's (STI) SP001, *Standard for the Inspection for Aboveground Storage Tanks*, establishes the scope and frequency for visual inspections of shop-fabricated containers. This rule amendment is consistent with past regulatory guidance and current industry best practices for this particular class of bulk storage containers.

a. Comments

One commenter suggested that EPA should not limit consideration of alternative integrity testing to only shop-fabricated containers. The commenter indicated that while field-erected tanks are larger than shop-fabricated tanks, they are designed to meet industry standards; there are no data to support a higher failure rate; and industry standards for visual inspections apply to field-erected tanks.

Two commenters also suggested that EPA modify the rule to clarify that tanks that are pre-fabricated in sections, and then field-erected in a limited number of places, should qualify for the alternative provisions, since many AFVO facilities utilize these tanks and there are fewer field welds than for a completely field-erected tank. In addition, one commenter suggested that these partial field-assembled tanks are not necessarily the large capacity containers that EPA may seek to exclude from the integrity testing provision.

b. Response to Comments

For the reasons stated above, EPA believes it is appropriate to limit the alternative integrity testing criterion to shop-fabricated containers: They are simpler in design and construction in relation to field-erected containers, including those bulk storage containers that are partially field assembled. EPA believes this criterion distinguishes between more complex bulk storage containers, which may require greater integrity testing scrutiny, and smaller, less complex containers.

EPA disagrees with the commenter who questioned whether this criterion was relevant, by asserting that the industry standards for visual inspection apply to field-erected tanks. While visual inspection may be a component of an integrity testing program for field-erected tanks, EPA is unaware of any industry standard which limits integrity testing for a field-erected bulk storage container to visual inspection only. Industry standards typically incorporate visual inspection into a broader integrity testing program which typically also includes non-destructive testing on a regular schedule and includes inspection of the tank's shell and bottom plate. EPA believes this criterion, in combination with the others, limits the applicability of the integrity testing relief to those AFVO containers that, because of equipment design and handling requirements already provide environmentally equivalent protection. In contrast, containers that are partially shop-fabricated and then finalized in the field may be subject to additional inspection requirements to bring these containers into service and for continued service beyond fully shop-fabricated containers. It should also be noted that the rule provides sufficient flexibility to make an environmental equivalence determination, in accordance with § 112.7(a)(2), which may be used to address fielded-erected containers that may vary in complexity, including field-erected containers comprised of pre-fabricated sections.

7. Required Recordkeeping

The SPCC regulations require that inspections and tests be conducted in accordance with the written procedures that the owner or operator or the certifying PE develop for the facility and that records of inspections and testing be kept with the SPCC Plan in accordance with the recordkeeping provisions of § 112.7(e). EPA believes that visual inspection that is part of the periodic maintenance of the bulk storage container's support and foundation must be documented. Records of inspections and tests kept under usual and customary business practices will suffice. To take advantage of this alternative option for AFVOs, the owner or operator or PE should refer to the appropriate requirements under 21 CFR part 110 to develop an appropriate inspection, evaluation, and testing program for an SPCC-regulated facility.

No comments were submitted in reference to this requirement.

8. Other Suggested Criteria and Options

EPA received a number of comments with suggestions for other approaches to provide integrity testing relief to certain AFVO containers.

a. Comments

Two commenters suggested extending the testing frequency for AFVO containers based upon the internal corrosion differences between AFVO and petroleum-based oils. Other commenters suggested that EPA exempt from the integrity testing requirements storage containers used for AFVO in compliance with the secondary containment provisions and that undergo visual inspection on a routine basis. The commenters noted that a leak would be discovered before it could escape into the environment due to the inspection frequency.

Another commenter requested that EPA use the same approach for AFVO as detailed in the *SPCC Guidance for Regional Inspectors* (Chapter 7) where it is explained that other design approaches, other industry standards, or other good engineering practices may be used alone or as a 'hybrid' program where equivalent results in meeting the SPCC requirements is obtained. The commenter suggested that the language should be expanded to allow the same alternatives for similar containers of all oil covered by the regulation.

One commenter recommended that EPA require a certified external tank and vessel inspection every ten years for tanks/vessels greater than 10,000 gallons capacity when non-hazardous substances are stored and annual inspections are conducted by a preventive maintenance inspector who is familiar with the equipment and the FTPI 2007–1 standard.

Several commenters suggested exempting milk storage containers from SPCC requirements based on additional regulations which address storage for on-farm milk storage containers. Specifically, these commenters identified the Grade ''A'' Pasteurized Milk Ordinance (PMO), which addresses milk intended for human consumption.

b. Response to Comments

Regarding the comment on extending inspection frequency for AFVO containers, the rule does not establish a required frequency and the owner or

operator of the facility or PE can establish an inspection schedule to account for the chemical and physical characteristics of the oil being stored and for any other factors which may affect the integrity of a bulk storage container. In response to the comment requesting that EPA allow visual inspection and secondary containment instead of integrity testing on AFVO storage containers, EPA notes that the revisions to § 112.12(c)(6) may allow the owner or operator to conduct visual inspections to satisfy the integrity testing requirements, as long as they are conducted in accordance with industry standards.

EPA is also finalizing changes to § 112.12(c)(6) incorporating industry standards into an integrity testing program for AFVO bulk storage containers (consistent with the provision finalized at § 112.8(c)(6) for other oils). EPA also believes there is sufficient flexibility provided in § 112.7(a)(2) to make an environmental equivalence determination with respect to developing a hybrid integrity testing program. Therefore, EPA believes that the rule already allows other design approaches, other industry standards, or other good engineering practices to be used alone or as a 'hybrid' program where equivalent results in meeting the SPCC requirements are obtained.

Regarding the comments suggesting that integrity testing should follow specific fiberglass tank and pipe industry standards (FTPI 2007–1), the SPCC rule requires that the Plan be prepared in accordance with good engineering practices, including consideration of applicable industry standards (§ 112.3(d)(1)(iii)). An owner or operator may follow the fiberglass tank and pipe standards, if appropriate for the particular facility's characteristics. Thus, the rule already provides for this. However, it should be noted that when a standard (or any part of a standard) is incorporated into a facility's SPCC Plan, then adherence to that standard (or part of a standard) is mandatory for implementation of the Plan.

In response to the proposed differentiated integrity testing requirements for certain AFVO bulk storage containers, several commenters requested an exemption for bulk storage containers holding milk. The Agency considered comments supporting an exemption of certain milk bulk storage containers from the SPCC requirements. PMO is a model ordinance maintained through a cooperative agreement between the states, the FDA, and the regulated community. States typically adopt it either by reference or by directly incorporating its requirements into statutes or regulations. EPA agrees with commenters that milk containers merit further consideration with respect to SPCC rule applicability and the PMO. Thus, in the near future, EPA intends to publish a proposed rule on alternative regulatory approaches for milk, including an exemption based upon the PMO.

M. Oil Production Facilities

Since its original promulgation in 1973, the SPCC rule has included differentiated requirements for oil production facilities (§ 112.9), as compared to other types of facilities (§§ 112.8, 112.10, 112.11, and 112.12). Based on issues presented by the regulated community, EPA is finalizing certain revisions that further streamline, tailor or clarify the SPCC requirements for oil production facilities. Specifically, EPA is finalizing the following modifications for oil production facilities: excluding oil production facilities from the loading/unloading rack requirements at § 112.7(h), as described in Section V.F of this action; revising the definition of ''production facility''; extending the timeframe by which the owner or operator of a new oil production facility must prepare and implement an SPCC Plan; providing an alternative option for flow-through process vessels at oil production facilities to comply with the general secondary containment requirement and additional oil spill prevention measures in lieu of sized secondary containment requirements; providing an exemption for certain intra-facility gathering lines from the SPCC requirements; providing an alternative option for flowlines and intra-facility gathering lines at oil production facilities for contingency planning in lieu of all secondary containment requirements, while establishing more prescriptive requirements for a flowline/intra-facility gathering line maintenance program; providing compliance alternatives for certain produced water containers that do not contain oil as certified by a PE; providing compliance alternatives to sized secondary containment for produced water storage containers that are not otherwise exempt; establishing alternative criteria for an oil production facility to be eligible to self-certify an SPCC Plan as a qualified facility; and clarifying the definition of ''permanently closed'' as it applies to an oil production facility.

1. Definition of Production Facility

As described in Section V.D of this action, EPA is modifying the definition of ''facility'' to clarify that contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines may be considered separate facilities, and to specify that the ''facility'' definition governs the applicability of 40 CFR part 112. To provide clarity consistent with these revisions, EPA is also finalizing modifications to the definition of ''production facility.'' A ''production facility'' is a type of ''facility'' as defined in § 112.2. The revised definition reads as follows: ''*Production facility* means all structures (including but not limited to wells, platforms, or storage facilities), piping (including but not limited to flowlines or intra-facility gathering lines), or equipment (including but not limited to workover equipment, separation equipment, or auxiliary non-transportation-related equipment) used in the production, extraction, recovery, lifting, stabilization, separation or treating of oil (including condensate) and associated storage or measurement and is located in an oil or gas field, at a facility. This definition governs whether such structures, piping, or equipment are subject to a specific section of this part.''

With these revisions, EPA is adding a sentence at the end of the definition to clarify that while only the definition of ''facility'' governs the overall applicability of 40 CFR part 112, the definition of ''production facility'' is used to determine which sections of the rule may apply at a particular facility. (The sections for administrative and general rule requirements continue to apply to all facilities under 40 CFR part 112.) This change to the definition of production facility addresses concerns raised during litigation challenging the 2002 rule amendments and discussed in the May 25, 2004 **Federal Register** notice (69 FR 29728). EPA has also modified the phrase ''and located in a single geographical oil or gas field operated by a single operator'' to clarify that a production facility ''is located in an oil or gas field.'' This is consistent with this rulemaking's revisions to the definition of ''facility'' that emphasize the flexibility in how a facility owner or operator can determine the boundaries of a facility.

a. Comments

Several commenters expressed general support for EPA's proposed amendments to the definition of ''production facility.'' However, one commenter stated that the reference to '* * * property, parcels, leases * * *' in the definition of ''facility'' causes uncertainty because leases regularly extend beyond the size of a production facility. Several commenters also

suggested that the proposed addition of the phrase ''may be,'' would cause the definition to become ambiguous.

The Agency also received comment on various other suggested options. For example, operators of facilities producing AFVO requested that EPA clarify that this section applies only to petroleum oil production by adding the word ''petroleum'' to the definition of production facility, while several other commenters suggested removing the reference to ''a single geographical oil or gas field'' to reduce confusion. Several commenters expressed concerns regarding multi-facility Plans for production facility operations. Another commenter requested EPA remove the phrase ''gathering line'' from the definition of production facility to avoid dual jurisdiction. Two commenters requested additional clarity regarding natural gas and the definition of production facility. Finally, two commenters suggested that EPA include additional infrastructure, activities and equipment that support production operations under the specific requirements of § 112.9, or requested use of a ''primary function'' test of a facility to determine the facility's applicability to specific sections of the SPCC regulation.

b. Response to Comments

EPA agrees with those commenters who supported the modifications to the definition, and is finalizing revisions to the definition of ''production facility,'' with certain changes as described in this section. The Agency disagrees that the revised definition leads to industry uncertainty. The changes clearly indicate that the definition of production facility specifically identifies which rule requirements apply to a facility. For example, oil production facilities are excluded from the rule requirements in § 112.8: ''*Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities),*'' whereas the rule requirements in § 112.9: ''*Spill Prevention, Control, and Countermeasure Plan requirements for onshore oil production facilities*'' specify that these requirements only apply to production facilities.

EPA also disagrees with the commenter who suggested that the addition of the term ''petroleum'' to the definition of production facility is necessary. The addition of the term ''petroleum'' is unnecessary because the definition itself indicates that the type of facilities addressed in the definition is one that is involved with petroleum crude oil production and not any other type of oil production, such as AFVO production. EPA's intent has always been that the definition of production facility addresses petroleum crude oil production, extraction, recovery, lifting, stabilization, separation or treatment and associated storage or measurement. For example, the definition includes terms associated with petroleum crude oil production, such as gathering lines and flowlines which are exclusively associated with upstream petroleum crude oil/gas production, not AFVO production or processing facilities. The term ''oil or gas field'' is used exclusively in upstream crude oil and gas production, not in AFVO production. This language further clarifies that the definition of production facility is specific to petroleum crude oil and gas production operations rather than AFVO production.

Several commenters expressed concern regarding multi-facility Plans for oil production operations. The Agency does not intend to require an owner or operator who uses one SPCC Plan to address multiple SPCC-regulated facilities to aggregate the storage capacity of the individual facilities covered in the multi-facility SPCC Plan. However, the method in which an owner or operator defines the boundaries of individual facilities must be consistent in determining both FRP and SPCC applicability. The Agency believes that the changes to the definitions of ''facility'' and ''production facility'' will not discourage the use of multi-facility Plans because the Agency does not require the aggregation of individual facility capacities covered under a multi-facility Plan. To provide further clarity, EPA has removed the limiting term ''single geographic'' from the production facility definition. This change together with the other modifications finalized in this action, make it clear that an owner or operator is not compelled, by the definition of production facility, to aggregate separate facilities located in a ''single geographic'' oil production field into a single facility. If an owner or operator has several distinct operations in one oil field, he is not required to consolidate these operations into a single facility. On the other hand, the owner or operator does have the flexibility to consolidate these operations if he so chooses.

To address the commenter's concerns that EPA is adding the terms ''intra-facility'' in front of the term gathering line, the Agency notes that the addition of this term clarifies that EPA only regulates those gathering lines located within a facility, as determined by the owner or operator. The Agency disagrees with commenters who suggested removing the term ''gathering lines'' from the production facility definition to avoid dual jurisdiction. Gathering lines that are located within the boundaries of an SPCC-regulated facility are considered to be ''intra-facility gathering lines'' and are subject to EPA's jurisdiction. However, EPA is exempting intra-facility gathering lines subject to the regulatory requirements of DOT's pipeline regulations in 49 CFR parts 192 or 195 from this regulation. See section V.M.4 of this notice for more information.

EPA does agree that clarification on how these rules address natural gas facilities is appropriate. In some cases, a natural gas production facility may store condensate (petroleum oil) in quantities that meet the applicability criteria for the SPCC requirements and should be considered a production facility when determining applicability of specific requirements in the rule (such as § 112.9). In this final rule, therefore, EPA is adding the phrase ''(*including condensate*)'' to the definition. This clarification is consistent with the current definition and provides additional clarity. Gaseous phase hydrocarbons, such as natural gas, present at SPCC-regulated facilities are not regulated under the SPCC rule. A detailed explanation of this interpretation can be found at 69 FR 29729–29730, May 25, 2004.

EPA does not agree with the ''primary function'' approach to determine the applicability to specific sections of the SPCC regulation or the commenters' interpretation that, where geographic considerations warrant, the definition of production facility should include all infrastructure associated with activities and equipment that support operations (such as base camps, airports, vehicle/equipment repair operations, electrical generating facilities, construction equipment). The definition of ''production facility'' is used to determine which of the sections of the rule apply for these support operations. The definition of production facility extends to all containers and equipment directly related to the production of crude oil; it does not include infrastructure (containers and equipment) not uniquely associated with or in support of crude oil production. This is consistent with the approach the Agency has taken in other EPA regulations, such as the Resource Conservation and Recovery Act (RCRA) Subtitle C regulations for oil and natural gas exploration, development and production (53 FR 25447, July 6, 1988).

Thus, the Agency is clarifying in this notice that only the infrastructure, containers and equipment uniquely associated with the production of crude oil is subject to the specific requirements for a production facility (§ 112.9). Containers, equipment and piping containing crude oil used in the production, extraction, recovery, lifting, stabilization, separation or treatment of oil or gas condensate, or their associated storage or measurement is considered part of an oil production facility and subject to the specific requirements of § 112.9. Specific examples of containers, piping or equipment uniquely associated with or in support of the production of crude oil include, but are not limited to: Well heads; flowlines and intra-facility gathering lines; manifolds; heater treaters, free-water knockout or other primary separation vessels; bulk storage containers for crude oil or condensate; produced water containers; containers or pits storing drilling fluids; drilling oil storage/use; containers used for drilling completion operations; and hydraulic, dielectric, and lubrication oils used exclusively to support oil production operations. All other infrastructure or equipment that indirectly support crude oil production must meet the specific bulk storage requirements under § 112.8 or specific AFVO requirements under § 112.12, as applicable. (Any infrastructure and equipment at a facility subject to the SPCC rule, whether in direct support of crude oil production operations, or not, are also subject to the general rule requirements of §§ 112.1–112.7.)

For example, containers storing oil that support vehicle repair or maintenance (such as gasoline, lubricating oil) at a production facility are subject to both the general rule requirements and the specific requirements of § 112.8 because they are not directly or uniquely associated with crude oil production. Similarly, heating oil storage containers that support offices, oil storage to support construction activities, oil storage in transformers or electrical utility stations, or oil storage/processing to support refining operations (for example, topping facilities) and other bulk storage or the operational use of oil in containers, equipment and piping not used in the production, extraction, recovery, lifting, stabilization, separation or treatment of oil or gas condensate, or their associated storage or measurement are not considered part of an oil production facility and therefore are subject to both the general rule requirements and the rule requirements for onshore facilities under § 112.8 (or § 112.12 for AFVO).

The 1971 MOU memorialized the agencies' intent to minimize overlapping regulation by ''assign[ing] one agency the responsibility for regulating a complete operation at any one facility.'' EPA and DOT will revise the 2000 guidance memorandum, acknowledging that it has not provided a clear basis for implementing the 1971 MOU or delineating EPA and DOT jurisdiction (36 FR 24080, November 24, 1971). EPA will continue its work to improve SPCC guidance for pipeline operators and will communicate the results of discussions in a manner that affords further opportunity for public comment.

2. Modifications to § 112.9 for Drilling and Workover Facilities

To clarify that drilling and workover activities are not subject to the provisions at § 112.9, EPA is amending the title of § 112.9 to read ''Spill Prevention, Control, and Countermeasure Plan requirements for onshore oil production facilities (excluding drilling and workover facilities).'' EPA is also amending the introductory sentence of the section accordingly.

As described in the October 2007 proposed rule (72 FR 58378, October 15, 2007), during the life of an oil well, maintenance or remedial work may be necessary to improve productivity. A specialized workover rig, and associated containers and equipment are brought on-site to perform maintenance or remedial activities on the well. Workover operations that perform maintenance or remedial activities on oil wells are distinct from the normal production operations, and as such are not subject to the requirements of § 112.9, but are subject to the applicable requirements in § 112.10 (for onshore facilities) or § 112.11 (for offshore facilities). Workover activities are a distinct operation and, if conducted by a separate owner or operator, may be considered a separate mobile facility. Workover facilities may have a different SPCC Plan, separate from the production facility. EPA notes that although production activities may temporarily cease during workover, if the production equipment and containers (such as those found in a tank battery) remain in operation or storing oil (that is, they are not ''permanently closed''), then the production facility owner or operator must maintain his own SPCC Plan during workover activities.

a. Comments

Two commenters expressed support for EPA's clarification excluding drilling and workover facilities from the provisions of § 112.9.

b. Response to Comments

The Agency agrees with the commenters and is finalizing the amendment as proposed.

3. SPCC Plan Preparation and Implementation

As described in the October 2007 proposed rule (72 FR 58378, October 15, 2007), the variables associated with the start of operations at new oil production facilities could lead to significant changes in necessary storage capacity and facility design. In this rulemaking, EPA is finalizing an amendment to allow a new oil production facility (that is, one that becomes operational after July 1, 2009) a period of six months after the start of operations to prepare and implement an SPCC Plan. EPA is excluding oil production facilities from the current requirements at § 112.3(b)(1), and is adding a new paragraph at § 112.3(b)(3) to require the owner or operator of a new oil production facility to prepare and implement an SPCC Plan six months after the start of operations.

The rule amendment applies at a new oil production facility that begins operating after July 1, 2009. The amendment does not apply to drilling or workover activities at a production facility. Drilling and workover operations are subject to the requirements at § 112.3(c) for mobile facilities and may implement a general SPCC Plan. Therefore, both during the initial drilling of the well, as well as during any workover activity, there are measures required for spill prevention and response for any oil discharges that occur from a drilling or workover facility subject to this rule. This amendment would not apply to an existing production facility in which a new well is drilled, and added to the existing tank battery/facility. In this case, the facility owner or operator must amend the SPCC Plan in accordance with § 112.5(a), which requires the Plan to be amended within six months of the facility change, and implementation within six months of the amendment.

With this amendment, EPA recognizes that for some oil fields, based on the often variable conditions of the oil reservoir, the type and proportion of products may be uncertain until after the process of extraction has started. During this timeframe, additional equipment may be added or removed

from the facility which would require an amendment to the SPCC Plan and the owner or operator of a new oil production facility may need to make multiple revisions to the Plan. The Agency believes that allowing a new oil production facility six months after the start of operations to prepare and implement an SPCC Plan properly addresses these concerns. The ''start of operations'' for an oil production facility is indicated by the start of well fluid pumping, transfer via flowlines, separation, treatment or storage of crude oil, or the storage of other oils in capacities that exceed the rule's current oil storage capacity thresholds for applicability.

a. Comments

Several commenters expressed support for EPA's proposed amendment to allow new oil production facilities six months to prepare and implement an SPCC Plan. Two commenters, however, suggested that EPA allow owners and operators one year for sufficient time for Plan preparation and implementation. Another commenter suggested that EPA provide an automatic extension for a facility owner or operator based on his inability to obtain the services of a PE.

b. Response to Comments

The Agency agrees with those commenters supporting an extension of six months to the timeframe by which an oil production facility must prepare and implement an SPCC Plan. The Agency disagrees with the suggested alternative of one year for the owner or operator to prepare and implement an SPCC Plan after the start of production operations. The Agency recognizes the unique characteristics of an oil production facility, but given that an oil production facility is likely to stabilize operations within six months from start-up, a one-year time period for Plan preparation and implementation is inappropriate. If a facility owner or operator needs additional time to prepare and implement the SPCC Plan, the existing rule already provides the owner or operator the opportunity to request an extension of time to come into compliance in accordance with § 112.3(f) when circumstances are beyond his control. This may occur, for example, when there are no qualified personnel available or if there are equipment delivery delays.

4. Flowlines and Intra-Facility Gathering Lines

EPA is finalizing a conditional exemption from secondary containment requirements under the SPCC rule for flowlines and intra-facility gathering lines. That is, in lieu of general secondary containment, an owner or operator may opt to prepare a contingency plan and written commitment of manpower, equipment, and materials. Additionally, EPA is finalizing specific requirements for a flowlines and intra-facility gathering lines maintenance program. EPA is also exempting intra-facility gathering lines that are subject to the regulatory requirements at 49 CFR parts 192 or 195 from the SPCC requirements. EPA is not promulgating definitions of flowlines and intra-facility gathering lines in this action.

a. Definition of Flowline and Intra-Facility Gathering Line and Exemption

In the October 2007 proposal (72 FR 58378, October 15, 2007), EPA requested comments as to whether regulatory definitions for ''flowline'' and ''intra-facility gathering line'' are necessary, and if so, suggestions for appropriate definitions. This request was intended to determine whether clarification of the scope of the terms and their applicability under the SPCC rule was necessary. EPA indicated in the proposal that the Agency did not believe that such definitions were necessary because there is a common understanding of these terms within the affected industry. The Agency is clarifying the scope of the SPCC rule's applicability to gathering lines and finalizing an amendment that exempts the ''intra-facility'' gathering lines that are subject to both EPA and DOT regulatory requirements from the SPCC rule in response to comments on the proposed conditional exemption from secondary containment requirements for flowlines and intra-facility gathering lines. The Agency believes that this exemption is a logical outgrowth of the proposal and the comments received. In the October 2007 proposal, EPA acknowledged that given the characteristics of certain intra-facility gathering lines, these pipelines may be regulated under requirements of both EPA and DOT (72 FR 58407, October 15, 2007). EPA also recognized in the proposal that DOT requirements for pipelines may be similar in scope to SPCC regulations, so that compliance with DOT requirements may be considered environmentally equivalent to certain SPCC requirements. EPA also recognized in the proposal that DOT requirements for pipelines may be similar in scope to SPCC regulations, so that compliance with DOT requirements may be considered environmentally equivalent to certain SPCC requirements. DOT has promulgated regulations for pipelines under 49 CFR parts 192 (*Transportation of Natural and Other Gas by Pipeline*), 194 (*Response Plans for Onshore Oil Pipelines*) and 195 (*Transportation of Hazardous Liquids by Pipeline*). DOT has the statutory authority over gas or hazardous liquid pipelines of any diameter within environmentally sensitive rural areas (defined as ''unusually sensitive areas''), and liquid pipelines above six inches in diameter operating at low pressure. While many gathering lines are under DOT's statutory authority, only a subset of them has DOT regulatory requirements.

EPA recognizes that gathering lines can be outside the Agency's jurisdiction because they ''transport'' oil outside of an oil production facility. EPA has jurisdiction only over non-transportation-related facilities, which includes pipelines that transport oil within a facility. Any inter-facility pipeline, including a gathering line, that transports oil between facilities or from a facility to a vessel, or from a facility to a transportation-related pipeline facility, such as a transmission line, or a pipeline breakout tank, is considered transportation-related and is therefore outside the jurisdiction of EPA and not subject to the SPCC rule. However, the definition of ''facility'' as it applies to the SPCC rule is flexible. Depending upon how an owner/operator defines his facility under the SPCC rule, an oil production facility may also include gathering lines. While gathering lines within the SPCC facility boundaries are intra-facility piping, EPA is maintaining the term intra-facility gathering lines because it is a term that is well recognized within the production sector. For those intra-facility gathering lines that are regulated by both EPA and DOT, EPA is exempting them from the SPCC requirements. In other words, the exemption is for intra-facility gathering lines present at a facility where the piping is subject to both EPA and DOT jurisdiction and regulations. EPA's focus with the SPCC rule is the regulation of oil storage at facilities engaged in activities related to drilling, producing, gathering, processing, refining, transferring, distributing and use of oil, while DOT's focus is in the area of pipeline regulation; therefore, EPA believes it is appropriate to defer to DOT's technical regulation in lieu of EPA's intra-facility gathering line requirements. EPA believes this change is appropriate and is a logical outgrowth of the proposal and several comments received regarding jurisdiction of intra-facility gathering lines.

Only those lines that are subject to DOT regulations are eligible for the exemption finalized in this action.

Those intra-facility gathering lines located at a facility that are not subject to the regulatory requirements at 49 CFR parts 192 and 195 remain subject to the requirements in 40 CFR part 112. Other equipment and piping at an oil production facility (such as flowlines), remain subject to the SPCC requirements. In addition, this exemption requires that owners or operators of a facility identify and mark as ''exempt'' the location of exempt piping on the facility diagram. This requirement will assist facility and EPA personnel in defining the boundaries of EPA and DOT jurisdiction and provide response personnel with information used to identify hazards during a spill response activity.

As discussed in Section V.D of this notice, an owner or operator has the flexibility under the definition of facility to determine the boundaries of their SPCC facility; thus, the facility may include intra-facility gathering lines. DOT defines a production facility under 49 CFR parts 195 as ''piping or equipment used in the production, extraction, recovery, lifting, stabilization, separation or treating of petroleum or carbon dioxide, or associated storage or measurement. (To be a production facility under this definition, piping or equipment must be used in the process of extracting petroleum from the ground, and preparing it for transportation by pipeline.)'' (49 CFR 195.2) This definition is similar in scope to EPA's definition of production facility described above. However, DOT provides additional specificity regarding the endpoints of a production operation for the purpose of defining a gathering line. Under 49 CFR part 192, DOT clarifies that the beginning of gathering may not extend beyond the furthermost downstream point in a production operation (49 CFR 192.8(a)(1)).

Comments. Two commenters suggested clarifications of the term flowline, one of whom suggested a definition. Two other commenters stated that definitions for flowline or intra-facility gathering line were not needed, while several commenters suggested that the references to ''gathering lines'' with flowlines be eliminated, citing the confusion of using the term and noting the MOU with DOT, which specifically limits EPA's jurisdiction of these lines. Another commenter requested that EPA clarify that post-separation gas gathering lines are exempt from the SPCC rule. One other commenter suggested that EPA modify § 112.1(d)(1)(ii) to include an exemption for all gathering lines.

Response to comments. EPA disagrees with those commenters that suggest there is a need to define the terms ''flowline'' and ''gathering line.'' EPA believes the oil production sector has a common understanding of these terms and that specific definitions are not needed. ''Flowlines'' are piping that transfer crude oil and well fluids from the wellhead to the tank battery where separation and treatment equipment are typically located. Flowlines may also connect a tank battery to an injection well. Depending on the size of the oil field, flowlines may range in diameter and run from hundreds of feet to miles between the wellheads and the tank batteries or primary separation operations. The term ''gathering lines'' refers to piping or pipelines that transfer crude oil product between tank batteries, within or between facilities. Gathering lines often originate from an oil production facility's lease automatic custody transfer (LACT) unit, which transfers oil to other facilities involved in gathering, refining or pipeline transportation operations.

EPA considers gathering lines subject to EPA's jurisdiction if they are located within the boundaries of an otherwise regulated SPCC/FRP facility (that is, intra-facility gathering lines). Therefore, to address the concerns raised by commenters, the Agency is including the phrase ''intra-facility'' in front of the term gathering lines to clarify that EPA only has the authority to regulate piping, in this case intra-facility gathering lines, which are located within a facility boundary. The Agency also is finalizing an amendment that excludes from regulation those ''intra-facility'' gathering lines subject to both EPA and DOT regulatory requirements. Specifically, one commenter suggested that EPA modify § 112.1(d) to include an exemption for all gathering lines. While EPA does not agree that all intra-facility gathering lines, located within a production facility, should be excluded from the SPCC requirements, the Agency does agree that minimizing dual regulation, where appropriate, is beneficial to the regulated community. Therefore, EPA is finalizing a new exemption under § 112.1(d)(2)(i) and 112.1(d)(11) for intra-facility gathering lines subject to DOT regulation. The Agency believes this change is appropriate and is a logical outgrowth of the proposal and several comments received regarding jurisdiction of intra-facility gathering lines.

However, the Agency does not want to create a regulatory ''gap'' with this action. Gathering lines, as well as flowlines are a source of oil spills, as demonstrated in EPA's study of the exploration and production sector, ''Considerations for the Regulation of Onshore Oil Exploration and Production Facilities Under the Spill Prevention, Control, and Countermeasure Regulation (May 30, 2007; located in the docket for this rulemaking: EPA–HQ–OPA–2007–0584–0015). Currently, EPA has only a limited set of requirements for flowlines and intra-facility gathering lines, whereas DOT has more comprehensive requirements for pipelines (which are only applicable to a subset of gathering lines within DOT jurisdiction). Additionally, there are no industry standards for flowline or gathering line maintenance. Therefore, intra-facility gathering lines located at a facility that are not subject to the regulatory requirements under 49 CFR parts 192 or 195 remain subject to EPA's SPCC regulations under 40 CFR part 112. These lines also remain subject to EPA jurisdiction and the Agency, if appropriate, can use existing rule mechanisms under § 112.1(f) to bring exempted intra-facility gathering lines back under the SPCC rule requirements.

One commenter requested that EPA clarify that post-separation gas gathering lines are exempt from the rule. EPA maintains its position that hydrocarbons in a gaseous phase under ambient temperature and pressure, such as natural gas, are not regulated under the SPCC rule. However, production facilities can include piping with both oil and gas phases. In this instance, such a facility's dual-phase flowlines and intra-facility gathering lines (that is, those carrying both gas and liquid phase hydrocarbon) are subject to the SPCC requirements (unless they are subject to 49 CFR parts 192 or 195 and are therefore exempt) because if the lines were to rupture or leak, they may discharge oil to navigable waters or adjoining shorelines in quantities that may be harmful as defined in 40 CFR part 110.

b. Exemption From Secondary Containment

EPA believes that secondary containment is, in most cases, impracticable for flowlines and intra-facility gathering lines. Therefore, the Agency is amending § 112.7(c) to provide an alternative (which is optional) to the general secondary containment requirements for flowlines and intra-facility gathering lines (unless they are exempt from regulation). In lieu of secondary containment, the Agency will require the implementation of an oil spill contingency plan in accordance with 40 CFR part 109 (Criteria for State, Local and Regional Oil Removal Contingency Plans) and a written

commitment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharged that may be harmful, without having to make an impracticability determination for each piece of piping. The Agency is tailoring the requirements in an effort to improve compliance and enhance environmental protection.

Comments. Several commenters expressed support for EPA's proposed amendment to remove the secondary containment requirements for flowlines and intra-facility gathering lines at oil production facilities. Several commenters requested, however, that EPA acknowledge the option for owners or operators to select sized secondary containment based on site conditions and recommendations of the PE under certain circumstances. One commenter suggested a modification to allow collection areas rather than individual containment along gathering lines. Another commenter, however, stated that the proposed amendment to exempt flowlines and intra-facility gathering lines at oil production facilities from the secondary containment requirements is inconsistent with 33 U.S.C. 1321(j)(5)(D).

Response to comments. EPA agrees with the majority of commenters that secondary containment for flowlines and intra-facility gathering lines is, in most cases, impracticable and that providing secondary containment for these lines can be difficult and expensive for an owner or operator. Flowlines and intra-facility gathering lines are often several miles long, can be buried, can extend far from the main facility, and are often placed across land that is not owned by the owner or operator of the oil production facility. Providing secondary containment structures for these lines may result in soil erosion and negative impacts to the land (such as when they are located in farm fields). Buried flowlines present additional difficulty, because their exact location may be uncertain, especially at an oil production facility that has changed ownership since the original installation of the lines.

The Agency also recognizes that some facilities have already installed containment for flowlines and intra-facility gathering lines and therefore should not be required to provide a contingency plan in addition to secondary containment. Therefore, EPA agrees with those commenters who suggested that the requirement for a contingency plan in lieu of secondary containment should be an option.

Contingency planning is one of the many tools that the Agency has provided in the SPCC regulatory requirements. The Agency disagrees with the comment arguing that a contingency plan requirement is inconsistent with the intent of 33 U.S.C. 1321(j)(5)(D). The Agency's authority to promulgate the SPCC regulations is found in Section 311(j)(1)(C) of the Clean Water Act, 33 U.S.C. 1321(j)(1)(C). Section 311(j)(1)(C) requires the President to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil to navigable waters or adjoining shorelines from vessels and facilities and to contain such discharges. The statutory provision gives the Agency broad discretion to establish the requirements under the SPCC rule. Also, Section 311(j)(5)(D), 33 U.S.C. 1321(j)(5)(D), lists the requirements for facility response plans. The Agency has promulgated regulations for facility response plans in 40 CFR 112.20 and 112.21. The purpose of the SPCC program is to prevent and control oil discharges from reaching navigable waters or adjoining shorelines. However, it is important to recognize that despite best prevention efforts, discharges may occur. The contingency plan requirements under the SPCC program have dual purposes. They include components to prevent oil that has escaped its container or secondary containment from reaching navigable waters or adjoining shorelines, and also include components that address the timely and appropriate response actions to be implemented when an oil discharge does impact navigable waters or adjoining shorelines.

c. Contingency Plan in Lieu of Secondary Containment

EPA is amending §§ 112.7(c) and 112.9(d)(3) to provide an alternative to the secondary containment requirements for flowlines and intra-facility gathering lines at an oil production facility. In lieu of secondary containment, a facility owner or operator may opt to implement an oil spill contingency plan in accordance with 40 CFR part 109 (Criteria for State, Local and Regional Oil Removal Contingency Plans) and prepare a written commitment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharged that may be harmful, without having to make an impracticability determination for each piece of piping. The Agency is amending this provision in an effort to improve compliance and enhance environmental protection. The use of a contingency plan does not relieve the owner or operator of liability associated with an oil discharge to navigable waters or adjoining shorelines that violates the provisions of Section 311(b)(3) of the Clean Water Act, 33 U.S.C. 1321(b)(3). EPA is also amending § 112.7(a) to make it clear that the contingency plan provisions under § 112.9(d)(3) are not subject to the environmental equivalence provision.

Comments. Several commenters expressed support for EPA's proposal to require an oil spill contingency plan in lieu of secondary containment. One commenter, however, suggested an option to require annual physical inspections and the installation of isolation valves. Two other commenters requested that EPA reduce the burden of using this alternative option, because the documentation effort for a contingency plan is extensive.

Response to comments. The Agency does not agree that annual physical inspections and the installation of isolation valves are appropriate, because this could prove to be impracticable for some lines, specifically those that are buried.

With respect to the comments regarding the additional burden that a contingency plan requirement would impose on facilities, the Agency recognizes that this amendment would require additional documentation. However, EPA believes that a contingency plan is necessary when secondary containment is not provided. This final rule allows the owner or operator of the facility to develop a contingency plan as an option to general secondary containment. The contingency plan required when secondary containment is not practicable for flowlines and intra-facility gathering lines should rely on strong maintenance, corrosion protection, testing, recordkeeping, and inspection procedures to prevent and quickly detect discharges from such lines. It should also ensure quick availability and deployment of response equipment. The complexity or simplicity of a facility's contingency plan is subject to good engineering practice as determined by the certifying PE. EPA developed a model contingency plan as part of the SPCC Guidance for Regional Inspectors. This model plan is intended only as an example and inspectors should only use the document for this purpose. Additionally, EPA acknowledges that given the characteristics of certain intra-facility gathering lines, these pipelines may be regulated under requirements of both EPA and DOT. Because DOT requirements for pipelines may be similar in purpose and scope, EPA

recognizes that compliance with the DOT requirements (for example, 49 CFR part 194) for these gathering lines may be considered to satisfy the contingency planning requirement. Therefore a contingency plan developed for 49 CFR part 194 may serve to meet the SPCC Plan requirements. In addition, as previously discussed, the Agency is exempting intra-facility gathering lines that are subject to the regulatory requirements under 49 CFR part 192 or 195 from 40 CFR part 112. Furthermore, the owner or operator of an oil production facility who has prepared an FRP under § 112.20 satisfies the contingency planning requirement for flowlines and intra-facility gathering lines because an FRP is more comprehensive than a contingency plan under 40 CFR part 109. If such a facility owner or operator has already developed an FRP to comply with § 112.20, then he does not need to develop a contingency plan in accordance with 40 CFR part 109. The certifying PE must ensure that the FRP is adequate for the facility and prepared in accordance with good engineering practice. Similarly, the owner or operator of an oil production facility who has prepared a state spill or pollution prevention contingency plan that meets the requirements of 40 CFR part 109 may opt to use this state plan to comply with the SPCC contingency plan requirements.

It should also be noted that the contingency planning requirement is an alternative to the requirement for general secondary containment for flowlines and intra-facility gathering lines and the facility owner or operator can decide which option to comply with. The purpose of this action is to provide options and streamlined requirements that should improve compliance with the rule. The Agency recognizes that flowlines and intra-facility gathering lines are a source of oil discharges and believes that this action provides an alternative method for owners/operators to develop spill prevention and response practices for this equipment to maintain environmental protection.

d. Requirements for a Flowline and Intra-Facility Gathering Line Maintenance Program

EPA is amending the requirement for an owner or operator to prepare and implement a written flowline and intra-facility gathering line maintenance program under § 112.9(d)(4). This action specifies that the requirements apply to intra-facility gathering lines, as well as flowlines at an oil production facility. Intra-facility gathering lines pose the same potential for discharge as flowlines. EPA never intended to regulate the two types of piping differently. Under the amended provisions, a maintenance program must address procedures to:

- Ensure that such flowlines and intra-facility gathering lines and associated valves and equipment are compatible with the type of production fluids, their potential corrosivity, volume, and pressure, and other conditions expected in the operational environment.
- Visually inspect and/or test flowlines and intra-facility gathering lines and associated appurtenances on a periodic and regular schedule for leaks, oil discharges, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b). The frequency and type of testing must allow for the implementation of a contingency plan as described under part 109 of this chapter, if there is no secondary containment.
- Take corrective action or make repairs to any flowlines and intra-facility gathering lines and associated appurtenances as indicated by regularly scheduled visual inspections, tests, or evidence of a discharge.
- Promptly remove or initiate actions to stabilize and remediate any accumulations of oil discharges associated with flowlines, intra-facility gathering lines, and associated appurtenances.

Comments. Several commenters expressed support for EPA's proposed revisions to the flowline/intra-facility gathering line program, although some commenters suggested the addition of corrosion protection for these lines. A number of commenters expressed concern that the requirement for a contingency plan and maintenance program would be burdensome. Some of these commenters suggested using a maintenance program based on risk levels and good industry practices, as determined by a PE. Another commenter requested that the current language be maintained for a program of flowline maintenance.

Other commenters provided suggested other revisions. Specifically, some commenters provided alternative language for the provisions under § 112.9(d)(4). One commenter stated that the proposed requirement under the design and development requirements of § 112.9(d)(4)(i) is vague and unnecessary given the responsibility of a PE certifying the Plan. Other commenters also suggested adding language that would acknowledge that other methods of immobilizing hydrocarbons in soil matrices such as physical, chemical and/or biological treatment methods to address oil accumulations associated with flowlines rather than ''prompt removal.'' Finally, commenters expressed concern with the phrase ''promptly remove'', as associated with actions to stabilize and remediate any accumulations of oil discharges. Commenters suggested replacing this phrase with ''upon discovery''.

Response to comments. EPA is finalizing the amended requirements for a flowline and intra-facility maintenance program under § 112.9(d)(4), specifying that the requirements apply to intra-facility gathering lines, as well as flowlines at an oil production facility. The Agency believes that an effective flowline maintenance program is necessary to detect a discharge in a timely manner so that the oil discharge response operations described in the contingency plan may be implemented effectively. Additionally, eliminating the requirement for secondary containment necessitates more prescriptive requirements for discharge prevention to ensure the integrity of the primary containment of the pipe itself.

EPA is finalizing requirements under § 112.9(d)(4) to require a performance-based program of flowline and intra-facility gathering line maintenance that addresses the facility owner or operator's procedures, that must be documented in their SPCC Plan. EPA agrees with several comments on the language associated with these requirements and has made several changes to the proposed rule in response to these comments. EPA is finalizing the requirement under § 112.9(d)(4)(iv) with some modifications to the proposed regulatory text. The finalized rule states: ''Promptly remove or initiate actions to stabilize and remediate any accumulations of oil discharges associated with flowlines, intra-facility gathering lines, and associated appurtenances.'' This measure is intended to ensure the removal of oil accumulations in order to prevent a discharge. The Agency disagrees with the comment that suggested replacing ''Promptly remove'' with ''Upon discovery.'' ''Promptly remove'' indicates that the owner or operator of the facility has both the responsibility and flexibility to outline an inspection program under § 112.9(d)(4)(ii) which puts the timeframe for ''prompt removal'' in the context of the inspection frequency. Commenters also suggested, however, that language be added that would acknowledge that other methods of immobilizing

hydrocarbons in soil matrices, such as physical, chemical and/or biological treatment methods can be used. The Agency agrees that other methods may be used to stabilize and remediate, and thus, the regulatory text has been revised by adding the phrase, ''remove or initiate actions to stabilize and remediate'' to the rule. EPA considers the removal of oil-contaminated soil as a method to prevent oil from becoming a discharge as described in § 112.1(b). Disposal of oil must be in accordance with applicable Federal, state, and local requirements; under § 112.7(a)(3)(v), a facility owner or operator is required to describe the methods of disposal of recovered materials in accordance with applicable legal requirements. For the purposes of this provision, EPA believes that the removal of recoverable oil can be combined with physical, chemical, and/or biological treatment methods to address any residual oil. These treatment methods must be consistent with other Federal, state or local requirements as applicable, and must be properly managed to prevent a discharge as described in § 112.1(b).

EPA believes that the variations in production facility piping design, layout and location makes flexibility important in order to encourage compliance with this requirement, and believes that this flexibility is already available. However, the flowline and intra-facility gathering line maintenance program requirements also are subject to the environmental equivalence provision found at § 112.7(a)(2). That is, the facility owner or operator may deviate from the requirements if an environmentally equivalent alternate measure is implemented. EPA recognizes that other Federal or state requirements may be environmentally equivalent to certain SPCC requirements, including the flowline and intra-facility gathering line maintenance program requirement. An environmental equivalence determination is subject to review and certification by a PE.

5. Flow-Through Process Vessels

EPA is modifying the requirements at § 112.9(c) to provide an alternative to the sized secondary containment requirements for flow-through process vessels at oil production facilities. Flow-through process vessels, such as horizontal or vertical separation vessels—for example, heater-treater, free-water knockout, gun-barrel, etc.—have the primary purpose of separating the oil from other fractions (water and/or gas) and sending the fluid streams to the appropriate container. Specifically, in lieu of sized secondary containment, a facility owner or operator may opt to provide general secondary containment, inspect or test flow-through process vessels and components for leaks, corrosion or other conditions that could lead to a discharge, as described in § 112.1(b), promptly remove or initiate actions to stabilize and remediate any oil accumulations, and take corrective action should a discharge occur. EPA also would require that sized secondary containment be installed if the facility discharges more than 1,000 U.S. gallons of oil in a single discharge as described in § 112.1(b), or discharges more than 42 U.S. gallons of oil in each of two discharges as described in § 112.1(b) within any twelve month period, from flow-through process vessels (excluding discharges that are the result of natural disasters, acts of war, or terrorism) within six months of such a discharge.

EPA is taking this action because the Agency agrees with concerns regarding the requirement to provide sized secondary containment around flow-through process vessels, such as heater-treaters, due to a potential fire hazard if spilled oil collects around such equipment. EPA also recognizes that similar flow-through process equipment (i.e., oil-filled manufacturing equipment, such as reaction vessels, fermentors, high pressure vessels, mixing tanks, dryers, heat exchangers, and distillation columns) at non-production facilities are not subject to the more stringent sized secondary containment and inspection requirements required for bulk storage containers; only the general secondary containment requirements at § 112.7(c) apply. However, EPA recognizes that process equipment at non-production facilities, such as at manufacturing facilities, is typically attended during hours of operation and there is a greater potential to immediately discover and correct a discharge at non-production facilities than at oil production facilities, which are generally unattended. Therefore, EPA is requiring additional measures for flow-through process vessels at oil production facilities that do not have sized secondary containment, including inspection or testing of components, prompt removal or initiation of actions to stabilize and remediate any oil accumulations, and corrective action.

a. Exemption From Sized Secondary Containment

EPA is amending the requirements in § 112.9(c)(2) to add the phrase ''Except as described in paragraph (c)(5) of this section for flow-through process vessels'' at the beginning of the provision. This amendment removes the requirement to provide sized secondary containment for flow-through process vessels at oil production facilities without making an impracticability determination, and allows the facility owner or operator the option to comply with the alternate requirements in § 112.9(c)(5) instead.

The general secondary containment requirement of § 112.7(c) still applies to flow-through process vessels; they must be provided with secondary containment so that any discharge does not escape the containment system before cleanup occurs. As described in Section V.H of this notice, EPA is amending § 112.7(c) to clarify that the provision allows for the use of both active and passive secondary containment measures to prevent a discharge to navigable waters or adjoining shorelines. Active containment measures are those that require deployment or other specific action by the operator. These measures may be deployed either before an activity involving the handling of oil starts, or in reaction to a discharge, so long as the active measure is designed to prevent an oil discharge from reaching navigable waters or adjoining shorelines. However, active measures would generally have limited applicability at oil production facilities because these facilities are typically not attended and owners or operators may not be able to detect a discharge in a timely manner to successfully implement the active measures. In contrast, passive measures are installations that do not require deployment or action by the owner or operator and may be more appropriate for unattended production operations. The *SPCC Guidance for Regional Inspectors* provides several examples of the use of active and passive measures at an SPCC-regulated facility.

With this action, owners or operators of oil production facilities are no longer required to locate flow-through process vessels within a secondary containment system sized for the entire capacity of the largest single container and sufficient freeboard to contain precipitation. However, EPA believes that oil production facility owners and operators may want to provide secondary containment (such as berms) around the entire tank battery, as many oil production facilities currently do. These batteries can include flow-through process vessels, such as separators, along with oil stock tanks and other bulk storage containers. Such a facility design would provide the maximum environmental protection.

Comments. Several commenters expressed support for EPA's alternative option for flow-through process vessels

in lieu of sized secondary containment. Two commenters, however, requested that EPA clarify whether secondary containment is an alternative to the proposed option, while one commenter requested clarification on whether EPA means containment would hold the single largest process vessel and not containment sized to hold all vessel fluids. Another commenter expressed concern that the proposed requirements are burdensome; DOE generally supported that position and encouraged EPA to consider existing state regulatory programs in lieu of additional requirements.

Another commenter expressed concern that flow-through process vessels at production facilities cause pollution that can not be remediated to the pre-spill condition. Still another commenter was concerned that more oil than the contents of the vessels may be discharged because oil may be constantly flowing into these vessels from the wells. Finally, one commenter expressed concern that the proposed exemption from sized secondary containment is inconsistent with 33 U.S.C. 1321(j)(5)(D), which the commenter believes requires every SPCC Plan to identify the resources necessary to ''mitigate or prevent a substantial threat of'' a worst case discharge. The commenter expressed concern that general secondary containment for a ''most likely'' spill would fail to prevent the worst case discharge.

Response to comments. EPA recognizes that some facilities have already provided sized secondary containment in accordance with § 112.9(c)(2) for flow-through process vessels at productions facilities. EPA agrees with commenters that facility owners or operators who have installed such containment should not be required to comply with the additional requirements for these vessels. Therefore, EPA is amending the rule to indicate that flow-through process vessels equipped with sized secondary containment in accordance with § 112.9(c)(2) and (c)(3) are not required to comply with the alternate requirements under § 112.9(c)(5).

In response to the commenter who asked about the size of containment required, EPA notes that in determining how to provide appropriate general secondary containment for flow-through process vessels, a production facility owner or operator may consider the typical failure mode and most likely quantity of oil that would be discharged (*see* § 112.7(c)). Based on these site-specific conditions, the owner or operator can determine what capacity of secondary containment is needed, and design the containment method accordingly. The design for general secondary containment should address site-specific factors, including, but not limited to, frequency of site visits, rate of flow of the wells, capacity of the containers, and whether the facility is equipped with automatic shut-off devices to prevent an overflow. However, as discussed elsewhere in this preamble, general secondary containment is based on the most likely discharge, not the worst case discharge. EPA agrees with the commenter who expressed concern regarding the effects of a discharge from flow-through process vessels, but the Agency believes that this alternative approach, which requires general secondary containment in accordance with § 112.7(c) and the additional requirements to inspect, repair equipment, and address oil accumulations that may occur following a discharge from flow-through process vessels, addresses this concern. The Agency also believes the alternative requirements for flow-through process vessels address the concern that these facilities are constantly operating and have constant flow of fluids through this equipment because the owner or operator must inspect the equipment and take corrective action to address a discharge following procedures described in the SPCC Plan.

As part of this action, EPA considered whether existing state regulatory programs could satisfy the amended requirements. Although a number of states do have requirements for oil production facilities to prevent spills, they do not provide a comprehensive, national approach that would be equivalent to the SPCC requirements, as these programs have been developed to meet states' individual goals. Therefore, EPA believes that relying solely on state programs would not provide nationwide consistent requirements for spill prevention. However, the Agency recognizes the benefits of allowing the owner or operator of a regulated facility to take credit for compliance with state program requirements when these serve to meet certain SPCC requirements and can be referenced in accordance with 40 CFR part 112.

The Agency also disagrees with those commenters who characterized the amended requirements as excessive, and the requests for EPA to reconsider the necessity of additional measures in lieu of sized secondary containment. The amendment allows an owner or operator to provide general secondary containment for flow-through process vessels and requires new prevention measures as an alternative to the rule's existing sized secondary containment requirement. The alternative measures are optional—that is, the owner or operator may still choose to comply with the sized secondary containment requirement, and the facility owner or operator decides which option is best suited to the design and operation of the facility. The Agency believes that the alternative approach finalized in this rule for flow-through process vessels allows the owner or operator of an oil production facility flexibility in how to design secondary containment for this equipment and in how to comply with the additional requirements that maintain environmental protection.

The Agency disagrees with the commenter who argued that the revised option for flow-through process vessels at production facilities is inconsistent with the intent of 33 U.S.C. 1321(j)(5)(D). The Agency's authority to promulgate the SPCC regulations is found in Section 311(j)(1)(C) of the Clean Water Act, 33 U.S.C. 1321(j)(1)(C). Section 311(j)(1)(C) requires the President to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil to navigable waters and adjoining shorelines from vessels and facilities and to contain such discharges. The statutory provision gives the Agency broad discretion to establish the requirements under the SPCC rule. The purpose of the SPCC program is to prevent and control oil discharges from reaching navigable waters or adjoining shorelines. Also, Section 311(j)(5)(D), 33 U.S.C. 1321(j)(5)(D), lists the requirements for facility response plans. The Agency has promulgated regulations for facility response plans in 40 CFR 112.20–21and this action does not impact the requirement for an owner/operator to prepare and implement an FRP when the facility meets the substantial harm criteria in § 112.20(f). Therefore, this amendment does not conflict with the requirements under 33 U.S.C. 1321 (j)(5)(D).

b. Additional Requirements

Because oil production facilities are typically unattended while operating, EPA is adding a provision at § 112.9(c)(5) to provide additional requirements for flow-through process vessels at those facilities that do not provide sized secondary containment. These additional requirements include periodic inspection and/or testing for leaks, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b); corrective action or repairs to flow-through process vessels and any associated components as indicated by

regularly scheduled visual inspections, tests, or evidence of an oil discharge; and prompt removal or initiation of actions to stabilize and remediate any accumulations of oil discharges associated with flow-through process vessels.

Comments. One commenter recommended not mandating routine inspection of flow-through vessels, because oil and gas operators routinely visit tank batteries and wells and the lease operator would observe leaks from the vessels. The commenter also stated that weather conditions require aerial inspections during the winter months, which may not be possible given the proposed requirement. Another commenter expressed concern with the burden of complying with the additional inspection requirements.

Several commenters provided alternative language for promptly removing any accumulations of oil discharges as described under § 112.9(c)(5). Specifically, commenters suggested adding language that would acknowledge other methods of immobilizing hydrocarbons in soil matrices (such as physical, chemical and/or biological treatment methods) to address oil accumulations associated with flowlines. Commenters also expressed concern with the phrase ''promptly remove'' and suggested replacing it with the phrase ''upon discovery.''

Response to comments. The requirement of periodic inspection and/or testing of flow-through process vessels and associated appurtenances on a regular schedule for leaks, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b) is intended to increase the likelihood that a discharge will be prevented or detected promptly. This is especially true for components that typically cause discharges, such as dump valves. These requirements are consistent with the inspection requirements for bulk storage containers under § 112.9(c)(3). EPA recognizes that because oil production facilities are typically unattended, remote, and have a constant flow of oil and well fluids, sized secondary containment measures provide environmental protection for any potential discharge. EPA does not intend for inspections to create a public safety concern for personnel conducting inspections and EPA expects that the SPCC Plan will include provisions to address weather-related concerns that may impact the inspection schedule. Because EPA is revising the rule such that flow-through process vessels are subject to the general secondary containment requirement (§ 112.7(c)) instead of the sized secondary containment requirement, the Agency seeks to ensure that any leak, or potential for a leak, is detected promptly enough to prevent a discharge of the entire contents of the separation or treating equipment. Therefore, EPA believes it is important to require that inspections be completed and documented in accordance with the requirements in § 112.7(e).

EPA is amending the requirement under § 112.9(c)(5)(iii) with some modifications to the proposed language, in response to comments regarding removal of oil accumulations. Specifically, commenters suggested adding language that would acknowledge that other methods of immobilizing hydrocarbons in solid matrices, such as physical, chemical and/or biological treatment methods should be allowed. EPA agrees that other methods may be used to stabilize and remediate and thus, the Agency is adding the phrase, ''remove or initiate actions to stabilize and remediate'' to address this concern. EPA considers the removal of oil-contaminated soil as a method to prevent oil from becoming a discharge as described in § 112.1(b). Disposal of oil must be in accordance with applicable Federal, state, and local requirements; under § 112.7(a)(3)(v), a facility owner or operator is required to describe the methods of disposal of recovered materials in accordance with applicable legal requirements. For the purposes of this provision, removal of recoverable oil may be combined with physical, chemical, and/or biological treatment methods to address any residual oil. These treatment methods must be consistent with other Federal, state or local requirements as applicable, and must be properly managed to prevent a discharge as described in § 112.1(b). However, the Agency disagrees with the comment that suggested replacing ''Promptly remove'' with ''Upon discovery.'' ''Promptly remove'' indicates that the owner or operator of a facility has both the responsibility and flexibility to outline an inspection program under § 112.9(c)(5)(i) which puts the timeframe for ''prompt removal'' in the context of the inspection frequency.

Finally, EPA believes that variations in oil production facility piping design, layout, and location make flexibility important in order to encourage compliance with these additional measures. However, such flexibility is already available in that these requirements for flow-through process vessels are subject to the environmental equivalence provision found at § 112.7(a)(2). For example, other Federal or state requirements may be environmentally equivalent to certain SPCC requirements. Thus, the facility owner or operator may deviate from the requirements if an environmentally equivalent alternate measure, subject to review and certification by a PE, is implemented. The environmental equivalence provision found at § 112.7(a)(2) cannot be used for any containment provision associated with flow-through process vessels.

c. Reportable Discharge

EPA is finalizing a provision at § 112.9(c)(5)(iv) to require that a production facility owner or operator ensure that all flow-through process vessels subject to this subpart (that is, are using the new alternative to sized secondary containment) comply with § 112.9(c)(2) and (c)(3) within six months from the discovery of a discharge from a flow-through process vessel of more than 1,000 U.S. gallons of oil in a single discharge as described in § 112.1(b), or more than 42 U.S. gallons of oil in each of two discharges as described in § 112.1(b), occurring within any twelve month period. When determining spill history, the amount specified in the criterion (either 1,000 or 42 U.S. gallons) refers to the amount of the discharge that actually reaches navigable waters or adjoining shorelines, and not the total amount of the discharge. Discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism are not considered toward this requirement. A flow-through process vessel using this alternative approach must already comply with § 112.9(c)(1) and § 112.9(c)(4) and therefore these requirements were not added to § 112.9(c)(5)(iv).

Comments. Two commenters expressed concern with the reportable discharge criterion because § 112.4 already requires a facility with a discharge as described in this provision to submit a report to the Regional Administrator within 60 days.

Response to comments. While the Agency acknowledges that EPA continues to require a facility that has had a discharge as described in § 112.1(b) to submit a report to the Regional Administrator within 60 days, EPA believes that the owner or operator of a facility that has had such a discharge, as described in this criterion, should be required to comply with the sized secondary containment requirement because it would appear that the facility was not able to prevent discharges to navigable waters or adjoining shorelines by complying with the alternative standard—that is, general

secondary containment with additional measures. If a facility owner or operator is unable to successfully prevent oil discharges using general containment requirements and additional measures, EPA believes that requiring sized secondary containment provides a fail-safe method to address the risk of discharges. The Agency's preferred method for preventing discharges from flow-through process vessels at these constantly-flowing, unattended facilities is the use of sized secondary containment. Sized secondary containment provides a buffer to allow for containment of fluids from these vessels until a discharge is discovered. Thus, the owner or operator would be required to automatically amend the SPCC Plan and provide sized secondary containment for all flow-through process vessels at the production facility within six months of the discharge. This containment must be sized to contain the contents of the single largest container, with sufficient freeboard for precipitation. Additionally, the owner or operator must submit a report to the EPA Regional Administrator as required under § 112.4(a).

The discharge criterion is a well-established threshold in the SPCC rule. This discharge criterion is similar to the provision in § 112.4(a) for discharges that must be reported to the EPA Regional Administrator. Under § 112.4, a facility owner or operator must report certain information to the Regional Administrator whenever the facility experiences a discharge reportable under § 112.4. The Agency has used this criterion for eligibility for alternative measures in the past, such as to allow the owner or operator of a qualified facility to self-certify the SPCC Plan and to allow the use of contingency planning and other measures in lieu of secondary containment for qualified oil-filled operational equipment (see 71 FR 77266, December 26, 2006). The Agency believes that finalizing this criterion to trigger the requirement to redesign secondary containment is consistent with other spill history criteria used elsewhere in the SPCC rule.

6. Alternative Qualified Facility Eligibility Criteria for Oil Production Facilities

In December 2006 (71 FR 77266, December 26, 2006), EPA promulgated an amendment to the SPCC rule to allow the owner or operator of a qualified facility to self-certify his SPCC Plan, which in this final rule EPA identifies as a Tier II qualified facility. Furthermore, as described in Section V.G of this notice, EPA is establishing an additional option for a subset of qualified facilities (designated as Tier I qualified facilities) that meet an additional criterion. The owner and operator of a Tier I qualified facility may complete and implement a streamlined, self-certified SPCC Plan template (promulgated as Appendix G to 40 CFR part 112).

The following table illustrates the tiers, criteria, and options for production facilities meeting the qualified facilities eligibility criteria and all other production facilities, as described in this notice:

Production facilities that are qualified facilities		All other production facilities
Tier I	Tier II	
Oil production facility and: (1) No more than two producing wells per single tank battery / ten barrels or less of crude oil per well per day / if the facility has an injection well; or (2) No more than four producing wells per single tank battery / ten barrels or less of crude oil per well per day / no injection wells; or (3) The facility has10,000 U.S. gallons or less aggregate aboveground oil storage capacity; and		Oil production facility with an aggregate aboveground oil storage capacity greater than 10,000 gallons and: (1) More than two producing wells per single tank battery with one or more injection wells; (2) More than four producing wells per single tank battery; or (3) More than ten barrels of crude oil produced per well per day; or
Within any twelve-month period, three years prior to the Plan certification date, or since becoming subject to the SPCC rule if in operation for less than three years, there has been: (1) No single discharge of oil to navigable waters or adjoining shorelines exceeding 1,000 U.S. gallons; and (2) No two discharges of oil to navigable waters or adjoining shorelines each exceeding 42 U.S. gallons*; and		Within any twelve-month period, three years prior to the Plan certification date, or since becoming subject to the SPCC rule if in operation for less than three years, there has been: (1) A single discharge of oil to navigable waters or adjoining shorelines exceeding 1,000 U.S. gallons; or (2) Two discharges of oil to navigable waters or adjoining shorelines each exceeding 42 U.S. gallons*; or
No individual aboveground oil containers greater than 5,000 U.S. gallons;	Has individual aboveground oil containers greater than 5,000 U.S. gallons; or Owner or operator eligible for Tier I qualified facility status, but decides not to take the option or chooses to develop a ''hybrid'' Plan;	Owner or operator eligible for qualified facility status, but decides not to take the option;
Then: Complete and self-certify Plan template Appendix G to 40 CFR part 112) in lieu of a full PE-certified Plan.	Then: Prepare a self-certified Plan in accordance with all applicable requirements of § 112.7 and subparts B and C of the rule, in lieu of a PE-certified Plan.	Then: Prepare a PE-certified Plan in accordance with all applicable requirements of § 112.7 and subparts B and C.

* This criterion does not include discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism. Additionally, the gallon amount described in this criterion addresses the amount of the discharge that actually reaches navigable waters or adjoining shorelines.

In the October 2007 proposed rule, EPA solicited comment on whether the Agency should consider alternative criteria in identifying a ''qualified facility,'' and thus, allow the owner or operator of an oil production facility to self-certify the SPCC Plan, notwithstanding the tank storage capacity at the facility. Specifically, EPA requested comment on an approach that was suggested by EPA and two approaches that were suggested by DOE (*see* 72 FR 58411, October 15, 2007 for a more detailed description of the specific approaches on which EPA solicited comment.) Based on the comments received, and the Agency's evaluation of this industry sector, EPA is finalizing in this rule an amendment that provides alternative criteria for identifying qualified facilities in the oil production sector for onshore facilities. EPA believes that alternative eligibility criteria for identifying a qualified facility for certain onshore oil production facilities is appropriate because, notwithstanding their simple configurations, many of these small oil production facilities cannot meet the 10,000 gallon aggregate aboveground oil storage capacity threshold for Tier I and II qualified facility designation. Given (1) the large number of marginal or stripper wells in the U.S.[6]; (2) that they contribute a significant portion of the country's oil production; and (3) EPA's understanding of the particular aboveground oil storage container capacities and the nature of the fluids handled at certain small oil production facilities, other criteria beyond oil storage container capacity are more appropriate in determining whether an owner or operator of such a facility should self-certify his SPCC Plan. These other criteria, unique to small oil production facilities, serve to identify a qualified facility consistent with the intent of this approach as promulgated on December 26, 2006 (71 FR 77266), by identifying the simplest operations by factors other than strictly capacity.

A qualified oil production facility is one that meets all of these conditions: (1) No more than two producing wells per single tank battery if the facility has an injection well; or no more than four producing wells per single tank battery with no injection wells at the facility; (2) each well produces no more than ten barrels of crude oil per day; and (3) the facility has not had a single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve month period in the three years prior to Plan certification, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years. Facilities with no more than two producing wells are eligible to be a qualified facility regardless of whether they have injection wells. Discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism do not disqualify a facility owner or operator from the alternative option described above.

The Tier II qualified facility eligibility criteria at § 112.3(g)(2) have been amended to include these criteria for oil production facilities. The owner or operator of a qualified oil production facility may choose to prepare a self-certified SPCC Plan in lieu of a Plan certified by a PE. An oil production facility owner or operator exercising this option may be required to make production or shipping records available to support his eligibility. Records kept under usual and customary business practices will suffice, and must be kept for a period of three years, in accordance with § 112.7(e).

Owners or operators of oil production facilities may meet Tier II qualified facility eligibility through either criterion—has an aggregate aboveground oil storage capacity of 10,000 U.S. gallons or less (§ 112.3(g)(2)(i)); or the criteria described above for an onshore oil production facility (§ 112.3(g)(2)(ii)). An oil production facility that also meets the Tier I qualified facility eligibility criteria in § 112.3(g)(1) (that is, the facility has no individual oil storage container with a capacity greater than 5,000 U.S. gallons) would be eligible to develop an SPCC Plan following the template in Appendix G to the SPCC rule finalized in this rulemaking (see Section V.G of this notice).

Elsewhere in today's preamble, EPA clarified that a natural gas production facility storing condensate (petroleum oil), in quantities that meet the SPCC applicability criteria, is considered an oil production facility. Since such an onshore natural gas production facility, as described above, is considered an onshore oil production facility, it may be eligible for the qualified facility relief for marginal wells if it meets the other new criteria finalized today in § 112.3(g)(2)(ii). Additionally, since a natural gas production facility can often store smaller quantities of oil, the facility may already meet the existing ''capacity based'' qualified facility criteria in § 112.3(g)(2)(i), available to all facility types.

Additionally, in order to provide the owner or operator of a production facility that meets the qualified facility criteria with the necessary time to fully understand the new regulatory options finalized in today's action, EPA is proposing, in a separate action in the **Federal Register** of November 26, 2008 (73 FR 72016), a new compliance date to prepare or amend and implement the production facility's SPCC Plan.

a. Alternative Qualified Facility Eligibility Criteria for Oil Production Facilities

This approach is intended as an alternative to the existing 10,000 gallon aggregate aboveground oil storage capacity eligibility criteria. It provides tailored qualified facility eligibility criteria based on process operating conditions and equipment unique to oil production facilities rather than static oil storage capacity. The owner or operator of an oil production facility that meets the 10,000 gallon threshold may already self-certify his SPCC Plan and does not also need to meet the differentiated criterion for oil production facilities finalized in this action.

Ten barrels or less of crude oil produced per well per day. The ten barrels or less per well per day criteria was chosen because this production rate is consistent with the definition of a ''stripper well.'' EPA established differentiated requirements for ''stripper wells'' under the CWA, which were codified in 1979 (see 40 CFR 435.60). The Interstate Oil and Gas Compact Commission (IOGCC) also defines ''stripper wells'' as wells that produce ten barrels of oil per day or less.[7] This production rate limits the qualified oil production facility approach to those facilities with smaller quantities of oil and associated fluids.

Maximum of two producing wells per single tank battery (if the facility has an injection well) or maximum of four producing wells per single tank battery (with no injection wells at facility). In the October 2007 proposal, EPA suggested that the criterion used to identify qualified oil production facilities should be a maximum of four wells at a single tank battery producing no more than ten barrels of oil per day (72 FR 58378, October 15, 2007). The Agency requested comment on this approach. While commenters expressed

[6] The Interstate Oil and Gas Compact Commission estimates that there are 422,255 marginal oil wells as of January 1, 2007 (IOGCC Marginal Wells: 2007 Report).

[7] *See* Interstate Oil and Gas Compact Commission, 2006: ''Marginal Wells: Fuels for Economic Growth'', p. 4 (defining ''stripper wells'' as wells that produce 10 barrels of oil per day or less).

support generally for a definition of ''qualified facility'' specific to the oil production sector, they also argued that limiting the definition to those facilities with four wells or fewer would not allow many facilities to take advantage of this approach. However, the Agency analyzed comments provided on the original proposal that established qualified facilities (70 FR 73524, December 12, 2005) together with the comments provided on the approach described in the October 2007 proposed rule (72 FR 58378) relative to the overall reason for identification of a qualified facility; that is, that owners and operators of facilities that handle small oil quantities, with simple, straightforward processes and equipment, should be capable of developing, implementing, and self-certifying an SPCC Plan without the services of a PE. With this underlying principle in mind, EPA considered the type and scale of operations and the equipment involved at small, marginal well oil production facilities and concluded that when there are no injection wells at the facility, four producing wells per single tank battery is an appropriate criteria to define a simple oil production facility configuration.

One or more injection wells are typically used to inject produced water underground for disposal or to enhance recovery of oil from production wells. The underground injection process can add additional piping to the design of an oil production facility. Consequently, EPA has included a ''no injection wells'' criterion for qualified oil production facilities with more than two wells per single tank battery. The injection well process typically consists of piping extending from a produced water container to the injection wellhead, valves, and pumps and may include tank level indicators, floats, flow controls, and actuators/switches that add additional equipment to the oil production facility. EPA believes the integration of such injection equipment and its operation into the design and operation of the production facility calls for PE certification rather than the owner or operator self-certifying of the SPCC Plan at facilities that have more than two production wells and injection wells. EPA also does not believe it is reasonable or appropriate for an owner or operator to designate the injection well and its associated piping a separate facility just to meet the alternative qualified facility eligibility criteria. However, as noted in section V.M.7, an injection well that injects fluids that were stored in a container that is exempt from the SPCC regulation under § 112.9(c)(6)(i) will not preclude a facility from being eligible for treatment as a qualified facility under § 112.3(g)(2)(ii). Therefore, the Agency believes that at a facility with no injection wells and a maximum of four producing wells per single tank battery, each of which produce ten barrels or less of crude oil per well per day, captures the oil production operations targeted by the self-certification option because these facilities, with a limited number of producing wells per tank battery operating at a low flow rate, and no injection wells or associated equipment, are less complex than other oil production facilities.

Commenters also argued that ''no injection wells'' is not part of an established definition and that small facilities that utilize injection for secondary or tertiary recovery would not qualify. As EPA considered the type and scale of operations, and the likely quantities of oil handled, EPA also analyzed whether marginal well oil production facilities with an injection well that handle small oil quantities could be similarly less complex than other oil production facilities. The Agency established the threshold of two wells per single tank battery if there is one or more injection wells at the facility because field observation and professional judgment suggests that with two wells, the tank battery is typically situated near the well head to minimize the length of flowlines. As the number of wells flowing to a single tank battery decreases to two wells, the footprint of the facility potentially decreases and the lesser area encompassed by a facility with fewer wells flowing to the tank battery means that significantly shorter flowlines are needed to move well fluids to separation and storage processes. EPA also understands that as the number of wells in a lease (the term used for the area of wells run by an owner or operator) decreases, the number of tanks and separators typically decreases. Depending on the flow rates and well locations, separate tank batteries serving widely separated wells may be installed on one lease. Fewer valves, smaller separation equipment and fewer or smaller storage tanks in the tank battery are also expected at a facility with two wells than those with four wells per single tank battery. Finally, based on the Agency's best professional judgment and experience in the field, pumpers and well service operations typically occur once or twice per week; on this basis, the likely quantities of well fluids and marketable oil generated by a two-well operation per single tank battery is more consistent with the quantities expected at qualified facilities that are not oil production facilities. By limiting the overall number of producing wells, and therefore the associated equipment and piping at an oil production facility, the Agency is targeting those production facilities that should be eligible to self-certify SPCC Plans. In order to strike a balance between those operations with injection wells and those without, EPA is allowing oil production facilities with no more than two producing wells that also have injection wells an option to self certify the Plan. Regardless of the presence of injection wells at these facilities, the overall number of wells and associated equipment is still limited by this approach. In addition, the likely smaller oil quantities stored at a two-well facility with injection wells captures the smaller operators targeted by the self-certification option because these facilities are similar in complexity to an oil production facility with four producing wells per tank battery with no injection wells. Similarly, the specification of ''per single tank battery'' is intended to make clear that the self-certification option for production facilities does not extend to a central processing area (a production treatment and separation operation that receives fluids from a qualified facility tank battery).

Although the criterion limits the number of wells per single tank battery, it does not limit the number of tank batteries located at the oil production facility. That is, EPA believes that tank batteries within an oil production facility may still have simple configurations and the presence of multiple tank batteries does not add complexity to the overall oil production facility. As EPA discussed previously in Section V.D of the preamble, the owner or operator of a production facility has the flexibility to define the facility's boundaries such that it can include multiple tank batteries. Therefore, if the oil production facility meets one of the two alternative criteria described in this section (that is, it has no more than two producing wells per single tank battery each of which produce ten barrels or less of crude oil per well per day if there are injection wells; or the facility has no more than four producing wells per single tank battery, each of which produce ten barrels or less of crude oil per well per day, and has no injection wells at the facility; and meets the reportable discharge history criterion) the owner or operator can self-certify the SPCC Plan.

Comments. Many commenters expressed general support that EPA

utilize other relevant criteria in identifying a ''qualified facility'' in the oil production sector, although most of the commenters did not support the approach EPA is promulgating in this final rule. However, other commenters questioned why oil production facilities would have different criteria than facilities in other industries when they already have less stringent requirements under the SPCC rule. Two commenters opposed any alternative eligibility criteria for production facilities, arguing that the basis of the qualified facility approach is to provide an alternative for the truly small operator to avoid the cost of PE certification of his SPCC Plan. Commenters questioned why EPA would reduce requirements for oil production facilities given the sector's spill history and operational complexity. These commenters requested that all facilities above 1,320 gallons of total aboveground oil storage capacity should be certified by a PE.

Still other commenters questioned the number of wells and other conditions that EPA described in the preamble to the proposal. One commenter stated that limiting the option to facilities with four wells is of concern because the number is not well-established and would restrict the applicability of this option. Several commenters also expressed concern with the ''no injection wells'' criterion, noting that injection does not add complexity to the facility, is a common practice, and the produced water that is reinjected is of low oil content. Commenters also stated that ''no injection wells'' is not part of an established definition and that small facilities that utilize injection for secondary or tertiary recovery would not qualify.

Other commenters suggested other approaches or options that EPA could pursue. For example, one commenter suggested the alternative eligibility criteria should be a production rate less than five barrels per day per well, and very simple operations consisting of no more than three wells flowing to one tank battery and no injection wells. Two other commenters provided support for oil production facilities to qualify for Tier I, although some commenters suggested that the Tier I qualified facility threshold discussed in the October 2007 proposal would be too limiting, and suggested that a facility with one 400 barrel (16,800 U.S. gallons) oil tank should be eligible for the Tier I category.

Response to comments. EPA agrees in principle with the commenters who supported alternative qualified facility eligibility criteria for oil production facilities and is finalizing the option described in the proposal with some modifications. The Agency does not agree that PE certification should be required for all facilities with more than 1,320 U.S. gallons oil storage capacity, given that the Agency has already promulgated an approach allowing owners and operators of facilities that meet certain criteria, including a total aboveground oil storage capacity of 10,000 U.S. gallons or less to self-certify Plans. A number of commenters pointed out that oil production facilities are already subject to a differentiated set of requirements under the SPCC rule. While the Agency recognizes this, it continues to believe that a differentiated alternative for facilities with simple configurations has merit, and that providing the added flexibility of self-certification for the smaller oil handlers/simpler operations, along with the other streamlined requirements tailored to the unique features of this sector (as described elsewhere in the preamble to this final rule) should improve overall spill prevention and environmental protection.

Because the configuration of an oil production facility is variable, complexity depends upon a number of factors, including, but not limited to: The oil field, production rate, type of fluid, operating equipment and conditions, and viscosity of the oil. Because oil production facilities do not have a ''typical'' configuration, the Agency has finalized eligibility criteria intended to minimize the complexity of the operations where self-certification seems appropriate. By setting the maximum number of wells at four producing wells if there are no injection wells at the facility, or two producing wells if there are injection wells at the facility, there is a greater likelihood that those wells are located near the tank battery. EPA believes that the four-well criterion targets those oil production facilities with less complex operations and configurations, consistent with other qualified facilities. Similarly, the criterion that excludes underground injection for a facility with four producing wells eliminates the complexity associated with injection related equipment. By limiting the number of producing wells per single tank battery to two producing wells at facilities that have injection, EPA believes that because of the smaller oil storage capacities and the greater likelihood that those wells are located near the tank battery, a marginal well oil production facility with two producing wells is consistent with other qualified facilities. In addition, the reduced complexity in decreasing from four to two producing wells is similar to the change in complexity associated with injection wells. As noted above, EPA believes a PE need not be involved in the SPCC Plan at facilities with a limited number of wells and associated equipment and piping.

A number of commenters noted that by limiting the number of wells per tank battery and not allowing injection wells to be utilized in designating a qualified facility for the oil production sector, it would limit the number of oil production facilities that could self-certify their SPCC Plan. First, it should be noted that in designating a ''qualified facility'' in the oil production sector, the purpose is to identify those facilities that should be eligible to self-certify their SPCC Plan without the involvement of a PE-that is, those facilities that handle small quantities of oil, with simple and straightforward processes and equipment, and not to maximize the number of oil production facilities that could be eligible to self-certify their SPCC Plan. However, EPA also estimated the number of facilities that would meet the eligibility criteria for a qualified facility under the eligibility criteria promulgated today for the oil production sector. Based on our analysis (which can be found in the Regulatory Impact Analysis for this action, located in the docket for this rulemaking), EPA estimates that approximately one third of oil production facilities would meet the alternative eligibility criteria. If those oil production facilities that meet the eligibility criteria for self-certification based on the 10,000 gallon threshold are also included, EPA estimates that almost half of oil production facilities could take advantage of self-certifying their SPCC Plan. Thus, EPA does not agree with commenters that the eligibility criteria being promulgated today for defining a qualified facility in the oil production sector is too narrow.

The Agency also agrees that oil production facilities should also be eligible as Tier I qualified facilities. Thus, the owner or operator of an oil production facility that meets the criteria finalized under this rulemaking and additionally meets the Tier I qualified facility eligibility criteria in § 112.3(g)(1) (that is, the facility has no individual oil storage container with a capacity greater than 5,000 U.S. gallons) is also eligible to use the streamlined Tier I qualified facility SPCC Plan template (Appendix G to the SPCC rule). The Agency also does not agree that the eligibility criteria for Tier I are too limiting, as the relief provided by the SPCC Plan template and other streamlined requirements are targeted to

a specific segment of the universe of facilities based upon simplicity of configuration and a 5,000-gallon limit on the total aboveground storage capacity for any single container. EPA believes that facilities that qualify for Tier I have a reduced risk of discharge in harmful quantities due to this limit on aboveground single container total storage capacity. Thus, the Agency does not agree that a 400-barrel container (16,800 U.S. gallons) should qualify for Tier I, as this quantity is three times the container threshold for other Tier I qualified facilities (with a maximum aboveground oil storage container of 5,000 U.S. gallons). Commenters did not provide data to support the larger tank size or demonstrate how this would maintain environmental protection. Larger containers have the potential for a larger discharge, may have more stringent requirements for inspection and maintenance in accordance with industry standards, and therefore, EPA believes should not be eligible for the Tier I streamlined requirements.

b. Alternative Approaches for Addressing Small Oil Production Facilities as Suggested by the Department of Energy (DOE): Alternative Eligibility Criteria

In the proposal to this rulemaking (72 FR 58378, October 15, 2007), the Agency sought input on different eligibility criteria, as suggested by DOE, to identify a small oil production facility as a qualified facility. The criteria would allow for the development of a self-certified SPCC Plan, and allow the use of a streamlined SPCC Plan template for a certain set of facilities, similar to that found in proposed Appendix G to the SPCC rule. Under the qualified facility criteria at § 112.3(g), a facility that has an aggregate aboveground oil storage capacity of 10,000 U.S. gallons or less and has not had a single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve-month period in the three years prior to Plan certification, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years is eligible for the qualified facility Plan requirements at § 112.6 (i.e., a self-certified Plan in lieu of a PE certified Plan). DOE suggested that because of the unique characteristics of small oil production facility operations, such facilities may merit the establishment of small oil production facility-specific eligibility criteria, including a different aggregate oil storage capacity threshold or stripper well definition for identifying qualified facilities. For example, DOE suggested that a stripper well be defined using the IRS tax code definition of 15 barrels or less of oil per day equivalence (see 26 U.S.C. 613A). In light of this request, EPA sought comment on whether there are unique circumstances at small or marginally economic oil production facilities and the alternative criteria based on these circumstances for the possible establishment of a ''qualified facility'' provision specific to small oil production facilities that would serve to increase SPCC spill prevention and reduce the likelihood of a harmful oil discharge.

Comments. Several commenters argued that the current threshold requirements are too low to provide significant benefit for marginal oil production facilities. For example, one commenter suggested a total aboveground oil storage capacity of 50,000 gallons where no single container is greater than 21,000 gallons, whereas another commenter suggested removing consideration of this approach unless produced water storage is eliminated from the threshold calculation.

Concerning the stripper well definition, two commenters supported DOE's suggestion to use the IRS tax code definition for marginal production to ease compliance. One commenter indicated that the EPA definition remains linked to facility storage capacity, and storage capacity at marginal wells is not sized based on current production levels and in fact decreases over time.

Concerning other regulatory programs addressing the objectives of the SPCC rule, one commenter suggested that state spill prevention regulatory programs should serve small production facilities rather than one Federal program. However, another commenter noted that states in general simply do not address equivalent requirements of the SPCC regulations and especially not to the extent of the SPCC regulations with respect to prevention of oil discharges. Two commenters suggested that EPA consider other regulatory requirements, including DOT Carrier Requirements for Spills, Spill Reporting, Transportation Security Planning, and EPA's Stormwater Discharge Permitting program, the National Pollutant Discharge and Elimination System (NPDES) program, and Underground Injection Control (UIC) program. Another commenter suggested allowing all SPCC facilities to have the option of using other equivalent prevention plans to meet SPCC planning requirements. Finally, one commenter suggested that EPA remove the self-certification provision from the rules so that all farmers, small businesses and other oil storage facilities are required to prepare a complete SPCC Plan certified by a PE to ensure ''equal and fair treatment for all owners and operators.''

Response to comments. The Agency disagrees with commenters who suggest establishing a new capacity based Tier II criterion for oil production facilities greater than the already established 10,000-gallon threshold for all facilities. While the Agency received a number of comments regarding a wide variety of thresholds for defining a Tier II qualified facility in the oil production sector, the comments did not provide sufficient data to support the threshold numbers other than it would increase the number of facilities that would be eligible as a qualified facility and thus, self-certify their SPCC Plan. More importantly, the commenters did not demonstrate how these new thresholds would maintain environmental protection. EPA does not agree with the commenters to base a new Tier II qualified facility threshold for oil production operations solely on an increased capacity threshold, as there was no justification for providing oil production facilities with a higher threshold than non-production facilities or for how the higher threshold relates to simplicity in facility configuration or operations.

Nevertheless, EPA agrees with commenters that the oil production sector has unique characteristics and that other criteria may better serve in defining a Tier II qualified facility. For example, the fact that oil production facilities have flow-through process vessels suggests that flow rate (in the form of an oil production rate) may be a better approach for setting a new criterion for identifying the simplest oil production facility operations. However, EPA disagrees with commenters who argued that the IRS tax code definition of 15 barrels or less of oil per day should be used in defining flow rate. Specifically, the IRS definition of 15 barrels of oil or less per day equivalent is calculated by dividing the average daily production of domestic crude oil and domestic natural gas from producing wells on such property for such calendar year by the number of such wells. Thus, under this approach, a facility will contain wells with marginal production, such as 15 barrels of oil per day, but also will likely contain wells that produce much greater quantities of oil, because the IRS definition calculates the average daily production of oil over all producing wells, as opposed to the amount of oil

that flows from any individual well. EPA believes that using such a definition defeats the purpose of identifying a qualified facility, which is to allow those small facilities that have relatively simple operations to self-certify their SPCC Plans. Thus, the Agency has adopted a per well approach that places a flow rate cap of ten barrels or less of oil produced per well per day, as this is consistent with the definition of ''stripper well'' codified at 40 CFR 435.60.

Additionally, because the source of the oil for production facilities is through extraction wells, the number of wells better identifies the complexity of a production operation. Finally, some of these facilities are unique as they reinject fluids in the reservoir for disposal purposes or for enhanced oil recovery. The presence of these injection wells is a characteristic unique to oil production facilities that can help to determine the complexity of the operation. These characteristics, unique to the oil production sector, provided the Agency with the basis for a tailored set of criteria to identify oil production facilities with simple configurations. Developing a criterion based solely on raising the oil storage capacity criterion would be inconsistent with the rationale established for the original 10,000-gallon criterion and would not necessarily maintain environmental protection. Thus, while EPA does not agree that raising the oil storage capacity threshold is appropriate, the Agency does agree with commenters that the unique characteristics of an oil production facility allow EPA to establish alternative criteria for a Tier II qualified facility, and EPA has finalized provisions to that effect.

Finally, EPA disagrees with commenters who suggested that the SPCC regulations are not needed because of other regulatory programs, such as state programs, or the NPDES or UIC programs. EPA conducted a comparison of a number of these programs with the SPCC program and found that they were not nationally uniform (*see Review of State Regulations Pertaining to Oil Spill Prevention at Onshore Production Facilities and Produced Water Containers,* prepared by Abt Associates Inc., June 6, 2008, and found in the docket for today's rulemaking). Further, under the Oil Pollution Act and CWA, EPA is required to promulgate oil spill prevention regulations, and it cannot delegate its responsibilities to other Federal or state programs, but has streamlined SPCC requirements or provided targeted exemptions from SPCC regulation when such regulations provide comparable or equivalent environmental protection. However, EPA has stated previously that if a facility owner or operator must comply with a state or Federal requirement that also satisfies an SPCC requirement, the owner or operator can include and reflect such effort in his SPCC Plan and not duplicate it solely for SPCC. EPA wants to minimize duplicative requirements where possible and is working to tailor requirements, where appropriate.

c. Alternative Approaches for Addressing Small Oil Production Facilities as Suggested by the Department of Energy (DOE): Exempt Existing Stripper Oil and Natural Gas Wells From all SPCC Requirements

The other approach that DOE requested that EPA solicit comment on in the proposal to this rulemaking (72 FR 58378, October 15, 2007) was to exempt stripper oil and natural gas wells from all SPCC requirements, except those applicable to crude oil and condensate tanks (e.g., tanks which store gas condensate (which is an oil) at oil and gas production facilities). The eligibility criteria for the exemption would include those facilities that meet the IRS tax code definition of stripper well property at 26 U.S.C. 613A. In addition, the eligibility criteria would not be limited, for example, to those facilities that did not have injection wells or used injection wells as secondary or tertiary recovery techniques, which DOE has indicated may be regulated under existing Federal and state regulatory programs. DOE believes that such criteria have no direct relationship to the spill risk posed by marginal wells facilities and may serve as a disincentive to enhanced oil and gas recovery and well maintenance.

Comments. Many of the commenters expressed support for an exemption of stripper oil and natural gas wells from all SPCC requirements. Commenters expressed concerns that implementation of the SPCC rule may cause oil production wells to be shut in. One other commenter suggested regulating only crude oil and condensate containers, given that the releases reported to the NRC from this industry sector are low and EPA ''has never conducted a comprehensive environmental analysis of the risks associated with these proposed regulations and whether they significantly change from the current regulatory program to this proposed one.''

Response to comments. While the majority of comments the Agency received supported an outright exemption for stripper oil and natural gas wells from the SPCC requirements, the commenters did not provide sufficient data to justify an exemption or demonstrate how an exemption would maintain environmental protection. EPA also disagrees with the commenters that the SPCC requirements and compliance costs alone would cause small oil production facilities to shut down, reducing U.S. oil production (*see* memorandum dated April 11, 2008, *Preliminary Assessment of SPCC Compliance Costs and Energy Impacts on Oil Exploration and Production*). As EPA has noted elsewhere, these facilities, which are generally unattended, can store large quantities of oil and oil/water mixtures in a variety of containers that may have large capacities. These factors, as well as others, highlight the hazard potential posed by these operations (*see Considerations for the Regulation of Onshore Oil Exploration and Production Facilities Under the Spill Prevention, Control, and Countermeasures Regulation,* May 30, 2007, in the docket for this rulemaking (EPA–HQ–OPA–2007–0584–0015)). Thus, based on this hazard, and without sufficient rationale, the Agency believes it inappropriate to grant an outright exemption for such stripper oil and natural gas wells from the SPCC requirements. However, EPA does agree that performance-based requirements tailored to the unique characteristics of marginal oil production facilities are justified, as EPA has described previously, which the Agency believes will lead to the prevention of oil spills.

7. Produced Water Containers

In the proposal for this rulemaking (72 FR 58378, October 15, 2007), EPA requested comment including appropriate rationale, information, and data, on three approaches related to produced water containers. The first approach required general secondary containment combined with additional requirements in lieu of sized secondary containment. The second approach, advanced by DOE, required inspection, maintenance, and periodic oil skimming of produced water containers in lieu of both sized and general secondary containment. Finally, comment was requested on a third approach, again advanced by DOE, that exempted produced water treatment facilities altogether.

Produced water containers are typically located within a tank battery at

an oil production facility[8] where they are used to store well fluids that result after marketable crude oil is separated from fluids extracted from the reservoir and prior to subsequent use (e.g., re-injection or beneficial reuse), further treatment, or disposal. Under normal operating conditions, a layer of oil may be present on top of the fluids in these containers. The amount of oil by volume observed in produced water containers varies, but based on EPA's understanding, is generally estimated to range from less than one to up to ten percent, and can be greater. However, the Department of Energy (DOE) and the oil production sector indicate that the oil layer may be much less, depending on the type of oil/water separation technology used, if any. Many commenters claim that the SPCC oil spill prevention requirements are inappropriately applied to produced water containers, arguing that in certain cases these containers hold mostly water with very low concentrations of oil or that produced water containers should be exempt under the exemption for wastewater treatment. EPA agrees that the SPCC regulations should not regulate the storage of oil if the discharge of that oil is not prohibited under section 311 of the Clean Water Act. Section 311(b)(3) prohibits the discharge of oil into or upon navigable waters of the United States or adjoining shorelines in such quantities as may be harmful, as determined by the President. That determination is made in 40 CFR part 110. EPA does not agree that produced water containers are eligible for the wastewater treatment exemption. However, the Agency recognizes that, depending on the use, some produced water containers may serve as oil/water separators, rather than bulk storage tanks, and such containers should be regulated in a similar fashion as other oil/water separators. To address these concerns, EPA is providing an exemption for certain produced water containers holding oil that would not violate section 311(b)(3) if discharged, and a differentiated set of requirements for other produced water containers at oil production facilities that are used for oil/water separation. EPA is also promulgating a definition of produced water container to clarify which containers will be eligible for this rule amendment. The Agency believes that the approaches for produced water containers promulgated in this rule amendment are a logical outgrowth of the three approaches discussed in the proposal and the comments received.

Specifically, EPA is finalizing two approaches for produced water containers at oil production facilities. Under the first approach, EPA is exempting produced water containers at oil production facilities from the requirements of the SPCC rule when a PE certifies, as part of the SPCC Plan, that based on the efficiency of the oil/water separation technology used, the contents of a produced water container, if completely discharged, does not contain oil in amounts that may be harmful, as described in 40 CFR part 110; the capacity of the exempted containers would not be counted in oil storage capacity.

Under the second alternative, which is drawn from two of the approaches presented in the proposal, for those produced water containers that cannot meet the criterion for the exemption under this rule, the facility owner/operator has the option to apply general secondary containment requirements and conduct visual inspections, maintenance and corrective action, in lieu of sized secondary containment, when a PE describes in the Plan and certifies that a practice is established that is designed to remove the amount of free-phase oil from the produced water container on a scheduled and routine basis. These containers are counted toward the aggregate storage capacity. As described below, if the production facility has certain types of oil discharges or fails to meet the requirements of this part of the rule, the facility will no longer be eligible for the exemption or the streamlined requirements.

EPA is taking this action because the Agency believes that there are alternative options for produced water containers that can provide the regulated community compliance flexibility while continuing to effectively protect the environment from discharges of quantities of oil that may be harmful. The options the Agency is providing for produced water containers are based on the facility's site-specific characteristics, and an owner or operator may still choose to comply with the sized secondary containment requirements of § 112.9(c)(2). For example, if a produced water container at an existing facility is already located within sized secondary containment, the owner/operator may elect to not follow the alternative requirements in § 112.9(c)(6). The comments received on the produced water options and the Agency's responses are located in section V.M.7.e. below.

a. Exemption for Produced Water Containers

A new subsection at § 112.9(c)(6) has been added to the rule to address the streamlined requirements for produced water containers. Paragraph 112.9(c)(6)(i) includes an exemption for those produced water containers and any associated piping and appurtenances downstream of the container that do not contain oil that would cause harm as described in 40 CFR 110.3 if the contents of the container are completely discharged.

EPA recognizes that some oil production facilities may have (or may want to install) separation equipment that performs at a highly efficient rate. In these cases, the contents of the produced water containers downstream of such separation equipment may not contain oil in quantities that may cause harm, as described in 40 CFR part 110. Under 40 CFR part 110, a discharge of oil in such quantities as ''may be harmful'' is defined as one that may violate applicable water quality standards; or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or cause a sludge or emulsion to be deposited beneath the surface of the navigable water or upon adjoining shorelines. To make this determination, the PE should apply the same standard as is set forth in 40 CFR 112.1, which allows the owner or operator (and the PE) to determine if a container could reasonably be expected to discharge oil in quantities that may be harmful as described in part 110 into or upon navigable waters. This determination is made by reference to the volume of oil reasonably expected to reach navigable waters or adjoining shorelines, if the entire contents of the container are completely discharged, and not by reference to the volume of oil in the container.

EPA understands that meeting the standard described above may require oil/water separation equipment and/or techniques such as hydrocyclones, induced gas floatation, ultra-filtration, and micro-filtration. Because of the level of separation efficiency and treatment required to meet the Part 110 standard, EPA believes that the involvement of a PE is necessary. Therefore, EPA is requiring owners/operators who take advantage of this exemption to have this part of their SPCC Plan certified by a PE, even for a qualified facility. EPA has amended the PE attestation in § 112.3(d)(1) to add a provision at (1)(vi) so that the PE specifically certifies that exempted produced water containers and any

[8] A wet gas facility that stores condensate and meets the other SPCC qualifying criteria is considered an oil production facility. Otherwise, a wet gas facility falls outside the scope of the Agency's SPCC jurisdiction.

associated piping and appurtenances downstream of the container (which may include flowlines and other appurtenances associated with injection and discharge) meet the 40 CFR part 110 ''no harm'' criterion and these containers are identified in the Plan and that appropriate produced water characteristics in the container, piping and appurtenances; procedures; or maintenance required to meet the standards of Part 110 are identified. The PE must use his professional judgment in applying the necessary procedures to determine that the contents of the container, if completely discharged, will meet the ''no harm'' criteria of 40 CFR part 110 and documents them in the Plan. Additionally, in accordance with § 112.5, the owner or operator must verify on an annual basis that the produced water characteristics in the container, piping and appurtenances; procedures; or maintenance required to meet the standards of Part 110 that formed the basis for the PE certification are maintained. The owner or operator must document the verification and sign a statement that the produced water characteristics in the container, procedures, or maintenance that formed the basis for the PE certification are maintained. The following words will suffice, ''I verify that the produced water characteristics in the container, and any associated piping and appurtenances downstream from the container; procedures; or maintenance required to meet the standards of Part 110 are maintained in accordance with the PE certification.'' This rule text provides an example of how the owner or operator can document the required annual verification for the exempt produced water containers. The verification must be maintained in accordance with § 112.7(e).

If the facility experiences a discharge from an exempt produced water container or any associated piping and appurtenances downstream from the container in quantities that may be harmful to navigable waters or adjoining shorelines (as described in 40 CFR part 110) then the produced water container is no longer exempt from the rule and must comply with all provisions of the SPCC rule within six months of the discharge, including the sized secondary containment requirements at § 112.9(c)(2). The final rule, as described above, focuses on a ''container'' and related to discharges under part 110. Under the requirements of 40 CFR part 110, such a discharge must also be reported to the National Response Center (NRC) at 1–800–424–8802.

This exemption does not change the current requirement for an owner/operator of a facility to mark the location and contents of all containers, including both exempt and non-exempt produced water containers, on the facility diagram. This requirement is necessary not only to assist response personnel in identifying hazards during spill response activities, but also to assist facility and Agency personnel in determining whether the exemption criteria are being met.

b. Alternative Option for Non-Exempt Produced Water Containers

For those produced water containers that do not meet the criteria for being exempt as described above, the facility owner/operator now has the option to comply with an alternative set of requirements in lieu of providing sized secondary containment. This new alternative compliance option, which is drawn from two of the approaches presented in the proposal, is provided in paragraph § 112.9(c)(6)(ii) and is described below.

The first approach described in the proposal would allow the owner or operator of a production facility to comply with the general secondary containment requirements along with additional measures as an option in lieu of sized secondary containment for existing produced water containers. Generally, the additional measures were requirements for periodic inspections, examination and integrity testing, prompt removal of oil discharges and corrective action. The second approach described in the proposal would allow the owner or operator of a production facility to comply with additional measures in lieu of both general and sized secondary containment. Generally, the additional measures under this approach were visual inspection, implementation of a skimming program, prompt removal of oil discharges and corrective action. In response to comments, the Agency developed this alternative compliance option which includes (1) compliance with general secondary containment requirements along with additional measures and (2) implementation of a procedure or process to remove free-phase oil or skimming program.

Specifically, the general secondary containment requirement at § 112.7(c) calls for secondary containment to be designed to hold the most likely quantity of oil potentially discharged in an event, rather than installation of sized secondary containment designed to hold the contents of the largest container with sufficient freeboard. Typically, the quantity of oil contained by general secondary containment is expected to be smaller than the amount of oil that would need to be contained by sized secondary containment. EPA believes that good general secondary containment practices can be successfully implemented if such practices are designed by a PE in consideration of the site specific factors and in combination with additional oil spill prevention practices including inspections, procedures to minimize the amount of free-phase oil in the container and procedures to remove/remediate discharged oil.

The piping and appurtenances downstream of the produced water containers addressed by this section are also subject to the general secondary containment requirements in § 112.7(c) and are not subject to sized secondary containment requirements. However, the owner or operator of the facility may choose to address the downstream piping and appurtenances using the optional approach offered under new § 112.9(d)(3). These provisions are noted in the rule under § 112.9(c)(6)(ii)(A) for clarity.

Procedure to separate free-phase oil. Under this alternative, the facility owner or operator must implement a process and/or procedure for the produced water container(s) that is designed to remove free-phase oil that accumulates on the surface of the produced water container. EPA expects this procedure or process will be implemented on a periodic basis so that the amount of free phase oil that collects in these produced water containers is within the amounts managed by the general secondary containment scheme designed by the PE and implemented by the facility owner/operator. The SPCC Plan must include a description of the free-phase oil separation and removal procedure or process, the frequency it is implemented or operated, the amount of free-phase oil expected to be maintained inside the container, and a description of the adequacy of the general secondary containment approach for the produced water container, including the anticipated typical failure mode and the method, design, and capacity for general secondary containment. Additionally, the owner or operator must keep records of the implementation of these procedures in accordance with § 112.7(e).

Like the amendment for exempt produced water containers, EPA has amended the PE attestation in § 112.3(d)(1) to add a provision at (1)(vii) so that the PE specifically certifies that an oil removal procedure for non-exempt produced water containers is designed according to good engineering practice to reduce the accumulation of free-phase oil, and that

the procedures and frequency for required inspections, maintenance and testing have been established.

Because this removal procedure is essential for reducing the amount of free-phase oil in the produced water tank, EPA requires that if, upon inspection, it is discovered that the removal procedure is not implemented, then the facility owner/operator may no longer take advantage of this alternative option and must comply with the sized secondary containment requirements at § 112.9(c)(2) within six months after EPA informs the facility owner/operator of this determination of ineligibility for the option.

Additional requirements. EPA believes that the combination of general secondary containment, a free-phase oil removal methodology as certified by a PE, and the additional requirements listed below provide the appropriate amount of environmental protection for these containers in lieu of sized secondary containment. The additional requirements include periodic inspection and/or testing of produced water containers and any associated piping and appurtenances downstream from the container for leaks, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b); corrective action or repairs to produced water containers and any associated piping as indicated by regularly scheduled visual inspections, tests, or evidence of an oil discharge; and prompt removal or initiation of actions to stabilize and remediate any accumulations of oil discharges associated with produced water containers.

Periodic inspection and/or testing of produced water containers and any associated piping and appurtenances downstream from the container is necessary to increase the likelihood that a discharge will be prevented or detected promptly when general secondary containment measures are used instead of sized secondary containment.

Corrective action is necessary to prevent a discharge from occurring, as well as in response to a discharge. This measure is intended to prevent discharges by ensuring that produced water containers are adequately maintained.

The requirement to promptly remove or initiate actions to stabilize or remediate any accumulations of oil discharges is intended to ensure the removal of oil accumulations around the container and any associated piping and appurtenances downstream from the container that may contribute to a discharge as described in § 112.1(b). EPA also considers the removal of oil-contaminated soil as a method to prevent oil from becoming a discharge as described in § 112.1(b). Disposal of oil and/or oil-contaminated media must be in accordance with applicable Federal, state, and local requirements.

The intent of these regulatory revisions is to treat produced water containers used for oil/water separation in a manner similar to that of a separator or flow-through process vessel, such as a heater-treater, free water knock-out, or gun barrel, because these produced water containers are being used for the same purpose. Use for oil/water separation is the basis for the differentiated treatment of flow-through process vessels as discussed in section V.M.5 above. Accordingly, these requirements are similar to those found at § 112.8(c)(5) for flow-through process vessels.

Reportable discharge. If the facility experiences a discharge of more than 1,000 U.S. gallons of oil in a single discharge as described in § 112.1(b), or discharges more than 42 U.S. gallons of oil in each of two discharges as described in § 112.1(b), occurring within any twelve month period (excluding discharges that are the result of natural disasters, acts of war, or terrorism) from a non-exempt produced water container, then the facility owner/operator may no longer take advantage of this alternative option and must comply with the sized secondary containment requirements at § 112.9(c)(2) and the inspection requirements at § 112.9(c)(3) within six months. Section 112.9(c)(6)(ii)(E) has been added to provide this requirement. A non-exempt produced water container must already comply with § 112.9(c)(1) and § 112.9(c)(4) and therefore these requirements were not added to § 112.9(c)(6)(ii)(E).

c. Definition of Produced Water Container

A production facility typically includes, at a minimum, a wellhead, a tank battery, and flowlines connecting the wellhead to the tank battery. The tank battery includes separation equipment, a crude oil or condensate container (stock oil tank), and typically a produced water container, which receives both oil and produced water from the separator, respectively. Produced water containers are typically located within the tank battery.

Produced water containers are located at a facility as part of the process that separates the oil from other fractions (water and/or gas). A produced water container is generally the last container in the separation process, as there may be more than one separator (e.g., heater-treater, gun barrel, free water knock-out) used in succession or in combination to separate the oil/water fraction.

To clarify which containers are subject to the requirements of § 112.9(c)(6), EPA provides a definition of a produced water container in § 112.2. EPA did not propose a definition for produced water containers in October 2007, but EPA believes that the definition promulgated in this notice is a logical outgrowth of the proposal. In the October 2007 proposal, EPA described produced water containers as bulk storage containers ''typically located within a tank battery at a production facility where they are used to store well fluids after separation and prior to subsequent use (e.g., re-injection or reuse), further treatment, or disposal.'' 72 FR 58413. EPA asked for and received comments on the characteristics of produced water containers (72 FR 58414) and crafted a definition to establish the specific containers eligible for this exemption consistent with the description in the proposal. A produced water container is a bulk storage container at an oil production facility used to store the produced water after initial oil/water separation, and prior to reinjection, beneficial reuse, discharge, or transfer for disposal. Piping and appurtenances downstream of the produced water container may include flowlines and other appurtenances associated with injection and discharge.

d. Overlap Between Produced Water Container Alternatives and Qualified Facilities

Some production facilities with produced water containers will meet the eligibility criteria for qualified facilities, under the previous eligibility criteria (*see* 71 FR 77266, December 26, 2006) or the additional criteria finalized in this notice exclusively for oil production facilities. EPA notes that both of the optional alternatives for a produced water container finalized in this notice (the exemption or the alternative requirements in lieu of sized secondary containment) require PE certification and are not amendments which can be self-certified. Therefore, if the owner or operator of an oil production facility qualifies as a Tier II qualified facility, and wants to self-certify his Plan and use one of the alternative approaches for produced water containers (exempt a produced water container or take advantage of the alternative requirements in § 112.9(c)(6)), then he must use a ''hybrid'' SPCC Plan. Sections of the Plan satisfying the produced water container requirements of § 112.9(c)(6)

must be certified by a PE, who completes the attestation in § 112.3(d)(1)(vi) and/or (vii). Section 112.6(b)(4)(ii) has been modified to emphasize this point. An owner or operator of an oil production facility which qualifies as a Tier I qualified facility may not use the self-certified SPCC Plan template found in Appendix G to 40 CFR part 112 if he wishes to exempt a produced water container or take advantage of the alternative requirements in § 112.9(c)(6), because the exemption or alternative requirements for produced water containers require PE certification and the template is for self-certification only.

In addition, the exemption for produced water containers meeting the criteria under § 112.9(c)(6)(i) can affect the applicability of the alternative qualified facility eligibility criteria for oil production facilities under § 112.3(g)(2)(ii). Under that section, an oil production facility with injection wells does not meet the alternative definition of qualified facility. However, if the injection well is to inject fluids from a container that is exempt under § 112.9(c)(6)(i), the presence of that injection well does not make the facility ineligible for regulation as a qualified facility under § 112.3(g)(2)(ii).

Comments. Many commenters expressed support for exempting produced water containers from the secondary containment requirements, SPCC regulation and/or an exemption for produced water treatment facilities. Some commenters suggested that the produced water containers at these facilities be subject to the wastewater treatment exemption. Other commenters suggested exempting produced water containers according to their location, upstream or downstream of separation, because the amount of oil remaining in the water after primary separation and treatment is minimal. In fact, several commenters indicated that EPA has authority to regulate discharges of oil, not water. Additionally, one commenter specifically noted that for older oil fields, produced water comprises a large amount of water or brine with extremely low oil content, ''perhaps 0.1% or less.'' One commenter claimed that produced water containers always have a layer of oil. Another commenter urged EPA to allow the certifying engineer to make the determination whether a given produced water tank or oil/water separator should have secondary containment, rather than including tanks that may or may not include measurable amounts of oil. Several commenters suggested produced water located at oil and gas facilities should be subject to the wastewater treatment exemption.

Two commenters suggested using ''primary separation'' as the difference between upstream and downstream production, while two other commenters noted it should be ''after the last separation.'' Two other commenters noted that if the facility is relying on gravity separation, the atmospheric storage tank should be considered bulk storage.

Several commenters suggested that discharges are already regulated by state law, the National Pollutant Discharge Elimination System (NPDES) program, or the Safe Drinking Water Underground Injection Control (UIC). DOE cited published information used to establish national effluent limitations for coastal oil and gas production facilities, discussed the efficiency of control and treatment technologies and found that numerous end-of-the-pipe treatment methods can achieve this level of effluent quality. One commenter suggested exempting NPDES-permitted ponds from storage capacity calculation for SPCC and FRP applicability due to their very low oil content.

Several other commenters addressed the proposed approach for additional requirements for produced water containers in lieu of sized secondary containment. One commenter supported the inspection, maintenance and periodic skimming proposed approach as a second option to an exemption. One commenter stated that field operators maintain a constant watch over the amount of oil carryover to the produced water tanks and when the oil layer reaches the point of being recoverable, the oil is skimmed and pumped. One commenter suggested ensuring that integrity testing is not required for produced water containers, because integrity testing of the typically closed-top fiberglass would be problematic, expensive, and difficult. However, other commenters opposed reduced requirements for produced water containers and expressed concerns about the potential for harmful discharges.

Response. After evaluating the comments received, EPA is modifying the requirements at § 112.9(c) to exempt produced water containers that meet certain conditions, and to allow an alternative management scheme (which is optional) for produced water containers that are used for oil/water separation in lieu of sized secondary containment. In deciding how to proceed, EPA acknowledges that the amount of oil by volume observed in produced water storage containers varies depending on a number of factors, including, but not limited to, separator efficiency, age and formation of the oilfield, and use of heat or chemical separation. EPA agrees with commenters that after separation, the amount of oil remaining in produced water can be minimal given the characteristics of the oilfield and facility/separator configuration. Therefore, EPA agrees with commenters that certain produced water containers with minimal amounts of oil may be eligible for exemption, and that certain produced water containers that are used for oil/water separation should be subject to differentiated requirements; EPA is allowing a PE to make the determination whether a given produced water container should be eligible for an exemption from the rule or for alternative requirements as described in § 112.9(c)(6)(ii). EPA believes the exemption criteria (certification by the PE that no discharge from the produced water container, including a complete loss of the capacity of the container, could cause a discharge in quantities that may be harmful as described in part 110) addresses the commenters' concerns about regulating produced water containers that do not contain oil in harmful quantities. Further, EPA believes the approach for non-exempt containers, featuring differentiated requirements and general secondary containment, provides appropriate regulatory requirements for these produced water containers.

The Agency does not agree, however, with commenters that produced water located at oil and gas facilities should be subject to the wastewater treatment exemption. The basis for the conditional exemption in these finalized amendments is whether oil is present in quantities that may be harmful. As stated in the preamble to the 2002 amendments to the SPCC rule, the goal of an oil production, recovery or recycling facility is to maximize the production and recovery of oil, which presumes that oil is present in quantities that may be harmful (67 FR 47068, July 17, 2002).

EPA has created a new section that describes alternative requirements for produced water containers (§ 112.9(c)(6)) in lieu of the sized secondary containment requirements of § 112.9(c)(2) and inspection requirements under § 112.9(c)(3). Produced water containers are typically found after the primary separation conducted by flow-through process vessels at an oil production facility. In order to address commenters who suggested using the term ''primary separation,'' the Agency has indicated

in the definition for produced water container that the container is used to store produced water after ''initial'' oil/water separation. The Agency agrees that produced water containers, including those used to separate oil from water by means of gravity separation, are bulk storage containers, and are therefore subject to requirements under § 112.9(c), including those specifically for produced water containers under paragraph (c)(6) of that section.

EPA agrees with commenters that oil production facilities may be regulated under the NPDES, UIC, other Federal regulations, and state regulations. However, the Agency's review of the scope of these programs and regulations indicates that these regulations do not necessarily provide an equivalent level of protection from accidental and incidental discharges of harmful quantities of oil to those required under the national SPCC requirements. Therefore these programs cannot serve solely as a substitute for an SPCC Plan at a facility. EPA acknowledges that onshore oil production facilities may discharge directly to surface waters pursuant to an NPDES permit and that technology-based discharge standards (effluent guidelines) for onshore produced water is ''zero discharge'' (with two exceptions: Produced water generated west of the 98th meridian that is put to beneficial use during the period of discharge (set to 35 mg/L), and stripper wells). An NPDES permit typically includes the guideline that the discharge ''shall be free from substances in amounts which would cause a visible sheen or visible deposits in the receiving water or adjoining shoreline.'' Because these permitted facilities are required to eliminate harmful quantities of oil in produced water, a produced water container at the facility may be eligible for the exemption finalized in this notice. Additionally, the NPDES requirements may be used by a PE to address the certification elements (produced water characteristics in the container and any associated piping and appurtenances downstream of the container, procedures or maintenance) required for the exemption.[9]

The Agency is finalizing an alternative to sized secondary containment requirements for a produced water container that does not meet the conditional exemption criteria described above. The alternate requirements finalized in this action take into consideration the commenters suggestions regarding the proposed alternatives. The finalized set of requirements include: Implementation of a procedure designed to separate the free-phase oil that may accumulate on the surface of the produced water, inspection or testing of the produced water container and components, prompt removal of or initiation of actions to contain and stabilize any oil accumulations, and corrective action should a discharge occur. The Agency did not include integrity testing in the finalized set of additional requirements. Produced water containers used specifically for oil/water separation serve the same purpose as separators or flow-through process vessel and thus, EPA is applying similar requirements to these containers.

EPA also agrees with the comment that when an oil layer in a produced water container becomes recoverable, the oil is typically skimmed and pumped. Consequently, EPA's final rule requiring removal and reduction of free-phase oil from the produced water container is consistent with industry practice. Whatever procedure is used must be developed by a PE, described in the Plan, and implemented by the owner or operator to reduce the amount of free-phase oil which may accumulate. Records of implementation of these procedures must be maintained in accordance with § 112.7(e).

8. Clarification of the Definition of Permanently Closed Containers

The Agency is addressing concerns expressed by the regulated community over the requirements for permanently closing a container, as described in the definition of ''permanently closed'' at § 112.2. EPA does not believe that further regulatory action is needed to address this issue. Specifically, the SPCC rule exempts from applicability and from capacity threshold determinations any oil storage container that is ''permanently closed.'' For a container to be permanently closed, all liquid and sludge must be removed from the container and connecting lines, all connecting lines and piping must be disconnected from the container and blanked off, all valves, except ventilation valves, must be closed and locked, and conspicuous signs must be posted on each container stating that it is a permanently closed container and noting the date of closure. Once permanently closed, a container is no longer required to be counted toward the total facility storage capacity, nor is it subject to the other requirements under the SPCC rule. The definition does not require that a permanently closed container be removed from the facility. In addition, any new container brought on to a facility that has never stored oil is not subject to the SPCC rule, nor is it counted toward the facility capacity until it stores oil. Furthermore, any other container that at one time stored oil but no longer contains oil or sludge, which is brought on to a facility and meets the definition of permanently closed, is not subject to the SPCC rule nor is it counted toward the facility capacity until it stores oil.

EPA also is clarifying that the permanent closure requirements under the SPCC rule are separate and distinct from the closure requirements in regulations promulgated under Subtitle C of the Resource Conservation and Recovery Act (RCRA) (i.e., *Standards For Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities at 40 CFR part 264 and Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities*) at 40 CFR part 264 and 265. These regulations describe the requirements for operators of facilities that use tank systems for storing or treating hazardous waste, as well as the requirements for tank closure and post-closure care (§§ 264.197 and 265.197). These requirements generally do not apply to an oil production facility. According to the applicability provision in § 264.1(b), ''the standards in this part apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste, except as specifically provided otherwise in this part or part 261 of this chapter'' (emphasis added). 40 CFR part 261 states that ''Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy'' are not hazardous waste (§ 261.4(b)(5)). Therefore, an oil production facility does not have to undergo the expense of permanent closure under Part 264 or 265 of RCRA, because these wastes (i.e. drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil) are not subject to these regulations.

Comments. Two commenters expressed support for EPA's proposed clarification that permanently closed containers need neither be removed from the facility nor be rendered permanently out of use in the future. One commenter suggested additional clarification stating that permanently sealed, unused oil containers can remain on-site at the facility with a minimum of cleaning and preparation.

[9] As noted above, because the definition of discharge under section 311(a)(2) excludes discharges subject to an NPDES permit, SPCC regulations promulgated under section 311(j) do not, and are not intended to, prevent such discharges.

Another commenter expressed concern, however, that the cost of closing a container would be prohibitive, and suggested it may cause premature abandonment of the operation. The commenter suggested that requiring a container to be cleaned is not necessary since the container would remain within the diked area.

Several commenters provided other suggested options. One commenter suggested that EPA clarify that sealing an empty container removes the container from being part of the production facility according to the definition of production facility. Agricultural stakeholders suggested that EPA modify its position on permanently closed containers so that a container removed from service can be placed back into service with minimal operational effort so that farmers and agribusiness can acquire storage capacity flexibility in response to variable production rates and economic conditions. One commenter suggested that small containers with a capacity between 500 and 1,500 gallons used for fueling and maintenance be allowed to be temporarily closed and exempt from the SPCC requirements when closed.

Response to comments. The Agency recognizes that variable economic conditions and production rates at an oil production facility may cause certain containers to be unused for long periods of time. However, EPA does not believe that it is appropriate to exempt containers from the SPCC requirements without requiring that all liquid and sludge be removed, even if the container remains in an area that is diked and it is for a temporary period of time. A ''temporary closure'' would be intended for situations where containers would only be closed for short periods of time, and arguably need less stringent requirements than a permanent closure. The significant difference in closure requirements between EPA's current ''permanent'' closure requirements and the suggested ''temporary'' closure requirements appears to be the removal of liquid and sludge from the container and connecting lines. EPA believes that allowing liquid and sludge to remain in the container, without the benefit of the SPCC rule protections, creates the potential for a discharge, regardless of the size of the container. One commenter suggested that such containers would remain in the diked area and thus, the potential for oil to be discharged would be minimal. However, if a container was no longer subject to the SPCC rule, there would be no requirement that it be contained in a diked area or that any precautions be taken to prevent the discharge of oil to navigable waters or adjoining shorelines. Finally, EPA believes that the permanent closure provisions require actions that render the container unavailable for oil storage, by requiring that all connecting lines and piping must be disconnected from the container and blanked off, and that all valves (except ventilation valves) must be closed and locked, thus preventing accidental spills where the container is inadvertently filled with oil. These provisions also serve as a clear indicator as to the status of a container and whether it is considered a regulated container under this rule and part of the storage capacity of the facility. EPA believes that these requirements are reasonable and provide the flexibility of allowing the container to remain on site for future use. EPA does not agree that cleaning a tank is cost-prohibitive and may shut in wells prematurely. The decision to clean and close a container in accordance with the SPCC provision is typically made by an owner or operator who can determine whether it is cost-effective to close the tank or to let it remain in service and not incur the costs associated with closure, including cleaning.

The Agency also disagrees with the comments suggesting that an owner or operator need only ''seal'' a tank without requiring that all liquid and sludge be removed in an effort not to be subject to the SPCC rule. For a container to be considered permanently closed at an oil production facility, as well as at any other SPCC-regulated facility, all liquid and sludge must be removed from the container and connecting lines, all connecting lines and piping must be disconnected from the container and blanked off, all valves, except ventilation valves, must be closed and locked, and conspicuous signs must be posted on each container stating that it is a permanently closed container and noting the date of closure. Once permanently closed, a container is no longer required to be counted toward the total facility storage capacity, nor is it subject to the other requirements under the SPCC rule (such as secondary containment).

EPA reiterates the statement it made in the preamble to the July 2002 amendments to the SPCC rule: ''If a tank is not permanently closed, it is still available for storage and the possibility of a discharge as described in § 112.1(b), remains. Nor does a short time period of storage eliminate the possibility of such a discharge. Therefore, a prevention plan is necessary. A tank closed for a temporary period of time may contain oil mixed with sludge or residues of product, which could be discharged. Discharges from these facilities could cause severe environmental damage during such temporary storage and are therefore subject to the rule'' (67 FR 47059, July 17, 2002).

Finally, as noted previously, the definition of ''permanently closed'' does not require that a container be removed from the facility; permanently closed containers may be brought back into use as needed for variations in production rates and economic conditions. However, a facility owner or operator should review state and local regulations, which may have additional requirements when the container is brought back into service.

9. Oil and Natural Gas Pipeline Facilities

EPA's current SPCC rules exempt ''equipment, or operation of a vessel or transportation-related onshore or offshore facility'' that is subject to DOT authority under the November 24, 1971 EPA–DOT MOU (1971 MOU; Appendix A of 40 CFR part 112). The 1971 MOU memorialized the agencies' intent to minimize overlapping regulation by ''assign[ing] one agency the responsibility for regulating a complete operation at any one facility.'' The final rule makes no change in these provisions and is not otherwise intended to impose new requirements on DOT-regulated oil and natural gas pipelines. Rather, by granting operators new flexibility in delineating facility boundaries, the final rule should reduce uncertainty and minimize, if not eliminate, overlapping enforcement. To the same ends, as EPA stated in the NPRM, EPA and DOT have committed to realize the goal of the 1971 MOU to more clearly define the jurisdictional scope of the SPCC requirements over oil and gas related infrastructure.

Comments. Several commenters expressed support for EPA and DOT in committing to a revision of the 1971 MOU, noting that a guideline memorandum issued by EPA and DOT in 2000 failed to achieve its intended purpose and has created confusion concerning the application of SPCC requirements to breakout tanks that are subject to DOT's pipeline safety regulation (49 CFR part 195). These commenters urged EPA and DOT to withdraw or modify the 2000 memorandum and develop additional guidance, with industry input, for eliminating dual regulation of pipeline systems. Commenters representing natural gas pipeline operators urged EPA and DOT to designate the specific equipment and appurtenances that are part of natural gas pipeline systems subject to the SPCC exemption in 40

CFR 112.1. Other commenters suggested that EPA specifically include an exemption for dry gas production facilities in the rule language to prevent any difference in regional interpretation. Still other commenters suggested that EPA determine Agency jurisdiction according to the primary function of the facility: one commenter suggested that DOT should exert sole jurisdiction over facilities that primarily provide breakout or pipeline terminus tankage, and another commenter suggested that the percentage of throughput by a particular mode can be used to delineate jurisdiction. Finally, other commenters suggested that the jurisdiction for all gathering lines should be under the sole jurisdiction of DOT, as these gathering pipelines would include both pipelines transporting product from a production facility, as well as pipelines gathering production from satellite storage locations to a central storage location.

Response to comments. The Agency has consulted with DOT in the development of this rulemaking, and will continue these consultations to address the EPA/DOT jurisdictional issues. EPA and DOT will revise the 2000 guidance memorandum, acknowledging that it has not provided a clear basis for implementing the 1971 MOU or delineating EPA and DOT jurisdiction. The agencies, as part of that effort, are evaluating the viability of a ''primary function'' approach described by commenters. EPA will continue work to improve guidance for pipeline operators and will communicate the results of discussions in a manner that affords public comment.

With respect to a 'dry gas production facility,' the Agency maintains its position that a dry gas production facility is not an oil production, oil recovery, or oil recycling facility, as described in the clarification published May 25, 2004 in the **Federal Register** notice (69 FR 29728) regarding the applicability of the wastewater treatment exemption to dry gas facilities. In that notice, EPA stated, ''A dry gas production facility is a facility that produces natural gas from a well (or wells) from which it does not also produce condensate or crude oil that can be drawn off the tanks, containers or other production equipment at the facility. As discussed in the preamble to the July 2002 rulemaking, 'the goal of an oil production, oil recovery, or oil recycling facility is to maximize the production or recovery of oil. * * *' 67 FR 47068. A dry gas facility does not meet this description.'' As such, dry gas facilities as defined here are not subject to the SPCC requirements and therefore, do not need to be addressed in the EPA/DOT MOU.

EPA disagrees with commenters that all gathering lines should be under the jurisdiction of DOT. As explained elsewhere in this notice (see discussion on flowlines and intra-facility gathering lines), EPA will continue to regulate only those intra-facility gathering lines not subject to DOT regulation. EPA is also finalizing an exemption to address the concern of commenters regarding dual regulatory requirements for these piping systems.

N. Man-made Structures

The preamble to the October 2007 notice of proposed rulemaking (72 FR 58378, October 15, 2007) addressed the consideration of man-made structures in determining the SPCC rule's applicability. Consistent with statements made in the preamble to a 1976 amendment to the rule (41 FR 34164, December 11, 1976), EPA maintains that man-made features, such as drainage control structures and dikes, are not to be used to conclude that there is no reasonable expectation that a discharge from the facility will reach navigable waters or adjoining shorelines. If there is a reasonable expectation that a discharge from the facility would reach navigable waters or adjoining shorelines in the absence of such containment or other structures, the facility is subject to the SPCC requirements. Secondary containment is required as part of an SPCC Plan and man-made structures, such as dikes, berms and retaining walls are often used to meet this planning requirement. However, unless properly implemented and maintained (as required by the SPCC rule), man-made structures may fail, thus putting the environment at risk in the event of a discharge. Therefore, it would defeat the preventative purpose of the rule to consider these structures (i.e., those required by the regulation) when determining applicability of the rule to a facility.

Nevertheless, EPA believes that it is appropriate for a facility owner or operator to consider man-made structures (for example, dikes, equipment, buildings, basements or other containment structures) to determine how to comply with the SPCC rule. More specifically, if an oil storage container at a regulated facility is located inside a building, the PE or facility owner or operator self-certifying the SPCC Plan may take into consideration the ability of the building walls and/or drainage systems to serve as secondary containment for the container. Furthermore, if, at a regulated facility, indoor conditions are such that they reduce external corrosion and potential for discharges, these operating conditions may be considered in the development of a site-specific container integrity inspection program. Given the clarifications provided in the preamble discussion of the proposal, EPA does not believe that further regulatory action is needed to address this issue.

1. Comments

Many commenters expressed general support for the clarifications on man-made structures related to secondary containment and integrity testing. One commenter, however, requested additional discussion and clarification on ''locationally exempt facilities,'' that is, facilities that may not be subject to the SPCC regulations because of their low likelihood of discharge to navigable waters or adjoining shorelines. The commenter recommended that consideration of man-made features that predate construction of an otherwise regulated facility should be allowed for a locational exemption.

Other commenters, however, did not believe that EPA's clarification goes far enough and requested specific exemptions based on EPA's reasoning regarding the potential ability for building features to serve as secondary containment. Thus, these commenters recommended exempting certain oil storage units located wholly within buildings, such as containers storing hydraulic oil for an elevator, emergency generators with a day tank, or machining coolant systems. Finally, one commenter recommended clarifying text in § 112.1(d)(1)(i) to ''allow consideration of such man-made features when conducting a reasonable expectation to discharge determination.''

2. Response to Comments

With regard to the commenter requesting clarification on ''locationally exempt facilities,'' in 1976, EPA amended the SPCC rule to clarify that when determining applicability of the rule to a facility, consideration must be based solely upon the geographical aspects of the facility, and that consideration of man-made features, such as dikes, equipment, or other structures that may serve to restrain, hinder, contain or otherwise prevent a discharge as described in § 112.1(b) should not be considered. When an owner or operator determines that the facility could not reasonably be expected to discharge oil in quantities that may be harmful to navigable waters or adjoining shorelines based upon geographic and locational aspects of the facility, then no SPCC Plan is required,

such as when a facility is located in a topographic low area or on flat land far from navigable waters or adjoining shorelines.

EPA disagrees with those commenters requesting an exemption for oil-filled equipment or other oil storage containers located inside buildings. That is, the requirements apply to all containers, unless otherwise specifically exempted, whether they are located inside or outside a building. Thus, EPA does not agree that text be included in § 112.1(d)(1)(i) to allow the consideration of man-made features when conducting a reasonable expectation to discharge because, as discussed above, the rule already allows the facility owner or operator to consider geographical and locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) in the determination. However, the SPCC Plan preparer may consider whether the building design provides adequate secondary containment to meet the general secondary containment requirements under § 112.7 for oil storage containers located indoors at a regulated facility. The owner or operator of a facility with oil-filled equipment may also be eligible for alternative compliance measures under § 112.7(k) for qualified oil-filled operational equipment if it meets the criteria in § 112.7(k)(1).

O. Underground Emergency Diesel Generator Tanks at Nuclear Power Stations

Under this final action, EPA is exempting underground oil storage tanks deferred under 40 CFR part 280, as originally promulgated, that supply emergency diesel generators at nuclear power generation facilities licensed by Nuclear Regulatory Commission (NRC) and that meet the NRC design criteria and quality assurance criteria. This exemption includes both tanks that are completely buried and tanks that are below-grade and vaulted. An underground storage tank or UST is defined in 40 CFR part 280 as ''any one or combination of tanks * * * the volume of which is 10 percent or more beneath the surface of the ground.'' Below-grade vaulted tanks and completely buried tanks that serve as underground emergency diesel generator tanks at nuclear power plants fall within this definition. Part 280 also states that a ''storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor'' is not an UST. Under the NRC regulations, a nuclear power generation facility must meet certain design criteria to ensure that the plant will be operated in a manner protective of the public's health and safety (such as 10 CFR part 50, Appendix A). These NRC design criteria cover the design, fabrication, installation, testing and operation of structures, systems, and components important to safety. Future construction permits and operating licenses for nuclear power stations may be issued per 10 CFR part 52, *Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Plants.* EPA compared the NRC regulations and guidelines with the relevant SPCC requirements. Under 10 CFR part 50, Appendices A and B, nuclear power generation facility operators must identify the relevant codes and standards, develop and implement a quality assurance program, and maintain appropriate records of the design, fabrication, erection, and testing throughout the life of the nuclear unit. The quality assurance program required per Appendix B must be documented by written policies, procedures or instructions and implemented as documented. To assist nuclear power unit licensees in complying with the license requirements, the NRC has developed a number of guidance documents, including documents pertaining to the operation of standby diesel generators. NRC Regulatory Guide 1.137, ''Fuel-Oil Systems for Standby Diesel Generators'' details the requirements for inspection and testing of fuel oil systems, corrosion protection, and the periodic cleaning of fuel supply tanks. These measures are similar to the measures required under the SPCC regulation for completely buried tanks, which include corrosion protection of buried tanks (§ 112.8(c)(4)) and of buried piping (§ 112.8(d)(1)), and inspection and testing of buried piping (§ 112.8(d)(4)). According to NRC, this guideline represents one acceptable method to meet the NRC requirements for these standby systems. If a licensee chooses an alternative approach, then equivalency must be demonstrated through an engineering review by the NRC as part of the licensing process.

EPA notes that nuclear power plants have unique characteristics that differentiate them from other types of SPCC-regulated facilities. Thus, EPA understands that certain actions necessary to comply with the SPCC rule could be impracticable at NRC facilities, because they may compromise the availability of the emergency diesel generation tank and consequently affect the reliability of the nuclear power supply and result in the shut down of a nuclear power plant. EPA believes that the NRC operating safety requirements best address the specific and unique operational challenges at nuclear power plants. EPA is, therefore, exempting underground oil storage tanks deferred under 40 CFR part 280 that supply emergency diesel generators at licensed NRC nuclear power generation facilities and that are subject to design criteria and quality assurance criteria under the NRC regulations. Below-grade vaulted tanks and completely buried tanks that serve as underground emergency diesel generator tanks at nuclear power plants fall within this exemption. This is consistent with 40 CFR 280.10(c)(3) which indicates that ''Any UST system that is part of an emergency generator system at nuclear power generation facilities regulated by the Nuclear Regulatory Commission under 10 CFR part 50, appendix A'' is deferred from regulation under certain parts of part 280. Note also that due to this exemption, these tanks are no longer counted toward the aggregate oil storage capacity under § 112.1(d)(2)(i).

1. Comments

Many commenters expressed general support for the amendments. One commenter specifically supports the revision in order to avoid dual regulation by EPA and NRC. Some commenters, however, expressed concern that EPA's proposed language was too narrow, because NRC's licensing program does not only regulate tanks under 10 CFR part 50; new facilities' tanks are likely to fall under the alternate regulation of 10 CFR part 52, and some older facilities might not be regulated by Appendix A or B of 10 CFR part 50. One commenter suggested that EPA remove the specific reference to the text of 10 CFR part 50, replacing with more general language.

Some commenters also suggested that vaulted tanks, which are usually aboveground or in a below-grade structural vault, should be exempted because of the impracticability of inspecting those tanks. One commenter suggested that EPA can use the phrase ''completely below-grade tank'' in § 112.1(d)(2)(i) and (d)(4) to identify the exempted tank universe as including below-grade vaults.

2. Response to Comments

EPA proposed language (72 FR 58378, October 15, 2007) to exempt completely buried tanks at a nuclear power generation facility that meet the NRC design criteria specifically at 10 CFR part 50, Appendices A and B. The Agency agrees with those commenters

that suggested this language is too limiting, and that because of this narrow reference to specific regulatory citation, grandfathered and/or newly constructed tanks at nuclear power generation facilities that are licensed by the NRC may not be eligible for the exemption under the SPCC rule. The language may also cause future confusion if NRC restructures its requirements or imposes new ones; the narrow reference may render this amended language obsolete. Therefore, EPA has modified the final rule language to address these concerns by not including references to 10 CFR Part 50. This will avoid future amendments to the SPCC rule in the event that NRC modifies the specific regulatory citations regarding design and/or operating requirements for completely buried tanks.

EPA agrees with the commenters who argued that the exemption should be extended to below-grade, vaulted tanks that do not meet the definition of a completely buried tank as defined in § 112.2. Commenters argue that there is insufficient space for physical inspection of the emergency diesel generator tanks at nuclear power plants that are located in below-grade structural vaults. EPA however, disagrees that all below-grade, vaulted tanks should be included in the exemption because some of these tanks can be physically inspected. In those cases, an inspector can routinely walk into the room and view the sides of the tank, while in other cases, the design of the vault is such that the space between the vault and the tank makes it impractical for an inspector to enter the confined space surrounding the tank on a routine basis. Therefore, EPA is extending the exemption to these below-grade, vaulted tanks that do not provide enough space for physical inspection. By way of background, 40 CFR part 280.12 defines an ''underground area'' as ''an underground room, such as a basement, cellar, shaft or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.'' Thus, where there is insufficient space for physical inspection, tanks have been removed from UST regulation. Therefore, EPA is basing the exemption on the definition of an UST under part 280, which encompasses below-grade, vaulted tanks that cannot be physically inspected.

P. Wind Turbines

The Agency was requested to address the applicability of the SPCC rule to wind turbines used to produce electricity. As discussed in the October 2007 notice of proposed rulemaking (72 FR 58378, October 15, 2007), the Agency believes that wind turbines meet the definition of oil-filled operational equipment promulgated in the December 2006 SPCC rule amendments (71 FR 77266, December 26, 2006), and thus can take advantage of the alternative compliance option provided for this type of equipment, to the extent that the wind turbines meet the oil storage capacity threshold in the rule. The amendments to the SPCC rule promulgated in December 2006 allow owners and operators of facilities with eligible oil-filled operational equipment the option to prepare an oil spill contingency plan and a written commitment of manpower, equipment, and materials to expeditiously control and remove any oil discharged that may be harmful without having to make an individual impracticability determination as required in § 112.7(d). If an owner or operator takes this option, he is also required to establish and document an inspection or monitoring program for this qualified oil-filled operational equipment to detect equipment failure and/or a discharge in lieu of providing secondary containment.

1. Comments

Several commenters agreed that the discussion in EPA's proposal added sufficient clarity on the applicability of the SPCC rule to wind turbines. One commenter also suggested that the discussion about turbines with gearbox capacities of 55 gallons or more meeting the definition of oil-filled equipment be included in EPA's *SPCC Guidance for Regional Inspectors.* Finally, one commenter considers a wind farm a facility and, asserted that because the total oil stored in the turbine gear cases plus the lubricant replacement storage may exceed the 1,320-gallon threshold, a full SPCC Plan should be required.

2. Response to Comments

The Agency agrees with those commenters who supported EPA's clarification on the applicability of the SPCC requirements to wind turbines. In addition, EPA will update the *SPCC Guidance for Regional Inspectors* to reflect the clarifications regarding the applicability of the SPCC rule to wind turbines that were discussed in the preamble to the proposed rule amendments (72 FR 58378, October 15, 2007). In response to the commenter who requested clarity on whether a wind farm is a facility, the owner or operator should refer to the definition of ''facility'' at § 112.2, to determine how to aggregate or disaggregate groups of turbines in order to define the boundaries of his facility (or facilities). A wind farm facility that meets the rule's oil storage capacity threshold and, due to its location, could reasonably be expected to have a discharge to navigable waters or adjoining shorelines, is subject to the SPCC rule and must prepare and implement an SPCC Plan. The clarification provided in this notice does not affect the applicability of the rule to wind farm facilities, but explains how wind turbines are considered under the rule and what provisions may apply to this type of equipment.

Q. Technical Corrections

EPA is finalizing a technical correction to the introductory paragraph of § 112.3 to move the phrase ''in writing'' after ''must prepare'' and then insert the phrase ''and implement'' after the phrase ''in writing,'' in order to provide an explicit requirement for a facility owner or operator to both prepare and implement an SPCC Plan. This paragraph describes the requirement for an owner or operator of an onshore or offshore facility subject to the rule to prepare an SPCC Plan, in writing, and in accordance with § 112.7 and any other applicable section of the rule. Adding the term ''and implement'' to this paragraph is consistent with the subsequent subsections, which provide compliance dates to both prepare or amend, and implement, an SPCC Plan for various categories of facility owners and operators. In describing the requirement to prepare a Plan in the introductory paragraph of § 112.3, the Agency inadvertently excluded the explicit requirement to also implement that Plan. Clearly, a facility owner or operator must implement his SPCC Plan in order for it to be effective in preventing discharges of oil to navigable waters or adjoining shorelines.

EPA also is finalizing a technical correction to the introductory paragraph of § 112.12 to delete the phrase ''(excluding a production facility).'' In the December 2006 amendments to the SPCC rule (71 FR 77266, December 26, 2006), EPA amended Subpart C of 40 CFR part 112 by removing several sections because they were not appropriate for AFVOs. At that time, as a point of clarification, EPA also removed the phrase ''for onshore facilities (excluding production facilities)'' from the title of § 112.12, because, having removed the inapplicable production facility requirements from Subpart C, it was no longer necessary to differentiate onshore oil production facilities from other facilities in § 112.12. However, EPA inadvertently neglected to remove the

corresponding phrase from the introductory paragraph of the section. EPA is correcting this inadvertent omission. Finally, the Agency is amending the regulation to include ''U.S.'' before gallons in several places, to indicate that the Agency means the U.S. gallon unit of measure and not the Imperial unit of measure.

1. Comments

One commenter expressed support for the technical corrections. Another commenter specifically supported the technical correction to § 112.12.

2. Response to comments

The Agency agrees with the need for these technical corrections and is finalizing them in this rulemaking.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under section 3(f)(1) of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because it is likely to have an annual effect on the economy of $100 million or more. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB's recommendations have been documented in the docket for this rulemaking. In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the regulatory impact analysis (RIA) entitled, ''Regulatory Impact Analysis for the Final Amendments to the Oil Pollution Prevention Regulations (40 CFR part 112)'' (July 2008). A copy of the analysis is available in the docket for this rulemaking and the analysis is briefly summarized below.

For the economic impact analysis of these amendments, EPA used the SPCC rule requirements at 40 CFR part 112, as amended in July 2002 (67 FR 47042, July 17, 2002) as the baseline to estimate the potential cost savings to regulated facilities from these amendments. The cost savings are not adjusted for the estimated, potential cost savings for the 2006 rule amendments and may overestimate the cost savings for these amendments, particularly for Tier I qualified facilities, revisions to the integrity testing requirement, and the proposed amendments to delay SPCC Plan preparation and implementation for new oil production facilities. The regulatory impact analysis developed in support of this final rule compares the compliance costs for owners and operators of facilities affected by the amendments in this rule to the costs owners and operators would face under the July 2002 SPCC rule amendments. The regulatory amendments have fourteen major components: (1) Exempt hot-mix asphalt; (2) exempt pesticide application equipment and related mix containers; (3) exempt residential heating oil containers at single-family residences; (4) amend the definition of ''facility'' to clarify the currently existing flexibility associated with describing a facility's boundaries; (5) amend the facility diagram requirement to provide additional clarity; (6) define ''loading/unloading rack'' to clarify the equipment subject to the provisions for facility tank car and tank truck loading/unloading racks, as well as amending the provision for this equipment; (7) provide streamlined requirements for a subset of qualified facilities; (8) amend the general secondary containment requirement to provide more clarity; (9) exempt non-transportation-related tank trucks from the sized secondary containment requirements; (10) amend the security requirements; (11) amend the integrity testing requirements to allow a greater amount of flexibility in the use of industry standards; (12) amend the integrity testing requirements for containers that store AFVOs that meet certain criteria; (13) tailor a number of requirements at oil production facilities; and (14) exempt underground oil storage tanks at nuclear power generation facilities. EPA is also providing clarification in the preamble to this rule on two additional issues identified by the regulated community: (1) The consideration of man-made structures in determining how to comply with the SPCC rule requirements and (2) the applicability of the rule to wind turbines for electricity generation.

For each of these components, EPA estimated potential cost savings to regulated facilities that may result from reductions in compliance costs. The main steps used to estimate the compliance cost impacts of this final rule are as follows:

- Develop the baseline universe of SPCC-regulated facilities;
- Estimate the number of facilities affected by the rule amendments;
- Estimate changes in unit compliance cost for each regulated facility affected by the rule;
- Estimate total compliance cost savings to owners and operators of potentially affected facilities; and
- Annualize compliance cost savings over a ten-year period, 2010 through 2019, and discount the estimates using three and seven percent discount rates.

Based on these steps, EPA estimated the annualized compliance cost savings to potentially affected facilities associated with each of the major components of the rule, and presents the results of the economic analysis in Exhibit 1. EPA uses four key assumptions in its regulatory impact analysis. First, the Agency assumes that cost minimization behavior applies to all owners and operators of facilities that qualify for reduced regulatory requirements, whereby all those affected would seek burden relief. Second, EPA assumed, consistent with EPA's guidelines for conducting economic analyses, that all existing owners and operators of facilities are in full compliance with the July 17, 2002 amendments to the SPCC rule (67 FR 47042). Third, EPA assumes that owners and operators of existing SPCC-regulated facilities would forgo compliance activities offered as alternatives where there is only a one-time initial investment because they would have already incurred the one-time cost. For example, EPA assumes that an owner or operator of an existing facility who would qualify for reduced security requirements under the final rule that allows facility owners or operators to tailor their security measures to the facility's specific characteristics and location, would have already provided the security measures as per the July 2002 rule amendments or demonstrated environmental equivalence for tailored security measures. Therefore, owners and operators of existing facilities would not take advantage of the provided alternative. Fourth, EPA assumes that compliance is nationally consistent although EPA recognizes that there is variability in state regulations and the distribution of affected facilities.

Exhibit 1 presents the estimated cost savings for each rule component and for the final rule amendments in total. For several rule amendments, such as the security requirements and facilities handling AFVOs, EPA did not have numeric data on the number of affected facilities within a general industry sector; thus, it developed three scenarios to evaluate a range of cost savings.[10] The exhibit below presents

[10] For example, to develop a range for the number of affected AFVO facilities, EPA contacted industry experts who determined that 40 percent to 90 percent of containers at AFVO facilities are made of stainless steel and almost all containers have bottom drainage. Therefore, based on professional judgment, the Agency considered three scenarios: 40% (low), 65% (medium) and 90% (high) of all

Continued

the estimated cost savings for these regulatory amendments which EPA estimates to be about $176 million on an annualized basis (2007$). The total potential cost savings are calculated taking into account the mid-point values of the estimated ranges of statistical distributions for unit costs. These estimates are not necessarily additive, given that they do not account for interactions that might exist among the various components of the rule.[11]

The oil production sector and farms will benefit from multiple components of the final rule. Specifically, farms will benefit from the amendments to: requirements for qualified facilities (i.e., Tier I); and security requirements, integrity testing requirements, and the facility diagram requirements. Farms will also benefit from the exemption from loading/unloading rack requirements; the exemption for pesticide application equipment and related mix containers, and single-family residential heating oil containers; and clarifications for nurse tanks and the definition of ''facility.'' The total cost savings to farm owners and operators from these amendments are estimated at $13 million on an annualized basis (2007$).

The oil production sector will also benefit from a number of the revisions to the SPCC rules, including the facility diagram requirements; an exemption from the loading/unloading rack requirements and for certain produced water containers when certified by a PE; some will benefit from the new requirements for Tier I qualified facilities; and amendments specific to the oil production sector (for example, the six-month delay in preparation and implementation of SPCC Plans and the exemption of flow-through process vessels from sized secondary containment requirements). The total savings to owners and operators of oil production facilities from all of the amendments that affect this sector are estimated at $116 million on an annualized basis (2007$).

EXHIBIT 1—ESTIMATED COMPLIANCE COST SAVINGS FOR THE REGULATORY AMENDMENTS

Rule component/scenario	Annualized cost savings ($2007, in millions, 7% discount rate)
Hot-Mix Asphalt:	
Exempt HMA containers	$8
Farms:	
Exempt pesticide application equipment and related mix containers	$4
Applicability of Mobile Refueler Requirements to Farm Nurse Tanks	
Residential Heating Oil Containers:	
Exempt single-family residential heating oil containers	$2
Definition of Facility:	
Revise the definition of ''facility''	No cost impact.
Facility Diagram:	
Revise facility diagram requirement	$3
Loading/Unloading Racks [1]:	
Define ''loading/unloading rack''	$51
Tier I Qualified Facilities:	
Provide streamlined requirements for Tier I qualified facilities	$24
General Secondary Containment:	
Revisions to the general secondary containment provision	No cost impact.
General Secondary Containment for Non-Transportation-Related Tank Trucks:	
Extend regulatory relief for mobile refuelers to the non-transportation-related tank trucks	No cost impact.
Security Requirements:	
Revise security requirements [2]	$9
Integrity Testing:	
Amend the integrity testing requirements to allow a greater amount of flexibility in the use of industry standards at all facilities.	$11
Animal Fats and Vegetable Oil:	
Amend integrity testing requirements for AFVO containers that meet certain criteria [3]	$2
Oil Production Facilities:	
Six-month delay for Plan preparation and implementation	$24
Exempt flowlines and gathering lines from secondary containment	No net cost impact.
Flow-through process vessels	$7
Streamlined requirements for small production facilities with marginal wells	$30
Produced water containers	No cost savings estimated.
Man-Made Structures:	
Consider manmade structures in determining SPCC rule applicability	No cost impact.
Nuclear Power Stations:	
Exempt underground oil storage tanks at nuclear power generation facilities.	Less than $1.
Wind turbines:	
Clarify applicability of the rule to wind turbines used to produce electricity	No cost impact.
Total	$176

[1] Mid-point estimate (17% of oil production facilities, 50% of AFVO facilities, and 8% of medium and large farms affected). Cost savings might be higher or lower using different assumptions.
[2] Mid-point estimate (50% of farms affected). Cost savings might be higher or lower using different assumptions.
[3] Mid-point estimate (65% of facilities affected). Cost savings might be lower using different assumptions.

AFVO facilities would have food oil tanks that are eligible.

[11] Certain industry sectors are affected by multiple rule components. As a result, taking advantage of one new requirement might preclude a facility from benefiting from other proposed requirements. The estimate also takes into account the overlap of the six-month delay with the relief for new small production facilities. The six-month delay is specifically designed to allow time for the facility production operations to stabilize in order to avoid the need for multiple certifications of the Plan by a PE. However, because small production facilities that meet the new qualified facility criteria would not have to have their SPCC Plan certified by a PE, they will not incur cost savings from the six-month delay in preparing SPCC Plan.

EPA recognizes that the economic analysis is constrained by limited availability of data and information. The SPCC regulation does not have a notification requirement for regulated facilities and thus, EPA relies on state information; Federal and proprietary databases; and information from industry experts as a basis for the cost information included in the analysis.

B. Paperwork Reduction Act

The information collection requirements for this final rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 0328.14.

EPA does not collect the information required by the SPCC rule on a routine basis. SPCC Plans ordinarily need not be submitted to EPA, but must generally be maintained at the facility. Preparation, implementation, and maintenance of an SPCC Plan by the facility owner or operator helps prevent oil discharges to navigable waters or adjoining shorelines and mitigate the environmental damage caused by such discharges. Therefore, the primary user of the data is the facility personnel. While EPA may, from time to time, request information under these regulations, such requests are not routine.

Although facility personnel are the primary data user, EPA also uses the data in certain situations. In particular, EPA reviews SPCC Plans: (1) When it requests a facility owner or operator to submit required information in the event of certain discharges of oil or to evaluate an extension request; and (2) as part of EPA's inspection program. State and local governments also may use the data, which are not necessarily available elsewhere and can greatly assist local emergency preparedness efforts. Preparation of the information for affected facilities is required under section 311(j)(1) of the Clean Water Act as implemented by 40 CFR part 112.

EPA estimates that in the absence of this rulemaking, approximately 623,000 existing facilities would be subject to the SPCC rule in 2010 and have SPCC Plans. In addition, EPA estimates that approximately 17,400 new facilities would become subject to the SPCC requirements during that year, resulting in a total of about 640,000 regulated facilities in 2010.[12]

Under this final rule, the storage capacity of containers solely containing HMA, residential heating oil containers at single-family residences, pesticide application equipment and related mix containers, and underground oil storage tanks at nuclear power generation facilities are exempt from the SPCC requirements; EPA is amending the definition of ''facility'' to clarify that contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines may be considered separate facilities, and to specify that the ''facility'' definition governs the applicability of 40 CFR part 112; EPA is amending the facility diagram requirement to provide additional clarity for all facilities; EPA is providing a definition for the term ''loading/unloading rack,'' which determines whether a facility is subject to the provisions at § 112.7(h), as well as specifically excluding onshore oil production facilities and farms from the requirements of § 112.7(h); providing an option that allows a subset of qualified facilities (Tier I) to complete and implement an SPCC Plan template (Appendix G to 40 CFR part 112) in order to comply with the SPCC rule requirements; amending the general secondary containment requirements to provide more clarity; exempting non-transportation-related tank trucks from the sized secondary containment requirements; modifying the security requirements to allow an owner or operator to tailor his security measures to the facility's specific characteristics and location; replacing the current integrity testing requirements with the requirements provided for qualified facilities, as promulgated in December 2006; providing flexibility in the rule for determining the scope of integrity testing that is appropriate for containers that store AFVOs that are intended for human consumption and that meet other criteria; and finally, this rulemaking streamlines the requirements for oil production facilities by modifying the definition of production facility to be consistent with the amendments to the definition of facility, extending the timeframe by which a new oil production facility must prepare and implement an SPCC Plan, providing an alternative option for flow-through process vessels at oil production facilities to comply with the general secondary containment requirements and additional oil spill prevention measures in lieu of sized secondary containment requirements, establishing more specific requirements for contingency planning and a flowline/intra-facility gathering line maintenance program, while exempting such flowlines and intra-facility gathering lines at oil production facilities from the secondary containment requirements, providing an exemption for certain intra-facility gathering lines, exempting certain produced water storage containers at oil production facilities that do not contain oil as certified by a Professional Engineer (PE), establishing alternative criteria for an oil production facility to be eligible to self-certify an SPCC Plan as a qualified facility, and clarifying the definition of ''permanently closed'' as it applies to an oil production facility.

Under this action, an estimated 640,000 regulated facilities are subject to the SPCC information collection requirements of this rule in 2010.[13] The Agency estimates that as a result of these amendments to tailor, clarify, and streamline certain SPCC requirements, the reporting and recordkeeping burden would decrease by approximately 1.3 million hours. The final rule amendments would reduce capital and operation and management costs by approximately $53 million on an annualized basis.[14] Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act 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

[12] To estimate the number of SPCC-regulated facilities in 2010, EPA used the estimated number of facilities for 2005 (571,000) and applied annual, industry-specific growth rates that resulted in about 640,000 facilities.

[13] To estimate the number of SPCC-regulated facilities in 2010, EPA used the estimated number of facilities for 2005 (571,000) and applied annual industry-specific growth rates.

[14] The paperwork burden reduction does not include the reduction associated with the amendment for milk bulk storage containers, because EPA only accounted for containers storing petroleum-based oil and not milk or related substances, when estimating the universe of affected facilities.

include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, a small entity is defined as: (1) A small business as defined in the U.S. Small Business Administration's (SBA) regulations at 13 CFR 121.201—the SBA defines small businesses by category of business using North American Industry Classification System (NAICS) codes, and in the case of farms and oil production facilities, which constitute a large percentage of the facilities affected by this rule, generally defines small businesses as having less than $0.5 million to $27.5 million per year in sales receipts, depending on the industry, or 500 or fewer employees, respectively; (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 that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, the Agency certifies that this action would not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities'' (5 U.S.C. 603 and 604). Thus, an agency may certify that a rule would not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

Under the final rule amendments, the following issues are addressed: Exempt HMA and HMA containers, pesticide application equipment and related mix containers, residential heating oil containers at single-family residences, and underground oil storage tanks at nuclear power generation facilities from the SPCC requirements; amend the definition of ''facility'' to clarify the flexibility associated with the existing definition in describing a facility's boundaries; clarify how containers, fixed and mobile, are identified on the facility diagram; define ''loading/unloading rack'' to clarify whether a facility is subject to the SPCC rule requirements of § 112.7(h); streamline the requirements for a subset of qualified facilities (Tier I qualified facilities); amend the general secondary containment requirements to provide more clarity; exempt non-transportation-related tank trucks from the sized secondary containment requirements; amend the facility security requirements to allow an owner or operator to tailor security measures to his facility's specific characteristics and location; replace the current integrity testing requirements with the regulatory requirements for a qualified facility promulgated on December 26, 2006 (71 FR 77266); provide flexibility in the rule to determine the scope of integrity testing that is appropriate for containers that store AFVOs that are intended for human consumption and that meet other criteria; and initiate several amendments to tailor the requirements for oil production facilities to address concerns raised by the production sector, respectively.

Overall, EPA estimates that this action will reduce annual compliance costs by approximately $176 million on an annualized basis (2007$) for owners and operators of affected facilities. Total costs were annualized over a 10-year period using a seven percent discount rate. EPA derived these savings by estimating the number of facilities affected by each amendment; identifying the specific behavioral changes that may occur (for example, choosing to prepare an SPCC Plan template instead of a full SPCC Plan); estimating the unit costs of compliance measures under the baseline and amended scenarios; and applying the change in unit costs to the projected number of affected facilities.

EPA has therefore concluded that this rule will relieve regulatory burden for small entities and therefore, certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule amendment 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. This final rule would reduce compliance costs on owners and operators of affected facilities by approximately $176 million on an annualized basis (2007$), although EPA acknowledges this total estimate is derived from analyses of individual major components of the rule that are not necessarily additive, given that they do not account for interactions that may exist among the various components. Thus, this rule amendment is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule amendment contains no regulatory requirements that might significantly or uniquely affect small governments. As explained above, the effect of the rule amendment will be to reduce burden for facility owners and operators, including certain small governments that are subject to the rule.

E. Executive Order—13132 Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State

and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This rule amendment does not have federalism implications. It would 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. Under CWA section 311(o), states may impose additional requirements, including more stringent requirements, relating to the prevention of oil discharges to navigable waters or adjoining shorelines. EPA recognizes that some states have more stringent requirements (56 FR 54612, October 22, 1991). This rule amendment will not preempt state law or regulations. Thus, Executive Order 13132 does not apply to this action.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule amendment does not have tribal implications, as specified in Executive Order 13175. This rule amendment will not significantly or uniquely affect communities of Indian trial 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.

Although this final rule is economically significant in that it would reduce compliance costs on owners or operators of affected facilities by approximately $176 million on an annualized basis (2007$), it is not subject to the Executive Order because the Agency does not have reason to believe the environmental health or safety risk addressed by this action presents a disproportionate risk to children.

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

This rule amendment is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The overall effect of the action is to decrease the regulatory burden on facility owners or operators subject to its provisions.

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, such as materials specifications, test methods, sampling procedures, and business practices that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The owner or operator of a facility subject to the SPCC rule has the flexibility to consider applicable industry standards in the development of an SPCC Plan, in accordance with good engineering practice. However, this rulemaking does not involve technical standards, as it does not set or incorporate by reference any one specific technical standard. Therefore, the NTTAA does not apply.

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

Executive Order 12898 (59 FR 7629, February 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. The overall effect of the action is to decrease the regulatory burden on facility owners or operators subject to its provisions.

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 a ''major rule'' as defined by 5 U.S.C. 804(2) because it will likely result in an annual effect on the economy of $100 million or more. This rule will be in effect on February 3, 2009.

List of Subjects in 40 CFR Part 112

Environmental protection, Animal fats and vegetable oils, Hot-mix Asphalt, Farms, Flammable and combustible materials, Integrity testing, Loading racks, Materials handling and storage, Natural gas, Oil pollution, Oil and gas exploration and production, Oil spill response, Penalties, Petroleum, Reporting and recordkeeping requirements, Secondary containment, Security, Tanks, Unloading racks, Water pollution control, Water resources.

Dated: November 20, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 112 as follows:

PART 112—OIL POLLUTION PREVENTION

■ 1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; and E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

Subpart A—[Amended]

■ 2. Amend § 112.1 as follows:

■ a. By revising paragraphs (d)(2)(i) and (d)(2)(ii);

■ b. By revising paragraph (d)(4); and

■ c. By adding paragraphs (d)(8) through (d)(12).

§ 112.1 General applicability.

* * * * *

(d) * * *

(2) * * *

(i) The completely buried storage capacity of the facility is 42,000 U.S. gallons or less of oil. For purposes of this exemption, the completely buried storage capacity of a facility excludes the capacity of a completely buried tank, as defined in § 112.2, and connected underground piping, underground ancillary equipment, and containment systems, that is currently subject to all of the technical requirements of part 280 of this chapter or all of the technical requirements of a State program approved under part 281 of this chapter, or the capacity of any underground oil storage tanks deferred under 40 CFR part 280 that supply emergency diesel generators at a nuclear power generation facility licensed by the Nuclear Regulatory Commission and subject to any Nuclear Regulatory Commission provision regarding design and quality criteria, not limited to 10 CFR part 50. The completely buried storage capacity of a facility also excludes the capacity of a container that is ''permanently closed,'' as defined in § 112.2 and the capacity of intra-facility gathering lines subject to the regulatory requirements of 49 CFR part 192 or 195.

(ii) The aggregate aboveground storage capacity of the facility is 1,320 U.S. gallons or less of oil. For the purposes of this exemption, only containers with a capacity of 55 U.S. gallons or greater are counted. The aggregate aboveground storage capacity of a facility excludes:

(A) The capacity of a container that is ''permanently closed'' as defined in § 112.2;

(B) The capacity of a ''motive power container'' as defined in § 112.2;

(C) The capacity of hot-mix asphalt or any hot-mix asphalt container;

(D) The capacity of a container for heating oil used solely at a single-family residence;

(E) The capacity of pesticide application equipment and related mix containers.

(F) The capacity of a produced water container, as defined in § 112.2, and any associated piping or appurtenances downstream of the container, that meets the requirements at § 112.9(c)(6)(i).

* * * * *

(4) Any completely buried storage tank, as defined in § 112.2, and connected underground piping, underground ancillary equipment, and containment systems, at any facility, that is subject to all of the technical requirements of part 280 of this chapter or a State program approved under part 281 of this chapter, or any underground oil storage tanks including below-grade vaulted tanks, deferred under 40 CFR part 280, as originally promulgated, that supply emergency diesel generators at a nuclear power generation facility licensed by the Nuclear Regulatory Commission, except that such a tank may qualify for the exemption if it is subject to any Nuclear Regulatory Commission provision regarding design and quality criteria, not limited to 10 CFR part 50. Such emergency generator tanks must be marked on the facility diagram as provided in § 112.7(a)(3), if the facility is otherwise subject to this part.

* * * * *

(8) Hot-mix asphalt, or any hot-mix asphalt container.

(9) Any container for heating oil used solely at a single-family residence.

(10) Any pesticide application equipment or related mix containers.

(11) Intra-facility gathering lines subject to the regulatory requirements of 49 CFR part 192 or 195, except that such a line's location must be identified and marked as ''exempt'' on the facility diagram as provided in § 112.7(a)(3), if the facility is otherwise subject to this part.

(12) A *produced water container,* as defined in § 112.2 and any associated piping or appurtenances downstream of the container, that meets the requirements at § 112.9(c)(6)(i), except that such a tank's location must be identified and marked as ''exempt'' on the facility diagram as provided in § 112.7(a)(3), if the facility is otherwise subject to this part.

* * * * *

■ 3. Amend § 112.2 by revising the definitions for ''Facility,'' ''Production facility,'' and adding definitions for ''Loading/unloading rack'' and ''Produced water container'' in alphabetical order to read as follows:

§ 112.2 Definitions.

* * * * *

Facility means any mobile or fixed, onshore or offshore building, property, parcel, lease, structure, installation, equipment, pipe, or pipeline (other than a vessel or a public vessel) used in oil well drilling operations, oil production, oil refining, oil storage, oil gathering, oil processing, oil transfer, oil distribution, and oil waste treatment, or in which oil is used, as described in Appendix A to this part. The boundaries of a facility depend on several site-specific factors, including but not limited to, the ownership or operation of buildings, structures, and equipment on the same site and types of activity at the site. Contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines under the ownership or operation of the same person may be considered separate facilities. Only this definition governs whether a facility is subject to this part.

* * * * *

Loading/unloading rack means a fixed structure (such as a platform, gangway) necessary for loading or unloading a tank truck or tank car, which is located at a facility subject to the requirements of this part. A loading/unloading rack includes a loading or unloading arm, and may include any combination of the following: piping assemblages, valves, pumps, shut-off devices, overfill sensors, or personnel safety devices.

* * * * *

Produced water container means a storage container at an oil production facility used to store the produced water after initial oil/water separation, and prior to reinjection, beneficial reuse, discharge, or transfer for disposal.

Production facility means all structures (including but not limited to wells, platforms, or storage facilities), piping (including but not limited to flowlines or intra-facility gathering lines), or equipment (including but not limited to workover equipment, separation equipment, or auxiliary non-transportation-related equipment) used in the production, extraction, recovery, lifting, stabilization, separation or treating of oil (including condensate), or associated storage or measurement, and is located in an oil or gas field, at a facility. This definition governs whether such structures, piping, or equipment

are subject to a specific section of this part.

* * * * *

■ 4. Amend § 112.3 as follows:
■ a. By revising the introductory text;
■ b. By revising paragraph (b)(1);
■ c. By adding paragraph (b)(3);
■ d. By adding paragraph (d)(1)(vi) and (d)(1)(vii); and
■ e. By revising paragraph (g).

§ 112.3 Requirement to prepare and implement a Spill Prevention, Control, and Countermeasure Plan.

The owner or operator or an onshore or offshore facility subject to this section must prepare in writing and implement a Spill Prevention Control and Countermeasure Plan (hereafter ''SPCC Plan'' or ''Plan''),'' in accordance with § 112.7 and any other applicable section of this part.

* * * * *

(b)(1) If you are the owner or operator of an onshore or offshore facility (excluding oil production facilities) that becomes operational after July 1, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan before you begin operations.

* * * * *

(3) If you are the owner or operator of an oil production facility that becomes operational after July 1, 2009, and could reasonably be expected to have a discharge as described in § 112.1(b), you must prepare and implement a Plan within six months after you begin operations.

* * * * *

(d) * * *

(vi) That, if applicable, all exempted produced water containers and any associated piping and appurtenances downstream of the container, including flowlines and other appurtenances associated with injection or discharge, meet the criteria described in § 112.9(c)(6)(i) and are identified in the Plan; and appropriate produced water characteristics in the container and any associated piping and appurtenances downstream of the container, procedures, or maintenance required to meet the standards of Part 110 required for the produced water container are identified in the Plan.

(vii) That, if applicable, for a produced water container subject to § 112.9(c)(6)(ii), any procedure to minimize the amount of free-phase oil is designed to reduce the accumulation of free-phase oil and the procedures and frequency for required inspections, maintenance and testing have been established and are described in the Plan.

* * * * *

(g) *Qualified Facilities.* The owner or operator of a qualified facility as defined in this subparagraph may self-certify his facility's Plan, as provided in § 112.6. A qualified facility is one that meets the following Tier I or Tier II qualified facility criteria:

(1) A Tier I qualified facility meets the qualification criteria in paragraph (g)(2) of this section and has no individual aboveground oil storage container with a capacity greater than 5,000 U.S. gallons.

(2) A Tier II qualified facility is one that has had no single discharge as described in § 112.1(b) exceeding 1,000 U.S. gallons or no two discharges as described in § 112.1(b) each exceeding 42 U.S. gallons within any twelve month period in the three years prior to the SPCC Plan self-certification date, or since becoming subject to this part if the facility has been in operation for less than three years (other than discharges as described in § 112.1(b) that are the result of natural disasters, acts of war, or terrorism), and either:

(i) Has an aggregate aboveground oil storage capacity of 10,000 U.S. gallons or less; or

(ii) Is an onshore oil production facility with:

(A) No more than two producing wells per single tank battery, each of which produce ten barrels or less of crude oil per well per day, if the facility has an injection well; or

(B) No more than four producing wells per single tank battery, each of which produce ten barrels or less of crude oil per well per day, and with no injection wells at the facility.

■ 5. Amend § 112.5 as follows:
■ a. By redesignating paragraphs (b) and (c) as paragraph (d) and (e);
■ b. By revising the newly redesignated paragraph (d) and;
■ c. Adding new paragraphs (b) and (c).

The additions and revisions read as follows:

§ 112.5 Amendment of Spill Prevention, Control, and Countermeasure Plan by owners or operators.

* * * * *

(b) For onshore oil production facilities with produced water containers exempted pursuant to the requirements at § 112.9(c)(6)(i), on an annual basis, the owner or operator must verify that the produced water characteristics in the container and any associated piping and appurtenances downstream of the container, procedures, or maintenance required to meet the standards of Part 110 that formed the basis for the PE certification described in that section are maintained. If an owner or operator fails to maintain the produced water characteristics in the container, or in the associated downstream piping and appurtenances; procedures; or maintenance required to meet the standards of 40 CFR part 110 that formed the basis for the PE's certification, then the produced water container and any associated piping and appurtenances downstream are ineligible for this exemption, and you must, within six months, comply with all provisions under this part applicable to the container and amend your Plan. A technical amendment made under this section must be prepared within three months and implemented as soon as possible, but not later than three months following the preparation of the amendment.

(c) The owner or operator of an onshore oil production facility with produced water containers exempted according to the requirements at § 112.9(c)(6)(i), must maintain the verifications in accordance with § 112.7(e). You must document your verification and sign a statement that the produced water characteristics in the container and any associated piping and appurtenances downstream from the container, procedures, or maintenance required to meet the standards of Part 110 are maintained in accordance with the PE certification. The following words will suffice, ''I verify that the produced water characteristics in the container and any associated piping and appurtenances downstream of the container, procedures, or maintenance required to meet the standards of 40 CFR part 110 that formed the basis for the PE's certification are maintained.''

(d) Notwithstanding compliance with paragraphs (a) and (c) of this section, complete a review and evaluation of the SPCC Plan at least once every five years from the date your facility becomes subject to this part; or, if your facility was in operation on or before August 16, 2002, five years from the date your last review was required under this part. As a result of this review and evaluation, you must amend your SPCC Plan within six months of the review to include more effective prevention and control technology if the technology has been field-proven at the time of the review and will significantly reduce the likelihood of a discharge as described in § 112.1(b) from the facility. You must implement any amendment as soon as possible, but not later than six months following preparation of any amendment. You must document your

completion of the review and evaluation, and must sign a statement as to whether you will amend the Plan, either at the beginning or end of the Plan or in a log or an appendix to the Plan. The following words will suffice, ''I have completed review and evaluation of the SPCC Plan for (name of facility) on (date), and will (will not) amend the Plan as a result.''

* * * * *

■ 6. Revise § 112.6 to read as follows:

§ 112.6 Qualified Facilities Plan Requirements.

Qualified facilities meeting the Tier I applicability criteria in § 112.3(g)(1) are subject to the requirements in paragraph (a) of this section. Qualified facilities meeting the Tier II applicability criteria in § 112.3(g)(2) are subject to the requirements in paragraph (b) of this section.

(a) *Tier I Qualified Facilities.*

(1) *Preparation and Self-Certification of the Plan.* If you are an owner or operator of a facility that meets the Tier I qualified facility criteria in § 112.3(g)(1), you must either: comply with the requirements of paragraph (a)(3) of this section; or prepare and implement a Plan meeting requirements of paragraph (b) of this section; or prepare and implement a Plan meeting the general Plan requirements in § 112.7 and applicable requirements in subparts B and C, including having the Plan certified by a Professional Engineer as required under § 112.3(d). If you do not follow the Appendix G template, you must prepare an equivalent Plan that meets all of the applicable requirements listed in this part, and you must supplement it with a section cross-referencing the location of requirements listed in this part and the equivalent requirements in the other prevention plan. To complete the template in Appendix G, you must certify that:

(i) You are familiar with the applicable requirements of 40 CFR part 112;

(ii) You have visited and examined the facility;

(iii) You prepared the Plan in accordance with accepted and sound industry practices and standards;

(iv) You have established procedures for required inspections and testing in accordance with industry inspection and testing standards or recommended practices;

(v) You will fully implement the Plan;

(vi) The facility meets the qualification criteria in § 112.3(g)(1);

(vii) The Plan does not deviate from any requirement of this part as allowed by § 112.7(a)(2) and 112.7(d) or include an exemption/measures pursuant to § 112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container; and

(viii) The Plan and individual(s) responsible for implementing this Plan have the approval of management, and the facility owner or operator has committed the necessary resources to fully implement this Plan.

(2) *Technical Amendments.* You must certify any technical amendments to your Plan in accordance with paragraph (a)(1) of this section when there is a change in the facility design, construction, operation, or maintenance that affects its potential for a discharge as described in § 112.1(b). If the facility change results in the facility no longer meeting the Tier I qualifying criteria in § 112.3(g)(1) because an individual oil storage container capacity exceeds 5,000 U.S. gallons or the facility capacity exceeds 10,000 U.S. gallons in aggregate aboveground storage capacity, within six months following preparation of the amendment, you must either:

(i) Prepare and implement a Plan in accordance with § 112.6(b) if you meet the Tier II qualified facility criteria in § 112.3(g)(2); or

(ii) Prepare and implement a Plan in accordance with the general Plan requirements in § 112.7, and applicable requirements in subparts B and C, including having the Plan certified by a Professional Engineer as required under § 112.3(d).

(3) *Plan Template and Applicable Requirements.* Prepare and implement an SPCC Plan that meets the following requirements under § 112.7 and in subparts B and C of this part: introductory paragraph of §§ 112.7, 112.7(a)(3)(i), 112.7(a)(3)(iv), 112.7(a)(3)(vi), 112.7(a)(4), 112.7(a)(5), 112.7(c), 112.7(e), 112.7(f), 112.7(g), 112.7(k), 112.8(b)(1), 112.8(b)(2), 112.8(c)(1), 112.8(c)(3), 112.8(c)(4), 112.8(c)(5), 112.8(c)(6), 112.8(c)(10), 112.8(d)(4), 112.9(b), 112.9(c)(1), 112.9(c)(2), 112.9(c)(3), 112.9(c)(4), 112.9(c)(5), 112.9(d)(1), 112.9(d)(3), 112.9(d)(4), 112.10(b), 112.10(c), 112.10(d), 112.12(b)(1), 112.12(b)(2), 112.12(c)(1), 112.12(c)(3), 112.12(c)(4), 112.12(c)(5), 112.12(c)(6), 112.12(c)(10), and 112.12(d)(4). The template in Appendix G to this part has been developed to meet the requirements of 40 CFR part 112 and, when completed and signed by the owner or operator, may be used as the SPCC Plan. Additionally, you must meet the following requirements:

(i) *Failure analysis, in lieu of the requirements in § 112.7(b).* Where experience indicates a reasonable potential for equipment failure (such as loading or unloading equipment, tank overflow, rupture, or leakage, or any other equipment known to be a source of discharge), include in your Plan a prediction of the direction and total quantity of oil which could be discharged from the facility as a result of each type of major equipment failure.

(ii) *Bulk storage container secondary containment, in lieu of the requirements in §§ 112.8(c)(2) and (c)(11) and 112.12(c)(2) and (c)(11).* Construct all bulk storage container installations (except mobile refuelers and other non-transportation-related tank trucks), including mobile or portable oil storage containers, so that you provide a secondary means of containment for the entire capacity of the largest single container plus additional capacity to contain precipitation. Dikes, containment curbs, and pits are commonly employed for this purpose. You may also use an alternative system consisting of a drainage trench enclosure that must be arranged so that any discharge will terminate and be safely confined in a catchment basin or holding pond. Position or locate mobile or portable oil storage containers to prevent a discharge as described in § 112.1(b).

(iii) *Overfill prevention, in lieu of the requirements in §§ 112.8(c)(8) and 112.12(c)(8).* Ensure that each container is provided with a system or documented procedure to prevent overfills of the container, describe the system or procedure in the SPCC Plan and regularly test to ensure proper operation or efficacy.

(b) *Tier II Qualified Facilities.*

(1) *Preparation and Self-Certification of Plan.* If you are the owner or operator of a facility that meets the Tier II qualified facility criteria in § 112.3(g)(2), you may choose to self-certify your Plan. You must certify in the Plan that:

(i) You are familiar with the requirements of this part;

(ii) You have visited and examined the facility;

(iii) The Plan has been prepared in accordance with accepted and sound industry practices and standards, and with the requirements of this part;

(iv) Procedures for required inspections and testing have been established;

(v) You will fully implement the Plan;

(vi) The facility meets the qualification criteria set forth under § 112.3(g)(2);

(vii) The Plan does not deviate from any requirement of this part as allowed by § 112.7(a)(2) and 112.7(d), or include an exemption/measures pursuant to § 112.9(c)(6) for produced water containers and any associated piping

and appurtenances downstream from the container, except as provided in paragraph (b)(3) of this section; and

(viii) The Plan and individual(s) responsible for implementing the Plan have the full approval of management and the facility owner or operator has committed the necessary resources to fully implement the Plan.

(2) *Technical Amendments.* If you self-certify your Plan pursuant to paragraph (b)(1) of this section, you must certify any technical amendments to your Plan in accordance with paragraph (b)(1) of this section when there is a change in the facility design, construction, operation, or maintenance that affects its potential for a discharge as described in § 112.1(b), except:

(i) If a Professional Engineer certified a portion of your Plan in accordance with paragraph (b)(4) of this section, and the technical amendment affects this portion of the Plan, you must have the amended provisions of your Plan certified by a Professional Engineer in accordance with paragraph (b)(4)(ii) of this section.

(ii) If the change is such that the facility no longer meets the Tier II qualifying criteria in § 112.3(g)(2) because it exceeds 10,000 U.S. gallons in aggregate aboveground storage capacity you must, within six months following the change, prepare and implement a Plan in accordance with the general Plan requirements in § 112.7 and the applicable requirements in subparts B and C of this part, including having the Plan certified by a Professional Engineer as required under § 112.3(d).

(3) *Applicable Requirements.* Except as provided in this paragraph, your self-certified SPCC Plan must comply with § 112.7 and the applicable requirements in subparts B and C of this part:

(i) *Environmental Equivalence.* Your Plan may not include alternate methods which provide environmental equivalence pursuant to § 112.7(a)(2), unless each alternate method has been reviewed and certified in writing by a Professional Engineer, as provided in paragraph (b)(4) of this section.

(ii) *Impracticability.* Your Plan may not include any determinations that secondary containment is impracticable and provisions in lieu of secondary containment pursuant to § 112.7(d), unless each such determination and alternate measure has been reviewed and certified in writing by a Professional Engineer, as provided in paragraph (b)(4) of this section.

(iii) *Produced Water Containers.* Your Plan may not include any produced water container exemptions or alternative procedures for skimming in lieu of sized secondary containment pursuant to § 112.9(c)(6), unless they have been reviewed and certified in writing by a Professional Engineer, as provided in paragraph (b)(4) of this section.

(4) *Professional Engineer Certification of Portions of a Qualified Facility's Self-Certified Plan.*

(i) As described in paragraph (b)(3) of this section, the facility owner or operator may not self-certify alternative measures allowed under § 112.7(a)(2) or (d), that are included in the facility's Plan. Such measures must be reviewed and certified, in writing, by a licensed Professional Engineer. For each alternative measure allowed under § 112.7(a)(2), the Plan must be accompanied by a written statement by a Professional Engineer that states the reason for nonconformance and describes the alternative method and how it provides equivalent environmental protection in accordance with § 112.7(a)(2). For each determination of impracticability of secondary containment pursuant to § 112.7(d), the Plan must clearly explain why secondary containment measures are not practicable at this facility and provide the alternative measures required in § 112.7(d) in lieu of secondary containment. By certifying each measure allowed under § 112.7(a)(2) and (d), the Professional Engineer attests:

(A) That he is familiar with the requirements of this part;

(B) That he or his agent has visited and examined the facility; and

(C) That the alternative method of environmental equivalence in accordance with § 112.7(a)(2) or the determination of impracticability and alternative measures in accordance with § 112.7(d) is consistent with good engineering practice, including consideration of applicable industry standards, and with the requirements of this part.

(ii) As described in paragraph (b)(3) of this section, the facility owner or operator may not self-certify measures as described in § 112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container. Such measures must be reviewed and certified, in writing, by a licensed Professional Engineer, in accordance with § 112.3(d)(1)(vi) or (vii), as applicable.

(iii) The review and certification by the Professional Engineer under this paragraph is limited to the alternative method which achieves equivalent environmental protection pursuant to § 112.7(a)(2); to the impracticability determination and measures in lieu of secondary containment pursuant to § 112.7(d); or the measures pursuant to § 112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container.

■ 7. Amend § 112.7 as follows:

■ a. By revising the first sentence in paragraph (a)(2);

■ b. By revising paragraphs (a)(3) introductory text and (a)(3)(i);

■ c. By revising paragraphs (c) introductory text and (c)(1);

■ d. By revising paragraph (g); and

■ e. By revising the heading to paragraph (h), paragraphs (h)(1) and (h)(2).

§ 112.7 General requirements for Spill Prevention, Control, and Countermeasure Plans.

* * * * *

(a) * * *

(2) Comply with all applicable requirements listed in this part. Except as provided in § 112.6, your Plan may deviate from the requirements in paragraphs (g), (h)(2) and (3), and (i) of this section and the requirements in subparts B and C of this part, except the secondary containment requirements in paragraphs (c) and (h)(1) of this section, and §§ 112.8(c)(2), 112.8(c)(11), 112.9(c)(2), 112.9(d)(3), 112.10(c), 112.12(c)(2), and 112.12(c)(11), where applicable to a specific facility, if you provide equivalent environmental protection by some other means of spill prevention, control, or countermeasure.

* * *

* * * * *

(3) Describe in your Plan the physical layout of the facility and include a facility diagram, which must mark the location and contents of each fixed oil storage container and the storage area where mobile or portable containers are located. The facility diagram must identify the location of and mark as ''exempt'' underground tanks that are otherwise exempted from the requirements of this part under § 112.1(d)(4), and produced water containers and any associated piping and appurtenances downstream from the container, that are otherwise exempted from the requirements of this part under § 112.1(d)(12). The facility diagram must also include all transfer stations and connecting pipes, including intra-facility gathering lines that are otherwise exempted from the requirements of this part under § 112.1(d)(11). You must also address in your Plan:

(i) The type of oil in each fixed container and its storage capacity. For mobile or portable containers, either

provide the type of oil and storage capacity for each container or provide an estimate of the potential number of mobile or portable containers, the types of oil, and anticipated storage capacities;

* * * * *

(c) Provide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in § 112.1(b), except as provided in paragraph (k) of this section for qualified oil-filled operational equipment, and except as provided in § 112.9(d)(3) for flowlines and intra-facility gathering lines at an oil production facility. The entire containment system, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs. In determining the method, design, and capacity for secondary containment, you need only to address the typical failure mode, and the most likely quantity of oil that would be discharged. Secondary containment may be either active or passive in design. At a minimum, you must use one of the following prevention systems or its equivalent:

(1) For onshore facilities:

(i) Dikes, berms, or retaining walls sufficiently impervious to contain oil;

(ii) Curbing or drip pans;

(iii) Sumps and collection systems;

(iv) Culverting, gutters, or other drainage systems;

(v) Weirs, booms, or other barriers;

(vi) Spill diversion ponds;

(vii) Retention ponds; or

(viii) Sorbent materials.

* * * * *

(g) *Security (excluding oil production facilities).* Describe in your Plan how you secure and control access to the oil handling, processing and storage areas; secure master flow and drain valves; prevent unauthorized access to starter controls on oil pumps; secure out-of-service and loading/unloading connections of oil pipelines; and address the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges.

(h) Facility tank car and tank truck loading/unloading rack (excluding offshore facilities, farms, and oil production facilities).

(1) Where loading/unloading rack drainage does not flow into a catchment basin or treatment facility designed to handle discharges, use a quick drainage system for tank car or tank truck loading/unloading racks. You must design any containment system to hold at least the maximum capacity of any single compartment of a tank car or tank truck loaded or unloaded at the facility.

(2) Provide an interlocked warning light or physical barrier system, warning signs, wheel chocks or vehicle brake interlock system in the area adjacent to a loading/unloading rack, to prevent vehicles from departing before complete disconnection of flexible or fixed oil transfer lines.

* * * * *

Subpart B—[Amended]

■ 8. Amend § 112.8 by revising the first sentence in paragraph (c)(2) and revising paragraphs (c)(6) and (c)(11) to read as follows:

§ 112.8 Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding oil production facilities).

* * * * *

(c) * * *

(2) Construct all bulk storage tank installations (except mobile refuelers and other non-transportation-related tank trucks) so that you provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation.* * *

* * * * *

(6) Test or inspect each aboveground container for integrity on a regular schedule and whenever you make material repairs. You must determine, in accordance with industry standards, the appropriate qualifications for personnel performing tests and inspections, the frequency and type of testing and inspections, which take into account container size, configuration, and design (such as containers that are: shop-built, field-erected, skid-mounted, elevated, equipped with a liner, double-walled, or partially buried). Examples of these integrity tests include, but are not limited to: visual inspection, hydrostatic testing, radiographic testing, ultrasonic testing, acoustic emissions testing, or other systems of non-destructive testing. You must keep comparison records and you must also inspect the container's supports and foundations. In addition, you must frequently inspect the outside of the container for signs of deterioration, discharges, or accumulation of oil inside diked areas. Records of inspections and tests kept under usual and customary business practices satisfy the recordkeeping requirements of this paragraph.

* * * * *

(11) Position or locate mobile or portable oil storage containers to prevent a discharge as described in § 112.1(b). Except for mobile refuelers and other non-transportation-related tank trucks, you must furnish a secondary means of containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation.

* * * * *

■ 9. Amend § 112.9 as follows:

■ a. By revising the section heading;

■ b. By revising the introductory text;

■ c. By revising paragraphs (c)(2) and (c)(3);

■ d. By adding paragraphs (c)(5) and (c)(6);

■ e. By revising paragraph (d)(3); and

■ f. By adding paragraph (d)(4).

§ 112.9 Spill Prevention, Control, and Countermeasure Plan Requirements for onshore oil production facilities (excluding drilling and workover facilities).

If you are the owner or operator of an onshore oil production facility (excluding a drilling or workover facility), you must:

* * * * *

(c) * * *

(2) Except as described in paragraph (c)(5) of this section for flow-through process vessels and paragraph (c)(6) of this section for produced water containers and any associated piping and appurtenances downstream from the container, construct all tank battery, separation, and treating facility installations, so that you provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation. You must safely confine drainage from undiked areas in a catchment basin or holding pond.

(3) Except as described in paragraph (c)(5) of this section for flow-through process vessels and paragraph (c)(6) of this section for produced water containers and any associated piping and appurtenances downstream from the container, periodically and upon a regular schedule visually inspect each container of oil for deterioration and maintenance needs, including the foundation and support of each container that is on or above the surface of the ground.

* * * * *

(5) *Flow-through process vessels.* The owner or operator of a facility with flow-through process vessels may choose to implement the alternate requirements as described below in lieu of sized secondary containment required in paragraphs (c)(2) and (c)(3) of this section.

(i) Periodically and on a regular schedule visually inspect and/or test flow-through process vessels and associated components (such as dump valves) for leaks, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b).

(ii) Take corrective action or make repairs to flow-through process vessels and any associated components as indicated by regularly scheduled visual inspections, tests, or evidence of an oil discharge.

(iii) Promptly remove or initiate actions to stabilize and remediate any accumulations of oil discharges associated with flow-through process vessels.

(iv) If your facility discharges more than 1,000 U.S. gallons of oil in a single discharge as described in § 112.1(b), or discharges more than 42 U.S. gallons of oil in each of two discharges as described in § 112.1(b) within any twelve month period, from flow-through process vessels (excluding discharges that are the result of natural disasters, acts of war, or terrorism) then you must, within six months from the time the facility becomes subject to this paragraph, ensure that all flow-through process vessels subject to this subpart comply with § 112.9(c)(2) and (c)(3).

(6) *Produced water containers.*

(i) A produced water container, and any associated piping and appurtenances downstream from the container, are exempt from the requirements of this part if a Professional Engineer certifies in accordance with § 112.3(d)(1)(vi) that no discharge from the produced water container, including a complete loss of the capacity of the container, could cause a discharge in quantities that may be harmful, as described in part 110 of this chapter. This determination for the container must be made in accordance with § 112.1(d)(1)(i).

(A) The SPCC Plan must include a description of the produced water characteristics in the container, procedures, or maintenance required to meet the standards of Part 110 and the owner or operator's annual verifications prepared in accordance with § 112.5.

(B) If an exempt produced water container as described in paragraph (c)(6)(i) of this section experiences a discharge as described in § 112.1(b), then such container, piping, and appurtenances are ineligible for this exemption and you must comply with all provisions under this part applicable to the container, including § 112.9(c)(2) and (c)(3) within six months of the date of the discharge.

(ii) For each container not exempted as described in paragraph (c)(6)(i) of this section, comply with § 112.9(c)(1) and (c)(4); and § 112.9(c)(2) and (c)(3), or:

(A) Implement, on a regular schedule, a procedure for each produced water container that is designed to separate the free-phase oil that accumulates on the surface of the produced water. Include in the Plan a description of the procedures, frequency, amount of free-phase oil expected to be maintained inside the container, and a Professional Engineer certification in accordance with § 112.3(d)(1)(vii). Maintain records of such events in accordance with § 112.7(e). Records kept under usual and customary business practices will suffice for purposes of this paragraph. If this procedure is not implemented as described in the Plan or no records are maintained, then you must comply with § 112.9(c)(2) and (c)(3).

(B) On a regular schedule, visually inspect and/or test the produced water container and associated piping for leaks, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b) in accordance with good engineering practice.

(C) Take corrective action or make repairs to the produced water container and any associated piping as indicated by regularly scheduled visual inspections, tests, or evidence of an oil discharge.

(D) Promptly remove or initiate actions to stabilize and remediate any accumulations of oil discharges associated with the produced water container.

(E) If your facility discharges more than 1,000 U.S. gallons of oil in a single discharge as described in § 112.1(b), or discharges more than 42 U.S. gallons of oil in each of two discharges as described in § 112.1(b) within any twelve month period from a produced water container subject to this subpart (excluding discharges that are the result of natural disasters, acts of war, or terrorism) then you must, within six months from the time the facility becomes subject to this paragraph, ensure that all produced water containers subject to this subpart comply with § 112.9(c)(2) and (c)(3).

(d) * * *

(3) For flowlines and intra-facility gathering lines that are not provided with secondary containment in accordance with § 112.7(c), unless you have submitted a response plan under § 112.20, provide in your Plan the following:

(i) An oil spill contingency plan following the provisions of part 109 of this chapter.

(ii) A written commitment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharged that might be harmful.

(4) Prepare and implement a written program of flowline/intra-facility gathering line maintenance. The maintenance program must address your procedures to:

(i) Ensure that flowlines and intra-facility gathering lines and associated valves and equipment are compatible with the type of production fluids, their potential corrosivity, volume, and pressure, and other conditions expected in the operational environment.

(ii) Visually inspect and/or test flowlines and intra-facility gathering lines and associated appurtenances on a periodic and regular schedule for leaks, oil discharges, corrosion, or other conditions that could lead to a discharge as described in § 112.1(b). For flowlines and intra-facility gathering lines that are not provided with secondary containment in accordance with § 112.7(c), the frequency and type of testing must allow for the implementation of a contingency plan as described under part 109 of this chapter.

(iii) Take corrective action or make repairs to any flowlines and intra-facility gathering lines and associated appurtenances as indicated by regularly scheduled visual inspections, tests, or evidence of a discharge.

(iv) Promptly remove or initiate actions to stabilize and remediate any accumulations of oil discharges associated with flowlines, intra-facility gathering lines, and associated appurtenances.

Subpart C—[Amended]

■ 11. Amend § 112.12 as follows:
■ a. By revising the introductory text;
■ b. By revising the first sentence in paragraph (c)(2); and
■ c. By revising paragraphs (c)(6) and (c)(11).

§ 112.12 Spill Prevention, Control, and Countermeasure Plan Requirements.

If you are the owner or operator of an onshore facility, you must:

* * * * *

(c) * * *

(2) Construct all bulk storage tank installations (except mobile refuelers and other non-transportation-related tank trucks) so that you provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation. * * *

* * * * *

(6) *Bulk storage container inspections.*

(i) Except for containers that meet the criteria provided in paragraph (c)(6)(ii)

of this section, test or inspect each aboveground container for integrity on a regular schedule and whenever you make material repairs. You must determine, in accordance with industry standards, the appropriate qualifications for personnel performing tests and inspections, the frequency and type of testing and inspections, which take into account container size, configuration, and design (such as containers that are: shop-built, field-erected, skid-mounted, elevated, equipped with a liner, double-walled, or partially buried). Examples of these integrity tests include, but are not limited to: Visual inspection, hydrostatic testing, radiographic testing, ultrasonic testing, acoustic emissions testing, or other systems of non-destructive testing. You must keep comparison records and you must also inspect the container's supports and foundations. In addition, you must frequently inspect the outside of the container for signs of deterioration, discharges, or accumulation of oil inside diked areas. Records of inspections and tests kept under usual and customary business practices satisfy the recordkeeping requirements of this paragraph.

(ii) For bulk storage containers that are subject to 21 CFR part 110, are elevated, constructed of austenitic stainless steel, have no external insulation, and are shop-fabricated, conduct formal visual inspection on a regular schedule. In addition, you must frequently inspect the outside of the container for signs of deterioration, discharges, or accumulation of oil inside diked areas. You must determine and document in the Plan the appropriate qualifications for personnel performing tests and inspections. Records of inspections and tests kept under usual and customary business practices satisfy the recordkeeping requirements of this paragraph (c)(6).

* * * * *

(11) Position or locate mobile or portable oil storage containers to prevent a discharge as described in § 112.1(b). Except for mobile refuelers and other non-transportation-related tank trucks, you must furnish a secondary means of containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container with sufficient freeboard to contain precipitation.

* * * * *

■ 12. Add Appendix G to read as follows:

BILLING CODE 6560–50–P

APPENDIX G to Part 112-
Tier I Qualified Facility SPCC Plan

This template constitutes the SPCC Plan for the facility, when completed and signed by the owner or operator of a facility that meets the applicability criteria in §112.3(g)(1). This template meets the requirements of 40 CFR part 112. Maintain a complete copy of the Plan at the facility if the facility is normally attended at least four hours per day, or for a facility attended fewer than four hours per day, at the nearest field office.

Facility Description

Facility Name _____
Facility Address _____
City _____ State _____ ZIP _____
County _____ Tel. Number _____ ( ) - _____

Owner or operator Name _____
Owner or operator Address _____
City _____ State _____ ZIP _____
County _____ Tel. Number _____ ( ) - _____

I. Self-Certification Statement (§112.6(a)(1))

The owner or operator of a facility certifies that each of the following is true in order to utilize this template to comply with the SPCC requirements:

I _____, certify that the following is accurate:

1. I am familiar with the applicable requirements of 40 CFR part 112;
2. I have visited and examined the facility;
3. This Plan was prepared in accordance with accepted and sound industry practices and standards;
4. Procedures for required inspections and testing have been established in accordance with industry inspection and testing standards or recommended practices;
5. I will fully implement the Plan;
6. This facility meets the following qualification criteria (under §112.3(g)(1)):
   a. The aggregate aboveground oil storage capacity of the facility is 10,000 U.S. gallons or less; or is an onshore oil production facility with no more than two producing wells per single tank battery, each of which produce ten barrels or less of crude oil per well per day if the facility has an injection well; or, is an onshore oil production facility with no more than four producing wells per single tank battery, each of which produce ten barrels or less of crude oil per well per day and with no injection wells at the facility; and
   b. The facility has had no single discharge as described in §112.1(b) exceeding 1,000 U.S. gallons and no two discharges as described in §112.1(b) each exceeding 42 U.S. gallons within any twelve month period in the three years prior to the SPCC Plan self-certification date, or since becoming subject to 40 CFR part 112 if the facility has been in operation for less than three years (not including oil discharges as described in §112.1(b) that are the result of natural disasters, acts of war, or terrorism); and
   c. There is no individual oil storage container at the facility with an aboveground

capacity greater than 5,000 U.S. gallons.

7. This Plan does not deviate from any requirement of 40 CFR part 112 as allowed by §112.7(a)(2) (environmental equivalence) and §112.7(d) (impracticability of secondary containment) or include an exemption/measures pursuant to §112.9(c)(6) for produced water containers and any associated piping and appurtenances downstream from the container;.
8. This Plan and individual(s) responsible for implementing this Plan have the full approval of management and I have committed the necessary resources to fully implement this Plan.

I also understand my other obligations relating to the storage of oil at this facility, including, among others:

1. To report an oil discharge to navigable waters or adjoining shorelines to the appropriate authorities. Notification information is included in this Plan.
2. To review and amend this Plan whenever there is a material change at the facility that affects the potential for an oil discharge, and at least once every five years. Reviews and amendments are recorded in an attached log [See Five Year Review Log and Technical Amendment Log in Attachments 1.1 and 1.2.]
3. Optional use of a contingency plan. A contingency plan:
    a. May be used in lieu of secondary containment for qualified oil-filled operational equipment, in accordance with the requirements under §112.7(k), and;
    b. Must be prepared for flowlines and/or intra-facility gathering lines which do not have secondary containment at an oil production facility, and;
    c. Must include an established and documented inspection or monitoring program;
    d. an oil spill contingency plan following the provisions of 40 CFR part 109; and a written commitment of manpower, equipment and materials to expeditiously remove any quantity of oil discharged that may be harmful. If applicable, a copy of the contingency plan and any additional documentation will be attached to this Plan as Attachment 2.

By completing this Plan template, I certify that I have satisfied the requirement to prepare and implement a Plan under §112.3 and all of the requirements under §112.6(a). I certify that the information contained in this Plan is true.

Signature _____ Title: _____
Name _____ Date: ____/_____/20___

II. Record of Plan Review and Amendments

Five Year Review (§112.5(b)):

Complete a review and evaluation of this SPCC Plan at least once every five years. As a result of the review, amend this Plan within six months to include more effective prevention and control measures for the facility, if applicable. Implement any amendment as soon as possible, but no later than six months following Plan amendment. Document completion of the review and evaluation, and complete the Five Year Review Log in Attachment 1.1. If the facility no longer meets Tier I qualified facility eligibility, the owner or operator must revise the Plan to meet Tier II qualified facility requirements, or complete a full PE certified Plan.

Table G-1 Technical Amendments (§§112.5(a), (c) and 112.6(a)(2))	
This SPCC Plan will be amended when there is a change in the facility design, construction, operation, or maintenance that materially affects the potential for a discharge to navigable waters or adjoining shorelines. Examples include adding or removing containers, reconstruction, replacement, or installation of piping systems, changes to secondary containment systems, changes in product stored at this facility, or revisions to standard operating procedures.	☐
Any technical amendments to this Plan will be re-certified in accordance with Section I of this Plan template. *[§112.6(a)(2)]* [See Technical Amendment Log in Attachment 1.2]	☐

III. Plan Requirements

1. Oil Storage Containers (§112.7(a)(3)(i)):

Table G-2 Oil Storage Containers and Capacities		
This table includes a complete list of all oil storage containers (aboveground containers[1] and completely buried tanks[2]) with capacity of 55 U.S. gallons or more, unless otherwise exempt from the rule. For mobile/portable containers, an estimate number of containers, types of oil, and anticipated capacities are provided.		☐
Oil Storage Container *(indicate whether aboveground (A) or completely buried (B))*	**Type of Oil**	**Shell Capacity (gallons)**

Total Aboveground Storage Capacity[a] _____ gallons

Total Completely Buried Storage Capacity _____ gallons

Facility Total Oil Storage Capacity _____ gallons

[a]Counts toward qualified facility applicability threshold

2. Secondary Containment and Oil Spill Control (§§112.6(a)(3)(i) and (ii), 112.7(c) and 112.9(c)(2)):

Table G-3 Secondary Containment and Oil Spill Control	
Appropriate secondary containment and/or diversionary structures or equipment[a] is provided for all oil handling containers, equipment, and transfer areas to prevent a discharge to navigable waters or adjoining shorelines. The entire secondary containment system, including walls and floor, is capable of containing oil and is constructed so that any discharge from a primary containment system, such as a tank or pipe, will not escape the containment system before	☐

[1]Aboveground storage containers that must be included when calculating total facility oil storage capacity include: tanks and mobile or portable containers; oil-filled operational equipment (e.g. transformers); other oil-filled equipment, such as flow-through process equipment. Exempt containers that are not included in the capacity calculation include: any container with a storage capacity of less than 55 gallons of oil; containers used exclusively for wastewater treatment; permanently closed containers; motive power containers; hot-mix asphalt containers; heating oil containers used solely at a single-family residence; and pesticide application equipment or related mix containers.

[2] Although the criteria to determine eligibility for qualified facilities focuses on the aboveground oil storage containers at the facility, the completely buried tanks at a qualified facility are still subject to the rule requirements and must be addressed in the template; however, they are not counted toward the qualified facility threshold.

[a] Use one of the following methods of secondary containment or its equivalent: (1) Dikes, berms, or retaining walls sufficiently impervious to contain oil; (2) Curbing; (3) Culverting, gutters, or other drainage systems; (4) Weirs, booms, or other barriers; (5) Spill diversion ponds; (6) Retention ponds; or (7) Sorbent materials.

Table G-4 below identifies the tanks and containers at the facility with the potential for an oil discharge; the mode of failure; the flow direction and potential quantity of the discharge; and the secondary containment method and containment capacity that is provided.

Table G-4 Containers with Potential for an Oil Discharge					
Area	Type of failure (discharge scenario)	Potential discharge volume (gallons)	Direction of flow for uncontained discharge	Secondary containment method[a]	Secondary containment capacity (gallons)
Bulk Storage Containers and Mobile/Portable Containers[b]					
Oil-filled Operational Equipment (e.g., hydraulic equipment, transformers)[c]					
Piping, Valves, etc.					
Product Transfer Areas (location where oil is loaded to or from a container, pipe or other piece of equipment.)					
Other Oil-Handling Areas or Oil-Filled Equipment (e.g. flow-through process vessels at an oil production facility)					

[a] Use one of the following methods of secondary containment or its equivalent: (1) Dikes, berms, or retaining walls sufficiently impervious to contain oil; (2) Curbing; (3) Culverting, gutters, or other drainage systems; (4) Weirs, booms, or other barriers; (5) Spill diversion ponds; (6) Retention ponds; or (7) Sorbent materials.

[b] For storage tanks and bulk storage containers, the secondary containment capacity must be at least the capacity of the largest container plus additional capacity to contain rainfall or other precipitation.

[c] For oil-filled operational equipment: Document in the table above if alternative measures to secondary containment (as described in §112.7(k)) are implemented at the facility.

3. Inspections, Testing, Recordkeeping and Personnel Training (§§112.7(e) and (f), 112.8(c)(6), 112.12(c)(6)):

Table G-5 Inspections, Testing, Recordkeeping and Personnel Training	
An inspection and testing program is implemented for all aboveground storage containers and piping at this facility. *[§112.8(c)(6), 112.12(c)(6)]*	☐
The following is a description of the inspection and testing program (e.g. reference to industry standard utilized, scope, frequency, method of inspection or test, and person conducting the inspection) for all aboveground storage containers and piping at this facility:	

Inspections, tests, and records are conducted in accordance with written procedures developed for the facility. Records of inspections and tests kept under usual and customary business practices will suffice for purposes of this paragraph. *[§112.7(e)]*	☐
A record of the inspections and tests are kept at the facility or with the SPCC Plan for a period of three years. *[§112.7(e)]* [See Inspection Log and Schedule in Attachment 3.1]	☐
Inspections and tests are signed by the appropriate supervisor or inspector. *[§112.7(e)]*	☐
Personnel, training, and discharge prevention procedures [§112.7(f)]	
Oil-handling personnel are trained in the operation and maintenance of equipment to prevent discharges; discharge procedure protocols; applicable pollution control laws, rules, and regulations; general facility operations; and, the contents of the facility SPCC Plan. *[§112.7(f)]*	☐
A person who reports to facility management is designated and accountable for discharge prevention. *[§112.7(f)]* Name/Title:_____	☐
Discharge prevention briefings are conducted for oil-handling personnel annually to assure adequate understanding of the SPCC Plan for that facility. Such briefings highlight and describe past reportable discharges or failures, malfunctioning components, and any recently developed precautionary measures. *[§112.7(f)]* [See Oil-handling Personnel Training and Briefing Log in Attachment 3.4]	☐

4. Security (excluding oil production facilities) §112.7(g):

Table G-6 Implementation and Description of Security Measures	
Security measures are implemented at this facility to prevent unauthorized access to oil handling, processing, and storage area. The following is a description of how you secure and control access to the oil handling, processing and storage areas; secure master flow and drain valves; prevent unauthorized access to starter controls on oil pumps; secure out-of-service and loading/unloading connections of oil pipelines; address the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges:	☐

5. Emergency Procedures and Notifications (§112.7(a)(3)(iv) and 112.7(a)(5)):

Table G-7 Description of Emergency Procedures and Notifications	
The following is a description of the immediate actions to be taken by facility personnel in the event of a discharge to navigable waters or adjoining shorelines *[§112.7(a)(3)(iv) and 112.7(a)(5)]*:	☐

6. Contact List (§112.7(a)(3)(vi)):

Table G-8 Contact List	
Contact Organization / Person	**Telephone Number**
National Response Center (NRC)	1-800-424-8802
Cleanup Contractor(s)	
Key Facility Personnel	
Designated Person Accountable for Discharge Prevention:	Office:
	Emergency:
	Office:
	Emergency:
	Office:
	Emergency:
	Office:
	Emergency:
State Oil Pollution Control Agencies	
Other State, Federal, and Local Agencies	
Local Fire Department	
Local Police Department	
Hospital	
Other Contact References (e.g., downstream water intakes or neighboring facilities)	

7. NRC Notification Procedure (§112.7(a)(4) and (a)(5)):

Table G-9 NRC Notification Procedure	
In the event of a discharge of oil to navigable waters or adjoining shorelines, the following information identified in Attachment 4 will be provided to the National Response Center immediately following identification of a discharge to navigable waters or adjoining shorelines [See Discharge Notification Form in Attachment 4]: *[§112.7(a)(4)]*	☐
• The exact address or location and phone number of the facility; • Date and time of the discharge; • Type of material discharged; • Estimate of the total quantity discharged; • Estimate of the quantity discharged to navigable waters; • Source of the discharge; • Description of all affected media; • Cause of the discharge; • Any damages or injuries caused by the discharge; • Actions being used to stop, remove, and mitigate the effects of the discharge; • Whether an evacuation may be needed; and • Names of individuals and/or organizations who have also been contacted.	

8. SPCC Spill Reporting Requirements (Report within 60 days) (§112.4):

Submit information to the EPA Regional Administrator (RA) and the appropriate agency or agencies in charge of oil pollution control activities in the State in which the facility is located within 60 days from one

of the following discharge events:

- A single discharge of more than 1,000 U.S. gallons of oil to navigable waters or adjoining shorelines or
- Two discharges to navigable waters or adjoining shorelines each more than 42 U.S. gallons of oil occurring within any twelve month period

You must submit the following information to the RA:

(1) Name of the facility;
(2) Your name;
(3) Location of the facility;
(4) Maximum storage or handling capacity of the facility and normal daily throughput;
(5) Corrective action and countermeasures you have taken, including a description of equipment repairs and replacements;
(6) An adequate description of the facility, including maps, flow diagrams, and topographical maps, as necessary;
(7) The cause of the reportable discharge, including a failure analysis of the system or subsystem in which the failure occurred; and
(8) Additional preventive measures you have taken or contemplated to minimize the possibility of recurrence

* * * * *

NOTE: Complete one of the following sections (A, B or C)

as appropriate for the facility type.

A. Onshore Facilities (excluding production) (§§112.8(b) and (d), 112.12(b) and (d)):

The owner or operator must meet the general rule requirements as well as requirements under this section. Note that not all provisions may be applicable to all owners/operators. For example, a facility may not maintain completely buried metallic storage tanks installed after January 10, 1974, and thus would not have to abide by requirements in §§112.8(c)(4) and 112.12(c)(4), listed below. In cases where a provision is not applicable, write "N/A".

Table G-10 General Rule Requirements for Onshore Facilities	
Drainage from diked storage areas is restrained by valves to prevent a discharge into the drainage system or facility effluent treatment system, except where facility systems are designed to control such discharge. *[§§112.8(b)(1) and 112.12(b)(1)]*	☐
Valves of manual, open-and-closed design are used for the drainage of diked areas. *[§§112.8(b)(2) and 112.12(b)(2)]*	☐
The containers at the facility are compatible with materials stored and conditions of storage such as pressure and temperature. *[§§112.8(c)(1) and 112.12(c)(1)]*	☐
Secondary containment for the bulk storage containers (including mobile/portable oil storage containers) holds the capacity of the largest container plus additional capacity to contain precipitation. Mobile or portable oil storage containers are positioned to prevent a discharge as described in §112.1(b). *[§112.6(a)(3)(ii)]*	☐
If uncontaminated rainwater from diked areas drains into a storm drain or open watercourse the following procedures will be implemented at the facility: *[§§112.8(c)(3) and 112.12(c)(3)]*	
• Bypass valve is normally sealed closed	☐
• Retained rainwater is inspected to ensure that its presence will not cause a discharge to navigable waters or adjoining shorelines	☐
• Bypass valve is opened and resealed under responsible supervision	☐
• Adequate records of drainage are kept [See Dike Drainage Log in Attachment 3.3]	☐
For completely buried metallic tanks installed on or after January 10, 1974 at this facility *[§§112.8(c)(4) and 112.12(c)(4)]*:	
• Tanks have corrosion protection with coatings or cathodic protection compatible with local soil conditions.	☐
• Regular leak testing is conducted.	☐
For partially buried or bunkered metallic tanks *[§112.8(c)(5) and §112.12(c)(5)]*:	
• Tanks have corrosion protection with coatings or cathodic protection compatible with local soil conditions.	☐
Each aboveground container is tested or inspected for integrity on a regular schedule and whenever material repairs are made. Scope and frequency of the inspections and inspector qualifications are in accordance with industry standards. Container supports and foundations are regularly inspected. [See Inspection Log and Schedule and Bulk Storage Container Inspection Schedule in Attachments 3.1 and 3.2] *[§112.8(c)(6) and §112.12(c)(6)(i)]*	☐
Outsides of containers are frequently inspected for signs of deterioration, discharges, or accumulation of oil inside diked areas. [See Inspection Log and Schedule in Attachment 3.1] *[§§112.8(c)(6) and 112.12(c)(6)]*	☐
For bulk storage containers that are subject to 21 CFR part 110 which are shop-fabricated, constructed of austenitic stainless steel, with a manhole and have no external insulation, formal visual inspection is conducted on a regular schedule. Appropriate qualifications for personnel performing tests and inspections are documented. [See Inspection Log and Schedule and Bulk Storage Container Inspection Schedule in Attachments 3.1 and 3.2] *[§112.12(c)(6)(ii)]*	☐
Each container is provided with a system or documented procedure to prevent overfills for the container, Describe:	☐

Table G-10 General Rule Requirements for Onshore Facilities	
Liquid level sensing devices are regularly tested to ensure proper operation [See Inspection Log and Schedule in Attachment 3.1]. *[§112.6(a)(3)(iii)]*	☐
Visible discharges which result in a loss of oil from the container, including but not limited to seams, gaskets, piping, pumps, valves, rivets, and bolts are promptly corrected and oil in diked areas is promptly removed. *[§§112.8(c)(10) and 112.12(c)(10)]*	☐
Aboveground valves, piping, and appurtenances such as flange joints, expansion joints, valve glands and bodies, catch pans, pipeline supports, locking of valves, and metal surfaces are inspected regularly. [See Inspection Log and Schedule in Attachment 3.1] *[§§112.8(d)(4) and 112.12(d)(4)]*	☐
Integrity and leak testing are conducted on buried piping at the time of installation, modification, construction, relocation, or replacement. [See Inspection Log and Schedule in Attachment 3.1] *[§§112.8(d)(4) and 112.12(d)(4)]*	☐

B. Onshore Oil Production Facilities (excluding drilling and workover facilities) (§112.9(b), (c), and (d)):

The owner or operator must meet the general rule requirements as well as the requirements under this section. Note that not all provisions may be applicable to all owners/operators. In cases where a provision is not applicable, write "N/A".

Table G-11 General Rule Requirements for Onshore Oil Production Facilities	
At tank batteries, separation and treating areas, drainage is closed and sealed except when draining uncontaminated rainwater. Accumulated oil on the rainwater is returned to storage or disposed of in accordance with legally approved methods. *[§112.9(b)(1)]*	☐
Prior to drainage, diked areas are inspected and *[§112.9(b)(1)]*:	
• Retained rainwater is inspected to ensure that its presence will not cause a discharge to navigable waters	☐
• Bypass valve is opened and resealed under responsible supervision	☐
• Adequate records of drainage are kept [See Dike Drainage Log in Attachment 3.3]	☐
Field drainage systems and oil traps, sumps, or skimmers are inspected at regularly scheduled intervals for oil, and accumulations of oil are promptly removed [See Inspection Log and Schedule in Attachment 3.1] *[§112.9(b)(2)]*	☐
The containers used at this facility are compatible with materials stored and conditions of storage. *[§112.9(c)(1)]*	☐
All tank battery, separation, and treating facility installations (except for flow-through process vessels) are constructed with a capacity to hold the largest single container plus additional capacity to contain rainfall. Drainage from undiked areas is safely confined in a catchment basin or holding pond. *[§112.9(c)(2)]*	☐
Except for flow-through process vessels, containers that are on or above the surface of the ground, including foundations and supports, are visually inspected for deterioration and maintenance needs on a regular schedule. [See Inspection Log and Schedule in Attachment 3.1] *[§112.9(c)(3)]*	☐
New and old tank batteries at this facility are engineered/updated in accordance with good engineering practices to prevent discharges including at least one of the following: (i) adequate container capacity to prevent overfill if regular pumping/gauging is delayed; (ii) overflow equalizing lines between containers so that a full container can overflow to an adjacent container; (iii) vacuum protection to prevent container collapse; or (iv) high level sensors to generate and transmit an alarm to the computer where the facility is subject to a computer	☐

Table G-11 General Rule Requirements for Onshore Oil Production Facilities	
production control system. *[§112.9(c)(4)]*	
Flow-through process vessels and associated components are: • Are constructed with a capacity to hold the largest single container plus additional capacity to contain rainfall. Drainage from undiked areas is safely confined in a catchment basin or holding pond; *[§112.9(c)(2)]* and • That are on or above the surface of the ground, including foundations and supports, are visually inspected for deterioration and maintenance needs on a regular schedule. [See Inspection Log and Schedule in Attachment 3.1] *[§112.9(c)(3)]* *Or* • Visually inspected and/or tested periodically and on a regular schedule for leaks, corrosion, or other conditions that could lead to a discharge to navigable waters; and • Corrective action or repairs are applied to flow-through process vessels and any associated components as indicated by regularly scheduled visual inspections, tests, or evidence of an oil discharge; and • Any accumulations of oil discharges associated with flow-through process vessels are promptly removed; and • Flow-through process vessels are provided with a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation within six months of a discharge from flow-through process vessels of more than 1,000 U.S. gallons of oil in a single discharge as described in §112.1(b), or a discharge more than 42 U.S. gallons of oil in each of two discharges as described in §112.1(b) within any twelve month period. *[§112.9(c)(5)]* *(Leave blank until such time that this provision is applicable.)*	☐ ☐ ☐ ☐ ☐
All aboveground valves and piping associated with transfer operations are inspected periodically and upon a regular schedule. The general condition of flange joints, valve glands and bodies, drip pans, pipe supports, pumping well polish rod stuffing boxes, bleeder and gauge valves, and other such items are included in the inspection. [See Inspection Log and Schedule in Attachment 3.1] *[§112.9(d)(1)]*	☐
An oil spill contingency plan and written commitment of resources is provided for flowlines and intra-facility gathering lines [See Oil Spill Contingency Plan and Checklist in Attachment 2 and Inspection Log and Schedule in Attachment 3.1] *[§112.9(d)(3)]* or Appropriate secondary containment and/or diversionary structures or equipment is provided for flowlines and intra-facility gathering lines to prevent a discharge to navigable waters or adjoining shorelines. The entire secondary containment system, including walls and floor, is capable of containing oil and is constructed so that any discharge from the pipe, will not escape the containment system before cleanup occurs.	☐ ☐
A flowline/intra-facility gathering line maintenance program to prevent discharges from each flowline has been established at this facility. The maintenance program addresses each of the following: • Flowlines and intra-facility gathering lines and associated valves and equipment are compatible with the type of production fluids, their potential corrosivity, volume, and pressure, and other conditions expected in the operational environment; • Flowlines, intra-facility gathering lines and associated appurtenances are visually inspected and/or tested on a periodic and regular schedule for leaks, oil discharges, corrosion, or other conditions that could lead to a discharge as described in §112.1(b). The frequency and type of testing allows for the implementation of a contingency plan as described under part 109 of this chapter. • Corrective action and repairs to any flowlines and intra-facility gathering lines and associated appurtenances as indicated by regularly scheduled visual inspections, tests, or evidence of a discharge.	☐ ☐ ☐ ☐

Table G-11 General Rule Requirements for Onshore Oil Production Facilities	
• Accumulations of oil discharges associated with flowlines, intra-facility gathering lines, and associated appurtenances are promptly removed. *[§112.9(d)(4)]*	☐
The following is a description of the flowline/intra-facility gathering line maintenance program implemented at this facility:	

C. Onshore Oil Drilling and Workover Facilities (§112.10(b), (c) and (d)):

The owner or operator must meet the general rule requirements as well as the requirements under this section.

Table G-12 General Rule Requirements for Onshore Oil Drilling and Workover Facilities	
Mobile drilling or worker equipment is positioned or located to prevent discharge as described in §112.1(b). *[§112.10(b)]*	☐
Catchment basins or diversion structures are provided to intercept and contain discharges of fuel, crude oil, or oily drilling fluids. *[§112.10(c)]*	☐
A blowout prevention (BOP) assembly and well control system was installed before drilling below any casing string or during workover operations. *[§112.10(d)]*	☐
The BOP assembly and well control system is capable of controlling any well-head pressure that may be encountered while the BOP assembly and well control system are on the well. *[§112.10(d)]*	☐

ATTACHMENT 1 – Five Year Review and Technical Amendment Logs

ATTACHMENT 1.1 – Five Year Review Log

I have completed a review and evaluation of the SPCC Plan for this facility, and will/will not amend this Plan as a result.

Table G-13 Review and Evaluation of SPCC Plan for Facility			
Review Date	Plan Amendment		Name and signature of person authorized to review this Plan
	Will Amend	Will Not Amend	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	
	☐	☐	

ATTACHMENT 1.2 – Technical Amendment Log

Any technical amendments to this Plan will be re-certified in accordance with Section I of this Plan template.

Table G-14 Description and Certification of Technical Amendments		
Review Date	Description of Technical Amendment	Name and signature of person certifying this technical amendment

ATTACHMENT 2 – Oil Spill Contingency Plan and Checklist

An oil spill contingency plan and written commitment of resources is required for:

- Flowlines and intra-facility gathering lines at oil production facilities and
- Qualified oil-filled operational equipment which has no secondary containment.

An oil spill contingency plan meeting the provisions of 40 CFR part 109, as described below, and a written commitment of manpower, equipment and materials required to expeditiously control and remove any quantity of oil discharged that may be harmful is attached to this Plan.	☐

Complete the checklist below to verify that the necessary operations outlined in 40 CFR part 109 - Criteria for State, Local and Regional Oil Removal Contingency Plans - have been included.

Table G-15 Checklist of Development and Implementation Criteria for State, Local and Regional Oil Removal Contingency Plans (§109.5)[a]	
(a) Definition of the authorities, responsibilities and duties of all persons, organizations or agencies which are to be involved in planning or directing oil removal operations.	☐
(b) Establishment of notification procedures for the purpose of early detection and timely notification of an oil discharge including:	☐
(1) The identification of critical water use areas to facilitate the reporting of and response to oil discharges.	☐
(2) A current list of names, telephone numbers and addresses of the responsible persons (with alternates) and organizations to be notified when an oil discharge is discovered.	☐
(3) Provisions for access to a reliable communications system for timely notification of an oil discharge, and the capability of interconnection with the communications systems established under related oil removal contingency plans, particularly State and National plans (e.g., NCP).	☐
(4) An established, prearranged procedure for requesting assistance during a major disaster or when the situation exceeds the response capability of the State, local or regional authority.	☐
(c) Provisions to assure that full resource capability is known and can be committed during an oil discharge situation including:	☐
(1) The identification and inventory of applicable equipment, materials and supplies which are available locally and regionally.	☐
(2) An estimate of the equipment, materials and supplies which would be required to remove the maximum oil discharge to be anticipated.	☐
(3) Development of agreements and arrangements in advance of an oil discharge for the acquisition of equipment, materials and supplies to be used in responding to such a discharge.	☐
(d) Provisions for well defined and specific actions to be taken after discovery and notification of an oil discharge including:	☐
(1) Specification of an oil discharge response operating team consisting of trained, prepared and available operating personnel.	☐

Table G-15 Checklist of Development and Implementation Criteria for State, Local and Regional Oil Removal Contingency Plans (§109.5)[a]	
(2) Predesignation of a properly qualified oil discharge response coordinator who is charged with the responsibility and delegated commensurate authority for directing and coordinating response operations and who knows how to request assistance from Federal authorities operating under existing national and regional contingency plans.	☐
(3) A preplanned location for an oil discharge response operations center and a reliable communications system for directing the coordinated overall response operations.	☐
(4) Provisions for varying degrees of response effort depending on the severity of the oil discharge.	☐
(5) Specification of the order of priority in which the various water uses are to be protected where more than one water use may be adversely affected as a result of an oil discharge and where response operations may not be adequate to protect all uses.	☐
(6) Specific and well defined procedures to facilitate recovery of damages and enforcement measures as provided for by State and local statutes and ordinances.	☐

[a] The contingency plan must be consistent with all applicable state and local plans, Area Contingency Plans, and the National Contingency Plan (NCP).

ATTACHMENT 3 – Inspections, Dike Drainage and Personnel Training Logs

ATTACHMENT 3.1 – Inspection Log and Schedule

Table G-16 Inspection Log and Schedule This log is intended to document compliance with §§112.6(a)(3)(iii), 112.8(c)(6), 112.8(d)(4), 112.9(b)(2), 112.9(c)(3), 112,9(d)(1), 112.9(d)(4), 112.12.(c)(6), and 112.12(d)(4), as applicable.					
Date of Inspection	Container / Piping / Equipment	Describe Scope (or cite Industry Standard)	Observations	Name/ Signature of Inspector	Records maintained separately [a]
					☐
					☐
					☐
					☐
					☐

[a] Indicate in the table above if records of facility inspections are maintained separately at this facility.

ATTACHMENT 3.2 – Bulk Storage Container Inspection Schedule – onshore facilities (excluding production):

To comply with integrity inspection requirement for bulk storage containers, inspect/test each shop-built aboveground bulk storage container on a regular schedule in accordance with a recognized container inspection standard based on the minimum requirements in the following table.

Table G-17 Bulk Storage Container Inspection Schedule	
Container Size and Design Specification	**Inspection requirement**
Portable containers (including drums, totes, and intermodal bulk containers (IBC))	Visually inspect monthly for signs of deterioration, discharges or accumulation of oil inside diked areas
55 to 1,100 gallons with sized secondary containment	Visually inspect monthly for signs of deterioration, discharges or accumulation of oil inside diked areas plus any annual inspection elements per industry inspection standards
1,101 to 5,000 gallons with sized secondary containment and a means of leak detection[a]	
1,101 to 5,000 gallons with sized secondary containment and no method of leak detection[a]	Visually inspect monthly for signs of deterioration, discharges or accumulation of oil inside diked areas, plus any annual inspection elements and other specific integrity tests that may be required per industry inspection standards

[a] Examples of leak detection include, but are not limited to, double-walled tanks and elevated containers where a leak can be visually identified.

ATTACHMENT 3.3 – Dike Drainage Log

Table G-18 Dike Drainage Log						
Date	Bypass valve sealed closed	Rainwater inspected to be sure no oil (or sheen) is visible	Open bypass valve and reseal it following drainage	Drainage activity supervised	Observations	Signature of Inspector
	☐	☐	☐	☐		
	☐	☐	☐	☐		
	☐	☐	☐	☐		
	☐	☐	☐	☐		
	☐	☐	☐	☐		

ATTACHMENT 3.4 – Oil-handling Personnel Training and Briefing Log

Table G-19 Oil-Handling Personnel Training and Briefing Log		
Date	**Description / Scope**	**Attendees**

ATTACHMENT 4 – Discharge Notification Form

In the event of a discharge of oil to navigable waters or adjoining shorelines, the following information will be provided to the National Response Center [also see the notification information provided in Section 7 of the Plan]:

Table G-20 Information provided to the National Response Center in the Event of a Discharge			
Discharge/Discovery Date		Time	
Facility Name			
Facility Location (Address/Lat-Long/Section Township Range)			
Name of reporting individual		Telephone #	
Type of material discharged		Estimated total quantity discharged	Gallons/Barrels
Source of the discharge		Media affected	☐ Soil ☐ Water (specify) _____ ☐ Other (specify) _____
Actions taken			
Damage or injuries	☐ No ☐ Yes (specify)	Evacuation needed?	☐ No ☐ Yes (specify)
Organizations and individuals contacted	☐ National Response Center 800-424-8802 Time _____		
	☐ Cleanup contractor (Specify) Time _____		
	☐ Facility personnel (Specify) Time _____		
	☐ State Agency (Specify) Time _____		
	☐ Other (Specify) Time _____		

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Federal Register

Friday,
December 5, 2008

Part III

Department of the Interior

Bureau of Reclamation

43 CFR Part 429

Use of Bureau of Reclamation Land, Facilities, and Waterbodies; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 429

RIN 1006–AA51

Use of Bureau of Reclamation Land, Facilities, and Waterbodies

AGENCY: Bureau of Reclamation, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Reclamation (Reclamation) is adopting this final rule on the use of Reclamation land, facilities, and waterbodies. This final rule addresses activities involving the possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from, Reclamation land, facilities, and waterbodies. This final rule supersedes the current rule which was originally published in 1983 and partially revised in April 2006.

DATES: This final rule is effective January 5, 2009.

FOR FURTHER INFORMATION CONTACT: Richard Rizzi, Mail Code: 84–53000, Bureau of Reclamation, P.O. Box 25007, Denver, CO 80225. Telephone: (303) 445–2900.

SUPPLEMENTARY INFORMATION:

I. Background

The current rule, 43 CFR part 429, titled Procedure to Process and Recover the Value of Rights-of-Use and Administrative Costs Incurred In Permitting Such Use (current rule), established the procedures to recover administrative costs associated with processing ''right-of-use'' applications and the value of rights-of-use granted by Reclamation to applicants for the use of Reclamation land. Sections of the current rule were modified, in part, in 2006 to correlate with 43 CFR part 423, titled Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies.

This final rule addresses activities involving the possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from, Reclamation land, facilities, and waterbodies. Regulations addressing public access to Reclamation property and occasional public activities such as hiking, camping, boating, and hunting, and closures are contained in 43 CFR part 423.

The demand for use of Reclamation land, facilities, and waterbodies for many different kinds of activities has increased dramatically since Reclamation began building Federal water supply, flood control, and hydropower projects over 100 years ago. With increased and varied uses has come confusion among the potential users of Reclamation land, facilities, and waterbodies about the process of applying for the various types of uses, the charges and fees associated with such uses, and other concerns. The current rule does not adequately address this confusion nor does it address prohibited and unauthorized uses of Reclamation's land, facilities, and waterbodies and associated penalties.

The Independent Offices Appropriation Act (IOAA) (31 U.S.C. 9701), September 13, 1982, as amended, sets forth Congress' intent that any use, permit, or similar thing of value provided by an agency is to be self-sustaining and that the IOAA authorizes agencies to prescribe rules establishing charges for such uses. The 1993 revision of the Office of Management and Budget (OMB) Circular A–25 established Federal policy directing that administrative costs be recovered for Government services and fees for the use or sale of Government goods or resources also be charged. OMB Circular A–25 provides information on the scope and types of activities subject to use fees and the basis on which these fees are established. It also provides guidance for agencies in implementing such fees and charges. The use of Reclamation land, facilities, or waterbodies is a use of Government resources, and as such, the IOAA and OMB Circular A–25 direct Reclamation to recover the costs and fees associated with the use of these resources.

Section 10 (43 U.S.C. 373) of the Reclamation Act of June 17, 1902, provides the Secretary of the Interior (Secretary) with the authority to issue rules as necessary for the purposes of carrying out the provisions of the Act. Section 10 (43 U.S.C. 387) of the Reclamation Project Act of 1939 provides the Secretary the authority, in his discretion, to grant leases, licenses, easements, and rights-of-way. These two Acts provide Reclamation with the general statutory authority to issue rules on authorizing or prohibiting uses of Reclamation land, facilities, and waterbodies.

This final rule addresses:

(a) The possession or occupancy of any portion of, or the extraction or disturbance of any natural resource from, Reclamation land, facilities, and waterbodies;

(b) The procedures to follow when the proposed use involves a Reclamation easement;

(c) The procedures to apply for use of Reclamation land, facilities, and waterbodies that involves the possession or occupancy of any portion of, or the extraction or disturbance of any natural resource from, Reclamation land, facilities, or waterbodies;

(d) The criteria Reclamation will use to evaluate applications;

(e) Our statutory authority and the basis for charging application fees, recovering administrative costs, and collecting use fees associated with authorized uses;

(f) Conditions under which application fees, administrative costs, or use fees may be waived or reduced if determined appropriate by Reclamation or as currently listed in OMB Circular A–25;

(g) The required terms and conditions associated with use authorizations;

(h) Prohibited uses of Reclamation land, facilities, and waterbodies and how Reclamation will resolve unauthorized uses;

(i) The criteria Reclamation will use to evaluate existing authorizations for otherwise prohibited uses of Reclamation land, facilities, and waterbodies; and

(j) The decisions and appeals process applicable to actions taken under this part.

II. Revision of Existing Rule

On December 20, 1983, Reclamation published 43 CFR part 429 titled Procedure to Process and Recover the Value of Rights-of-Use and Administrative Costs Incurred in Permitting Such Use in the **Federal Register** at 48 FR 56223. Sections of this rule were revised on April 17, 2006, in the **Federal Register** at 71 FR 19802 to better correlate with 43 CFR part 423. The sections that were revised or added were § 429.1 Purpose, § 429.2 Definitions, § 429.3 Establishment of the value of rights-of-use, § 429.6 Applications for rights-of-use, § 429.12 Applicability, and § 429.13 General Restrictions.

On July 18, 2007, Reclamation published a notice in the **Federal Register** at 72 FR 39530 announcing the availability of the proposed rule for a 90-day public comment period ending on October 16, 2007. As a result of comments received, the proposed rule was revised. Reclamation again published a notice of the proposed rule in the **Federal Register** at 73 FR 42236 on July 18, 2008, for a 60-day public comment period ending on September 16, 2008. During the 60-day public comment period, informational meetings regarding the proposed rule were held in each of Reclamation's five regions.

When the public comment period closed on the proposed rule, Reclamation considered the comments and incorporated them, where appropriate. This final rule, titled Use of Bureau of Reclamation Land, Facilities, and Waterbodies, supersedes the 1983 version and its 2006 modifications in their entirety.

III. Summary of Changes, Comments, and Responses

This section of the preamble describes changes from the proposed rule published on July 18, 2008, and provides responses to the comments received on that proposed rule by section. Approximately 260 individuals submitted comments during the 60-day comment period which ended on September 16, 2008.

Comments received that are similar in nature have been categorized by subject and in some instances have been combined with related comments. Comments and our responses on general issues not related to a specific section of the preamble or text of the proposed rule are arranged first. This section is followed by comments regarding the preamble of the proposed rule and our responses; and lastly, the changes we have made, comments received, and our responses related to specific sections of the text of the proposed rule.

General Comments and Responses

Comment: In its current form the proposed rule fairly manages the lands in Reclamation's charge and represents well the needs and desires of the people. It balances new and existing uses with an eye to the future.

Response: No response required.

Comment: The revised proposed rule provides for an acceptable process for fair and open decisions, and demonstrates that the public comment process does work and our government listens to its managing partners and the public at large.

Response: No response required.

Comment: It is more effective to manage a weed control program locally than from out of state.

Response: Weed control programs are managed at the local or regional office level.

Comment: Exclusions for the special circumstances at our reservoir should be made in the rule.

Response: We suspect that all holders of recreational and residential use authorizations would be quick to note the unique and special circumstances associated with their reservoir. But no reservoir is so unique that the requirements for Reclamation to manage its land, facilities, and waterbodies and to comply with Federal requirements, such as the Independent Offices Appropriation Act and Office of Management and Budget Circular A–25, could be put aside. Rather, we have incorporated into this rule flexibility so that local Reclamation offices can factor in special circumstances in managing use authorizations. For example: Use fees are determined locally; minimum time frames have been established for certain deficiencies to be corrected, but the local Reclamation office can provide more time when needed; minimum time frames have been established as to when inspections must occur, but the local Reclamation office can provide more frequent inspections if warranted; etc.

Comment: Why doesn't a land use agency such as the U.S.D.A. Forest Service manage our large recreational area?

Response: We are continually exploring opportunities to work with managing partners including the U.S.D.A. Forest Service, National Park Service, Bureau of Land Management, Fish and Wildlife Service, and State and local agencies to manage our recreation areas through formal agreements. We have been very successful in this endeavor in that only 42 of the 289 recreation areas located on Reclamation lands and waterbodies are directly managed by Reclamation. However, to date, we have not been able to find a governmental entity that is willing to take over management of the recreation at the reservoir in question.

Preamble Comments and Responses

Only those sections of the preamble to the proposed rule that received comments are discussed in this section.

IV. Informational Meetings

Comment: The meeting date in Albuquerque, New Mexico, conflicted with the monthly board meetings of the Carlsbad Irrigation District and the Elephant Butte Irrigation District preventing the two major districts in New Mexico from participating in the informational meeting.

Response: The dates and times for the informational meetings were established by the local office hosting the meeting and every attempt was made to meet the needs of the concerned public and to provide adequate advance notice of the meetings. The direct phone number for Reclamation's contact person was included in the published rule to allow for maximum availability to persons and groups unable to attend public meetings scheduled in their area. We regret that such a conflict occurred. Written comments were submitted by Elephant Butte Irrigation District and are included in the comments section of this document.

V. Procedural Requirements

Comment: The proposed rule will have a financial affect in excess of $100 million on irrigation districts. It alters the budgetary obligations of all affected irrigation districts by decreasing revenue credits. The rule raises legal and policy issues with respect to revenue credits and it constitutes a major Federal action since it impacts existing repayment and operation and maintenance contracts with irrigation districts.

Response: It is Reclamation's responsibility to make this determination based on economic analysis. We did not receive any evidence that contradicts our analysis, which shows that the total amount of fees and charges we annually collect for uses of Reclamation land, facilities, and waterbodies is well under $100 million. Additionally, revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with all statutory, regulatory, and policy requirements. Since such statutes, regulations, and policies have all been in place for years, even decades, this rule is not raising legal and policy issues.

Changes, Comments, and Responses Related to the Text of the Proposed Rule

Subpart A—Purpose, Definitions, and Applicability

Section 429.1 This section describes the purpose of 43 CFR part 429.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.2 This section establishes the definitions for terms that are used in part 429.

We made minor editorial changes to this section as compared to the previously proposed rule as well as expanding the definition of *private exclusive recreational or residential use* for clarification purposes.

Comment: Rewrite the definitions for *application* and *Reclamation*. For *application*, allow an authorized form provided by responsible water user organization; and for *Reclamation* include in the definition a water user organization that has assumed responsibility for the operation and maintenance of a project.

Response: Reclamation can only accept one of the two Office of Management and Budget (OMB) approved application forms listed under § 429.10: Form 7–2540 or SF 299. All

forms collected by a Federal agency which collects information from 10 or more individuals or entities on an annual basis must be approved by OMB and renewed by them on a 3-year basis. This does not preclude managing partners and water user organizations from using their own forms to facilitate activities for which they are responsible. Reclamation is an agency of the Federal government and as such the definition cannot be expanded to include a non-Federal entity.

Comment: The definition for *private exclusive recreational or residential use* should be modified to remove the statement ''which create the perception of such exclusion.'' To equate exclusive to exclusion is irrational.

Response: We have removed the subject phrase from the definition of *private exclusive recreational or residential use*.

Comment: Language should be added which makes it clear that issuing authorizations for a particular facility to a particular applicant is not the exclusionary conduct that the rule seeks to prohibit.

Response: We made changes under § 429.4 to clarify which uses are not considered private exclusive use.

Comment: Boat docks should be defined ''as lesser forms of private use.'' This terminology is used by the U.S. Army Corps of Engineers in their shoreline management guidelines.

Response: Although the U.S. Army Corps of Engineers' (COE) definition for private exclusive use does exclude such uses as boat docks and moorings, the definition goes on to state that those uses will be included in their shoreline management requirements. The COE shoreline management requirements include non-transferability of permits for any reason including sale of associated improvements or death of permittee and permits are issued for terms of 5 years or less. Reclamation has decided to go in a direction that allows for more flexibility for both the operators of Reclamation facilities and those who hold authorizations for existing private exclusive recreational and residential uses.

Comment: Add a definition for *commercial photography* to provide for the parallel treatment of filming and photography.

Response: We did not add a definition for commercial photography to the rule. Both commercial filming and photography are subject equally to Reclamation's requirements and processes as stated under § 429.3.

Section 429.3 This section describes the types of uses of and activities on Reclamation land, facilities, and waterbodies that typically require a use authorization under part 429.

We made no changes to this section as compared to the previously proposed rule.

Comment: Traditional public uses of Reclamation land may be subject to the proposed new rule instead of 43 CFR part 423. The terms of § 429.3(c) and (f) would remove the ambiguity and potential conflict with the proposed new § 429.4(a) which exempts individual, non-commercial uses.

Response: In fact, many activities on Reclamation land, facilities, and waterbodies may be subject to both part 423 and part 429 of this chapter. The distinction between these two parts is that part 429 specifies for which activities use authorizations must be obtained and part 423 specifies what conduct by the public is or is not acceptable on Reclamation land, facilities, and waterbodies. Even though an activity may be authorized under part 429 of this chapter, use authorizations do not condone all possible conduct by the public.

Section 429.4 This section lists the types of uses of and activities on Reclamation land, facilities, and waterbodies that do not require authorization under part 429.

We made changes to this section as compared to the previously proposed rule for clarification purposes including the addition of a new paragraph (b) which provides examples of the types of buildings and structures used by concessionaires or managing partners that are not subject to this part.

Comment: Is written permission needed to boat or swim on Reclamation waterbodies?

Response: No. These activities are listed under § 429.4 as not being subject to the requirement and processes established under this part. They are, however, subject to part 423 of this chapter which relates to public conduct on Reclamation land, facilities, and waterbodies.

Section 429.5 This section addresses who is authorized under part 429 to issue use authorizations.

We made changed this section as compared to the previously proposed rule to add that a copy of all use authorizations issued by managing partners be provided to the local Reclamation office.

Comment: Reclamation is commended for amending the 2007 proposed rule. The changes allow for the efficient and effective relationship between Reclamation and water user organizations that have assumed contractual responsibility for the operation and maintenance of Reclamation projects. Reclamation's efforts in balancing its ultimate responsibility for Federal land, with the practical realities of operating and managing Reclamation project are appreciated.

Response: No response required.

Comment: Do not make any changes to grazing leases or re-route the revenues collected for such leases issued by water user organizations.

Response: Under this section, water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies pursuant to a contract with Reclamation may issue limited use authorizations. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in compliance with all statutory, regulatory, and policy requirements.

Comment: Requiring authorization from a water user organization constitutes an improper delegation of federal authority per 43 U.S.C. 387 which provides the Secretary with the authority to grant leases, license, easements, and rights-of-way. It may be proper for the Secretary to delegate this authority to Reclamation, but not to a water user organization.

Response: Only water user organization's who are authorized under their contract for operation and maintenance of Reclamation land, facilities, and waterbodies may issue limited use authorizations to third parties. Additionally, only Reclamation or another Federal agency may issue authorizations that convey an interest in Reclamation land, facilities, or waterbodies.

Section 429.6 This section details when water user organizations must approve Reclamation's use authorizations.

We changed this section as compared to the previously proposed rule. Section 10 of the Reclamation Project Act of 1939 as amended is the statutory authority for use authorizations under paragraph (a). Due to comments received, we requested a legal review within the Department of the Interior of this provision and this paragraph has now been revised to track with section 10.

Section 10 of the Reclamation Project Act of 1939 as amended is the statutory authority for use authorizations under paragraph (a). This paragraph has now been revised to track with Section 10.

We have added paragraph (c) which addresses the Regional Directors' discretionary authority to seek concurrence for all use authorizations not addressed in paragraph (a). This was

formerly addressed in paragraph (b) and limited to use authorizations of less than 25 years.

Comment: Delete the requirement that Reclamation obtain the approval of water user organizations for easements and rights-of-way for periods in excess of 25 years, and indicate that such a requirement is at the discretion of the regional director.

Response: Section 10 of the Reclamation Project Act of 1939 specifies that Reclamation will grant easements and rights-of-way for periods in excess of 25 years only with the written approval of any water user organization under contract obligation for repayment to Reclamation.

Comment: Rewrite this section to state that all use authorizations for easements and rights-of-way within a project or division are subject to the approval of any water user organization under contract obligation for repayment, and for those water user organizations who have assumed responsibility for operation and maintenance of that project or division. This requirement would not apply to any other type of authorization.

Response: Section 10 of the Reclamation Project Act of 1939 specifies that Reclamation will grant easements and rights-of-way for periods in excess of 25 years only with the written approval of any water user organization under contract obligation for repayment to Reclamation. We do, however, provide in the rule that at a minimum all affected water user organizations be notified prior to the issuance of any use authorization. Additionally, at the discretion of the Regional Director, the affected water user organization may be asked to formally concur with the issuance of the proposed use authorization.

Subpart B—Proposed Uses Involving Reclamation Easements

Section 429.7 This section discusses the use of land not owned by Reclamation, but where Reclamation holds easements.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.8 This section discusses whether fees are required for the use of Reclamation easements.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Subpart C—Requesting Authorizations To Use Reclamation Land, Facilities, and Waterbodies

Section 429.9 This section explains what you should do before filing an application.

We made no changes to this section as compared to the previously proposed rule.

Comment: Revise this section to include discussion of a proposed use with the water user organization as described in § 429.5.

Response: In contacting Reclamation, a potential applicant will be referred to the appropriate water user organization if that organization has the contractual authority to issue use authorizations for the intended use. This issue will be more directly addressed in revisions to applicable Reclamation Manual Directives and Standards and handbooks rather than in this rule. Additionally, when Reclamation is responsible for issuing the use authorization, local Reclamation offices will continue to coordinate with water user organizations when applicable to determine whether a proposed use is compatible with the needs and purposes of the project.

Section 429.10 This section describes what application forms to use and how to determine which application form is appropriate to use.

We made no changes to this section as compared to the previously proposed rule.

Comment: Revise this section to add a water user organization's form authorized by Reclamation.

Response: Reclamation can only accept one of the two OMB approved application forms listed under § 429.10: Form 7–2540 or SF 299. All forms used by a Federal agency which collect information from 10 or more individuals or entities on an annual basis must be approved by OMB and renewed by them on a 3-year basis.

Section 429.11 Where the use authorization application forms can be found is provided in this section.

We made no changes to this section as compared to the previously proposed rule.

Comment: Revise this section to include wording that contact information for the appropriate water user organization can be obtained from any Reclamation office.

Response: The local Reclamation office will provide water user organization contact information when appropriate. This will be addressed more directly in revisions to applicable Reclamation Manual Directives and Standards and handbooks.

Section 429.12 The appropriate location for filing an application is listed in this section.

We made no changes to this section as compared to the previously proposed rule.

Comment: Revise this section to read: ''File your application * * * with the Reclamation office or water user organization having jurisdiction over the land.* * *''

Response: Although some water user organizations may have assumed responsibility for the operation and maintenance of Reclamation land, facilities, and waterbodies pursuant to a contract with Reclamation, Reclamation still maintains jurisdiction over the subject land, facilities, and waterbodies. The location for filing an application should be coordinated between the local Reclamation office and water user organization.

Section 429.13 This section tells how long the application review process will take.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.14 The criteria Reclamation will consider when reviewing applications is described in this section.

We made no changes to this section as compared to the previously proposed rule.

Comment: This section does not include the best interests of the affected project beneficiaries, nor does it address the impacts of not receiving revenue credits which would create further financial burdens on the water user organizations.

Response: This rule complies with OMB Circular A–25 which directs the recovery of revenues for administrative costs incurred by Reclamation in the processing of use applications and for the use of Federal lands. Although the responsibility for operation and maintenance of Reclamation land, facilities, and waterbodies may be contractually transferred in some instances to a water user organization, they are owned by the United States. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with applicable Federal statutes, regulations, and policies.

Section 429.15 This section discusses whether Reclamation is required to issue use authorizations.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Subpart D—Application Fees and Administrative Costs

Section 429.16 The amount of the application fee and when to pay the fee is described in this section.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.17 This section explains under what circumstances administrative costs will be collected.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.18 This section explains when administrative costs will be due and payable.

We made no changes to this section as compared to the previously proposed rule.

Comment: Administrative costs should include a reasonable charge for project related land, facilities, and waterbodies for the benefit of the project beneficiaries.

Response: OMB Circular A–25 provides our authority to collect administrative costs that are incurred by us in processing a use application for an authorization to use Reclamation land, facilities, or waterbodies. We do not have authority to collect administrative costs for any other entity.

Section 429.19 This section describes what the process is when the initial estimate for administrative costs is insufficient.

We made no changes to this section as compared to the previously published rule. We received no comments on this section.

Section 429.20 This section describes how to request a detailed explanation of the administrative costs.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.21 This section describes what occurs if the administrative costs are overpaid.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.22 This section discusses whether future administrative costs can be charged after a use authorization is issued by Reclamation.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Subpart E—Use Fees

Comment: This subpart fails to include the best interests of the affected project beneficiaries by not charging a reasonable fee for the project beneficiaries and not providing those reasonable fees as revenue credits to the benefit of the affected project.

Response: This rule complies with OMB Circular A–25 which directs the recovery of revenues for the use of Federal lands. Although the responsibility for operation and maintenance of Reclamation land, facilities, and waterbodies may be contractually transferred in some instances to a water user organization, they are owned by the United States. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with applicable Federal statutes, regulations, and policies.

Section 429.23 How Reclamation determines use fees is described in this section.

We made no changes to this section as compared to the previously proposed rule.

Comment: Increased fees have adverse impacts on cabin owners forcing them from their cabins.

Response: This rule does not set fees for cabins or any other use of Reclamation land, facilities, or waterbodies. Use fees are established on a case-by-case basis as determined by a valuation process or competitive bidding.

Comment: This section must be defined more clearly as well as accurately.

Response: The Reclamation Manual Directive and Standard, *Real Property Appraisal*, LND 05–01, which may be found at *http://www.usbr.gov/* outlines in depth the valuation process for determining use fees. The alternative method that may be used under this section for determining use fees is the competitive bidding process.

Section 429.24 This section explains when use fees should be paid.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.25 This section describes the length of time allowed to both submit a use fee payment and accept the offered use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

Section 429.26 This section describes under what conditions Reclamation may waive or reduce costs or fees.

We made minor editorial changes to this section.

Comment: This section does not take into consideration the affect that waiving fees would have on water user organizations. The requirement to collect fair market value should be retained.

Response: Section 6 of OMB Circular A–25 allows for a reduced fee or waiver under certain circumstances and we have simply incorporated this concept into this rule. As listed under § 429.23, we are required to collect a use fee based on a valuation or competitive bidding process unless the use fees have been waived by the applicable regional director. All revenues collected for the use of Reclamation land, facilities, and waterbodies must be handled in accordance with applicable Federal statutes, regulations, and policies.

Comment: Costs and fees associated with obtaining Reclamation's approval for an easement, right-of-way, or other authorized use should be automatically waived for applicants that are public entities.

Response: Public entities and others who believe they may be eligible for a waiver of some or all fees associated with the use of Reclamation land, facilities, or waterbodies may request such a waiver from the applicable Regional Director.

Subpart G—Terms and Conditions of Use Authorizations

Section 429.27 This section describes the general information that is contained in each use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.28 Terms and conditions that apply to all use authorizations from Reclamation are outlined in this section.

We made changes to this section as compared to the previously proposed rule. Under § 429.28(a)(3) we clarified when Reclamation may terminate a use authorization. These now include, but are not limited to, events such as a natural disaster or threats to public health and safety. We also modified § 429.28(a)(4) by deleting the condition that lack of use in a 2-year timeframe may result in the termination of a use authorization. We added the condition that failure to construct during the timeframe specified in the use authorization may constitute a presumption of abandonment and cause for termination.

Comment: The proposed rule allows existing docks to stay for now. However, it also gives Reclamation unilateral authority to terminate dock permits at any future point without public comment.

Response: We have revised § 429.28 to clarify under what conditions an authorization could be terminated without public comment. Additionally, § 429.32(a) has been revised to more clearly explain the public process that would be required prior to Reclamation making a determination that authorizations for existing private exclusive recreational and residential use would be terminated.

Comment: Under the proposed rule, individuals holding valid permits who do not construct or use their boat docks for a period of two years can lose their permits forever through a presumption of abandonment.

Response: We have revised § 429.28(a)(4) by removing the 2-year timeframe and adding the condition that construction must occur within the timeframe specified in the use authorization or the use authorization may be terminated.

Comment: It appears that this document may be in violation of First Amendment rights by denying the right to appeal.

Response: All final determinations made by Reclamation may be appealed using the process outlined in subpart I of this rule.

Section 429.29 This section describes additional terms and conditions or requirements that will be included in a use authorization.

We made no changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.30 This section explains whether a use authorization can be transferred or assigned to another individual or entity.

We made changes to this section as compared to the previously proposed rule to incorporate revisions made regarding the transfer of authorizations for existing private exclusive recreational or residential uses as described under § 429.32(e).

Comment: The proposed rule does not recognize homeowners' rights to transfer their dock permits should they sell their lakeside homes or pass them on to their heirs. Transfer authority is solely at the discretion of the local Reclamation office. This right should be recognized in the rule. Reclamation authority over transfers should be limited to record keeping and permit compliance.

Response: The conditions for transfer of use authorizations for existing private exclusive recreational or residential uses are now under 429.32(e). Notification of transfers must be provided to Reclamation in advance of the transfer. Holders of use authorizations should keep in mind, however, that a use authorization for private exclusive recreational or residential use does not vest an interest in Reclamation land, facilities, or waterbodies with the holder of the use authorization.

Subpart H—Terms and Conditions of Use Authorizations

Section 429.31 This section describes what the prohibited uses are on Reclamation land, facilities, and waterbodies.

We made changes to this section as compared to the previously proposed rule.

Section 429.31(b) now reflects that improvements made within the terms and conditions of an existing use authorization will not be considered a new private exclusive recreational or residential use. These improvements may include those necessary to maintain or repair the authorized use. Expansions of the authorized use within the terms and conditions of the existing authorization may also be allowed. Any such expansions should, however, be reviewed by the local Reclamation office prior to initiating the activity to ensure that the planned change is truly within the terms of the use authorization.

Additionally, § 429.31(b)(1) has been moved and incorporated into the definition of *private exclusive recreational and residential use* under § 429.2 and § 429.31(b)(2) has been moved to § 429.4(b)

Comment: Reword § 429.31(b) to state that uses outside an already existing permitted area would be prohibited. This would allow improvements, expansions, or repairs within the existing footprint of an existing authorized use.

Response: We have revised § 429.31(b) to incorporate the intent of this comment. Improvements, expansions, or repairs of the authorized use within the terms and conditions of the existing authorization may also be allowed. Any such improvements, expansions, or repairs should, however, be reviewed by the local Reclamation office prior to initiating the activity to ensure that the planned change is truly within the terms of the use authorization.

Comment: Prohibitions against new docks on lakes with limited public facilities are inconsistent with both Congressional mandates and agency principles. Requiring property owners to use limited public boat dock moorings reduces recreational opportunities for the public.

Response: Under this rule, new public docks are not prohibited. When as a result of an appropriate public planning process a need for additional public facilities is shown, we will explore opportunities to construct needed facilities under existing project authorities or seek managing partners willing to construct and maintain such facilities.

Comment: New landscaping is prohibited under the proposed rule while existing authorizations are grandfathered. Since use authorizations for landscaping have not as yet been issued by the local office, these uses would now be prohibited and subject to civil and criminal penalties. Homeowners' efforts to improve the shoreline in accordance with the resource management plan should be encouraged.

Response: New landscaping that falls within the parameters of an existing authorization for private exclusive recreational or residential use will not be considered new private exclusive recreational or residential use as stated under § 429.31(b). Applications submitted for a use authorization for landscaping will be reviewed and evaluated on a case-by-case basis by the local or regional Reclamation office.

Section 429.32 How Reclamation will address existing uses which are otherwise prohibited is discussed in this section.

The majority of comments received relate to this section of the proposed rule. Most of the commenters hold existing use authorizations for cabin sites or other recreational or residential uses, including boat docks, on Reclamation land, facilities, or waterbodies.

In response to comments received and to improve the clarity of this section, we have made several changes to this section as follow:

Paragraph (a) of this section more thoroughly describes the public process we will use when determining whether existing private exclusive recreational or residential uses remain compatible with public needs or project purposes. The minimum timeframe for such reviews has been increased from 5 years to 20 years, except for those instances where part 21 of this title requires reviews at least every 5 years. In addition, clarification was incorporated on how holders of existing use authorizations would be notified of opportunities for public participation.

Paragraphs (b), (c), and (d) of this section now address how and when

reviews of compliance with environmental, health and safety, and financial requirements will be conducted and how those results will be provided to the holder of the use authorization.

Paragraph (e) of this section was added to address the conditions for transferring existing authorizations for private exclusive recreational and residential uses.

Minor editorial changes were made to paragraph (f) (previously paragraph (e)) of this section.

No changes other than re-lettering were made to paragraphs (g), (h) and (j) (previously paragraphs (f), (g) and (i)) of this section.

A clarification was made to paragraph (i) (previously paragraph (h)) of this section concerning what use authorizations could not be renewed, transferred, etc.

Comment: The proposed rule provides no rationale for reversing the regulations previously proposed. Reclamation is not authorized to provide for private exclusive use. The proposed rule would violate Reclamation's Congressional mandate to provide for public recreation. We strongly object to the change in the proposed rule to allow private exclusive use to continue. Please do not privatize our public lands.

Response: Under this rule existing private exclusive recreational and residential uses will be discontinued when, through a public process, a determination is made that the needs of the public or of Reclamation projects are not being adequately met. We will continue to take into consideration the needs of the public in the management of these lands, facilities, and waterbodies.

Comment: The U.S.D.A. Forest Service regulations contain better protections for cabin owners and recognition of appropriate time periods which are omitted in this section.

Response: The U.S.D.A. Forest Service and Reclamation are governed by different Federal statutes, regulations, and policies that determine how both agencies manage cabin sites on Federal lands for which they have management responsibilities.

Comment: The term for compliance reviews should be expanded from 5 years to 20 years and reviews should be done on a lake-wide basis since individual dock compliance will occur at permit renewal.

Response: This section has been revised to reflect that we will conduct reviews for determinations as to compatibility with public needs and project purposes at least once every 20 years unless required otherwise by part 21 of this title. Compliance reviews for the criteria found under § 429.32(b) will be conducted once every 5 years since it is not appropriate to review, for example, an area any less frequently to determine if there are health and safety concerns.

Comment: The 90-day notification period to authorization holders for correction of identified deficiencies is not adequate in areas where weather limitations could impact their ability to bring their use into compliance with the requirements.

Response: Section 429.32(c) allows a minimum of 90 days to be provided to make corrections. Local managers will work with authorization holders to establish reasonable timeframes for curing deficiencies. Additionally, the compliance review reports will be provided to the holder of the use authorization by certified mail, return receipt requested.

Comment: Reclamation has no requirement to inform permit holders of expiring permits which could result in permanent loss of docks for unaware homeowners who miss renewal deadlines. Permit holders should be notified at least 90 days prior to permit expiration dates. Reclamation offices issuing permits should be given discretionary authority to reinstate lapsed permits where lack of notice or other extenuating circumstances can be shown.

Response: Section 429.32(d) has been revised to include written notification to the holder of an authorization for existing private exclusive recreational or residential use with the results of the compliance review that will be completed at least 6 months prior to the expiration date of the authorization. The notification will be sent at least 90 days prior to the expiration of the authorization and will include a reminder that it is time to renew the use authorization.

Comment: All dock permits should be for a term of 20 years.

Response: Under § 429.32(f) renewals of authorizations for all private exclusive recreational or residential will not exceed 20 year terms. The determination as to the appropriate length of the term which may be up to 20 years will be made on a case-by-case basis by the issuing Reclamation office.

Comment: Our existing use authorizations for private exclusive recreational and residential uses will not be renewed upon expiration.

Response: We will renew private exclusive recreational and residential use authorizations provided that the requirements of this final rule continue to be met.

Section 429.33 This section describes the consequences for using Reclamation land, facilities, and waterbodies without authorization.

We made changes to this section compared to the previously proposed rule. Paragraph (a) of this section was rewritten and is now a new paragraph (g) which discusses when legal action under part 423 of this chapter may apply.

Comment: Potential penalties under this proposed rule give Reclamation officials the right to hand out jail terms to people failing to remove docks for which permits have lapsed or been denied.

Response: Reclamation officials cannot unilaterally impose jail terms for violations. Penalties for unauthorized use of Reclamation land, facilities, or waterbodies are established under part 423 of this chapter not under this rule. We have added a new paragraph (g) to this section to clarify that a violation may be subject to legal action including criminal prosecution under part 423 of this chapter.

Comment: Fines levied can be retroactively assessed to the date of infraction. Interest on penalties should accrue from the date an individual is notified in writing of any violation.

Response: We reviewed this issue and determined it is appropriate to charge use fees as well as any penalties and interest from the date that the unauthorized use commenced. Those that use Reclamation land, facilities, or waterbodies without authorization should not be treated the same as those who have complied with the requirements. The application of interest from the date the unauthorized use commenced incorporates this concept.

Subpart I—Decisions and Appeals

Section 429.34 The decisionmaker for Reclamation's final determinations is listed in this section and provides when that decision will be effective.

We made minor editorial changes to this section as compared to the previously proposed rule. We received no comments on this section.

Section 429.35 This section explains if and when an appeal can be made to a final determination.

We made changes to this section as compared to the previously proposed rule to clarify that the appeal process applies to final determinations and to specify that you can appeal a Regional Director's final determination to the Commissioner within 30 days of the

postmark date of a Regional Director's letter of final determination.

Comment: The 30-day appeal period should commence on the date of receipt of decision.

Response: We changed this section to state that you can appeal a Regional Director's final determination to the Commissioner within 30 days of the postmark date of a Regional Director's letter of final determination.

Section 429.36 This section describes if and when a Commissioner's decision can be appealed. The process for and timeliness of such an appeal is also discussed in this section.

We added paragraph (c) to this section to clarify that the Commissioner's decision will take effect upon issuance and remain in effect unless a stay is specifically requested and granted by the Director, Office of Hearing and Appeals.

We received no comments on this section.

Section 429.37 This section discusses what happens to monies owed to the United States during an appeal process.

We made a change to this section as compared to the previously proposed rule to clarify that interest does not accrue when a stay has been issued at any point in the appeal process.

We received no comments on this section.

VI. Distribution Table

The following table indicates each section of the original 1983 rule, as modified in 2006, and where each was incorporated into the proposed rule or not included as the case may be.

Old section	New section
429.1	429.1.
429.2(a)–(n)	429.2.
429.3(a)	429.23.
429.3(b)	429.33(a) and (c).
429.3(c)	429.33(a) and (b).
429.4	429.26.
429.5	Removed.
429.6	429.7(b); 429.12; and 429.14.
429.6(a)	429.10.
429.6(a)(1)–(3)	Removed. Now contained in Application Forms.
429.6(b)	429.16; 429.20–429.22; and 429.26.
429.6(c)(1)–(4)	429.26.
429.6(d)(1)–(4)	429.13(a) and (b).
429.6(e)	429.19; 429.22.
429.6(f)	429.23–429.25.
429.6(g)	Removed. See Preamble.
429.7(a)	429.27–429.30.
429.7(b)	429.6.
429.7(c)	Removed.
429.7(d)	429.28(a)(3).
429.7(e)	429.28(a)(1).
429.7(f)	Removed.
429.8	429.28(a)(2), (3), and (4).
429.9(a)	429.28(a)(1).
429.9(b)	429.28(b).
429.10(a)	429.34(a) and (b); 429.35(a), (b), and (c).
429.10(b)	429.36(a) and (b).
429.11	Removed.
429.12(a)	429.1; 429.3–429.6.
429.12(b)	429.4(a).
429.12(c)	429.26.
429.12(d)	429.4(g).
429.12(e)	Removed.
429.13	429.1; 429.3.

VII. Procedural Requirements

1. Regulatory Planning and Review (Executive Order (E.O.) 12866)

OMB has determined that this rule is not a significant rule and has not reviewed this rule under the requirements of E.O. 12866. We have evaluated the impacts of this rule as required by E.O. 12866 and have determined that it is not a significant regulatory action. The results of our evaluation follow:

(a) This rule will not have an effect of $100 million or more on the economy. It would not adversely affect in any material way the economy, productivity, competition, jobs, environment, public health or safety, or State, local, and tribal governments or communities. The original rule covered only Reclamation lands. It was modified in 2006 to explicitly incorporate uses of Reclamation facilities and waterbodies. The proposed rule requires collecting an initial, nonrefundable deposit of $100 (referred to as the ''application fee''), the recovery of additional administrative costs in excess of the initial application fee, and a fee for the use of Reclamation land. It should be noted that this rule reduces the initial application fee from $200 ($150 refundable under specific circumstances) to a nonrefundable $100 application fee. The rule does not change the requirement for full cost recovery of additional administrative costs in excess of the $100 nonrefundable application fee or the requirement to collect the fee for use of Reclamation land, facilities, and waterbodies. Like the current rule, this rule provides for waivers or reductions of costs and fees under unique circumstances as determined to be appropriate by us in compliance with OMB Circular A–25.

(b) This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Since this rule is specific to Reclamation land, facilities, and waterbodies, any impact on another agency would be minimal.

Nevertheless, nothing in this rule precludes us from cooperating with other agencies on proposed actions that may impact or require the use of Reclamation's land, facilities, and waterbodies. An example of our working with other agencies is this rule's requirement to use Standard Form (SF) 299, Application for Transportation and Utility Systems and Facilities on Federal Lands, under E.O. 13327. The purpose of E.O. 13327 is to promote the efficient and economical use of America's real property assets. This proposed rule also requires the use of Form 7–2540, Bureau of Reclamation Right-of-Use Application Form, for all other requested uses.

(c) This rule does not alter the budgetary effects of entitlements, grants, user fees, concessions, loan programs, water contracts, management agreements, or the rights and obligations of their recipients.

(d) This rule does not raise any novel legal or policy issues. The recovery of administrative fees and charging of application and use fees are required by the IOAA, OMB Circular A–25, and the current rule.

2. Regulatory Flexibility Act

The Department of the Interior (Interior) certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. A small business's wish to apply to use Reclamation land, facilities, or waterbodies is strictly voluntary. One of the purposes of this rule is to provide small business applicants and others with the requirements they must follow when applying for such a use. An Initial Regulatory Flexibility Analysis is not required and, accordingly, a Small Entity Compliance Guide is not required.

3. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

(a) Does not have an annual effect on the economy of $100 million or more. There are no major changes in the costs or fees charged to applicants.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions. It is anticipated that this rule will not result in significant increases in administrative costs or use fees for any one applicant, but it will clarify for the public the basis for determining such costs and fees.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The cost to the private sector requesting use of Reclamation land, facilities, or waterbodies is a small fraction of a percent of an individual entity's total cost of doing business. Under this rule, such requests are made on a voluntary basis.

4. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate or a requirement to expend monies on the part of State, local, or tribal governments or communities, or the private sector of $100 million or more annually. This rule does not have a significant or unique effect on State, local, or tribal governments or communities, or the private sector. Requests from any of these entities to use Reclamation land, facilities, and waterbodies are strictly voluntary. If a requested use is authorized by Reclamation, the recovery of administrative costs and the payment of use fees associated with such use are required by law, OMB Circular, and regulation. There are provisions to allow a reduction or waiver of such costs and fees, at our discretion, when specific criteria are met. We are not imposing a duty, requirement, or mandate on State, local, or tribal governments or communities, or the private sector to request such uses. Thus, a statement containing information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630 and E.O. 13406)

Under the criteria in E.O. 12630 and E.O. 13406, this proposed rule does not have any implications of takings of property rights. This rule sets forth the requirements for applying to use Reclamation land, facilities, and waterbodies. It also clarifies the basis for charging application and use fees, and for the recovery of administrative costs under the requirements of the IOAA and OMB Circular A–25. A Takings Implication Assessment is not required.

6. Federalism (E.O. 13132)

Under the criteria in E.O. 13132, the rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it 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. A Federalism Assessment is not required.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria of E.O. 13175, Reclamation has evaluated this rule and determined that it would have no substantial effects on federally recognized Indian Tribes. This rule does not apply to land under the sovereign ownership of federally recognized Indian Tribes.

9. Paperwork Reduction Act

This rule does require information collection from 10 or more applicants and a submission under the Paperwork Reduction Act (PRA) is required. However, the information collection requirements associated with this rule have been previously submitted to OMB for review and have received approval under the requirements of the PRA. The SF 299, Application for Transportation and Utility Systems and Facilities on Federal Lands (used for access across our land, facilities, and waterbodies), was authorized by OMB No. 1004–0189, expiring on November 30, 2008. OMB also has approved the information collection in this rule (using the Bureau of Reclamation Right-of-Use Application Form 7–2540) and has assigned approval number 1006–0003, expiring on March 31, 2009. We estimate the burden associated with this latter information collection to be 2 hours per application. We use the information provided by applicants to determine the nature of the requested use and whether the requested use of our land, facilities, or waterbodies interferes with project operations or project security, or may create other issues. The information provided on the applications is also used to ensure, where appropriate and applicable, the technical and financial

resources of the applicant are sufficient to complete the construction of the infrastructure or project.

10. National Environmental Policy Act of 1969

This rule does not constitute a major Federal action and would not have a significant effect on the quality of the human environment. Therefore, this rule does not require the preparation of an environmental assessment or environmental impact statement under the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and its regulations.

11. Information Quality Act

In developing this rule, there was no need to conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

12. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in the E.O. 13211. A Statement of Energy Effects is not required.

13. Clarity of This Regulation

We are required by E.O. 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

—Be logically organized;
—Use the active voice to address readers directly;
—Use clear language rather than jargon;
—Be divided into short sections and sentences; and
—Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 429

Administrative practice and procedures, Public lands, Reclamation, Recreation and recreation areas, and Land rights-of-way.

Dated: November 17, 2008.

Kris D. Polly,

Acting Assistant Secretary—Water and Science.

■ For the reasons stated in the preamble, the Bureau of Reclamation revises 43 CFR part 429 as follows:

PART 429—USE OF BUREAU OF RECLAMATION LAND, FACILITIES, AND WATERBODIES

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Sec.

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Authority: 43 U.S.C. 373; 43 U.S.C. 373b; 43 U.S.C. 387; 43 CFR part 21; Public Law 108–447, Title VIII; 31 U.S.C. 9701, as amended.

Subpart A—Purpose, Definitions, and Applicability

§ 429.1 What is the purpose of this part?

The purpose of this part is to notify the public that any possession or occupancy of any portion of, and the extraction or disturbance of any natural resources from Reclamation land, facilities, or waterbodies are prohibited without written authorization from Reclamation, unless excepted as listed in § 429.4. This part describes:

(a) How to apply to Reclamation for a use authorization to allow your activity on Reclamation land, facilities, and waterbodies;

(b) How Reclamation reviews and processes your application, including the criteria for approval or denial of your application;

(c) The requirement for collection of application and use fees and the recovery of administrative costs;

(d) How Reclamation determines and collects costs and fees;

(e) Prohibited uses on Reclamation land, facilities, and waterbodies;

(f) How Reclamation will address existing authorized uses which are otherwise prohibited, including the criteria for approval or denial of requests to renew these use authorizations;

(g) The process and penalties associated with resolution of unauthorized uses; and

(h) How to appeal an action or determination made under this part.

§ 429.2 What definitions are used in this part?

The following definitions are used in this part:

Administrative costs means all costs incurred by Reclamation in processing your application and all costs associated with evaluating, issuing, monitoring, and terminating your use authorization on Reclamation land, facilities, and waterbodies. Administrative costs are distinct and separate from application and use fees and typically include, but are not limited to:

(1) Determining the use fee;

(2) Evaluating and documenting environmental and cultural resources compliance;

(3) Performing engineering review;

(4) Preparation of the use authorization; and

(5) Personnel and indirect costs directly associated with these actions.

Applicant means you as any person or entity (such as a private citizen, business, non-governmental organization, public entity, Indian tribe, or foreign government) who submits an application requesting use of Reclamation land, facilities, and waterbodies.

Application means either Form 7–2540 or SF 299. The choice of application form is dependent on the type of use requested.

Application fee means a $100 nonrefundable charge, which you must submit with your application to cover the costs of our initial review of your request. Application fees are distinct and separate from administrative costs and use fees.

Commissioner means the senior executive of the Bureau of Reclamation, Department of the Interior.

Consent document means a written agreement or notification listing conditions which will prevent unreasonable interference with our easement on non-Reclamation land.

Cultural resource means any prehistoric, historic, architectural, sacred, or traditional cultural property and associated objects and documents that are of interest to archaeology, anthropology, history, or other associated disciplines. Cultural resources include archaeological resources, historic properties, traditional cultural properties, sacred sites, and cultural landscapes that are associated with human activity or occupation.

Easement refers to an interest in land that consists of the right to use or control the land for a specific purpose, but does not constitute full ownership of the land.

Environmental compliance means complying with the requirements of the National Environmental Policy Act; the Endangered Species Act; the Clean Water Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; applicable regulations associated with these statutes; and other related laws and regulations.

Form 7–2540 means the Bureau of Reclamation Right-of-Use Application form required for all proposed uses of Reclamation land, facilities, and waterbodies, except those associated with construction and/or placement of transportation, communication, and utility systems and facilities.

Grantee means you as the recipient or holder of a use authorization regardless of the contractual format.

Interior means the United States Department of the Interior.

Managing partner means a Federal or non-Federal public entity that manages land, facilities, or waterbodies through a management agreement with Reclamation entered into pursuant to the Federal Water Project Recreation Act, as amended.

Part 21 of this title means Title 43 of the Code of Federal Regulations part 21, which is titled Occupancy of Cabin Sites on Public Conservation and Recreation Areas.

Part 423 of this chapter means Title 43 of the Code of Federal Regulations part 423, which is titled Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies.

Possession or occupancy and possess or occupy mean to control, use, or reside on Reclamation land, facilities, or waterbodies.

Private exclusive recreational or residential use means any use that involves structures or other improvements used for recreational or residential purposes to the exclusion of public uses that are not associated with the official management of a Reclamation project. This includes, but is not limited to the following:

(1) Cabin sites and associated improvements (including those currently defined in part 21 of this title); mobile homes, residences, outbuildings, and related structures; and associated landscaping, patios, decks, and porches;

(2) Boat houses, docks, moorings, piers, and launch ramps;

(3) Floating structures or buildings, including moored vessels used as residences or unauthorized business sites;

(4) Sites for such activities as hunting, fishing, camping, and picnicking (other than transitory uses allowed under part 423 of this chapter) that attempt to exclude general public access; and

(5) Access routes to private land, facilities, or structures when other reasonable alternative means of access is available or can be obtained.

Public entity means States, political subdivisions or agencies thereof; public and quasi-governmental authorities and agencies; and agencies of the Federal Government.

Public needs mean the recreational requirements of the general public at areas where existing authorized private exclusive recreational or residential uses are present.

Reclamation means the Bureau of Reclamation, United States Department of the Interior.

Reclamation facility means any facility under our jurisdiction. The term includes, but is not limited to, buildings, canals, dams, ditches, drains, fish and wildlife facilities, laterals, powerplants, pumping plants, recreation facilities, roads, switchyards, transmission and telecommunication lines, and warehouses.

Reclamation land means any land under the jurisdiction of, or administered by, Reclamation and may include, but is not limited to, the following:

(1) All land acquired by Reclamation through purchase, condemnation, exchange, or donation for Reclamation project and water related purposes;

(2) All land withdrawn by Reclamation from the public domain for Reclamation purposes; and

(3) All interests in land acquired by Reclamation, including easements and rights exercised by the United States under the 1890 Canal Act (43 U.S.C. 945).

Reclamation law means the Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 371 *et seq.*), and all Acts which supplement or amend the 1902 Act.

Reclamation project means any land, facilities, or waterbodies used for water supply, water delivery, flood control, hydropower, or other authorized purposes including fish, wildlife, and recreation administered by Reclamation under Federal laws.

Reclamation waterbodies means any body of water situated on Reclamation land and under Reclamation jurisdiction. Examples of Reclamation waterbodies include, but are not limited to, reservoirs, lakes, and impoundments.

Regional Director means any one of the representatives of the Commissioner, or their delegates, who are responsible for managing their respective region's land, facilities, and

waterbodies and for the decisions made under this part.

Standard Form (SF) 299 means the form titled Application for Transportation and Utility Systems and Facilities on Federal Lands used when requesting permission for construction and/or placement of transportation, communication, or utility systems and facilities.

Unauthorized use means use of Reclamation land, facilities, and waterbodies without proper authorization.

Use authorization means a document that defines the terms and conditions under which we will allow you to use Reclamation land, facilities, and waterbodies. Use authorizations can take the form of easements, leases, licenses, permits, and consent documents. This document is also referred to as a ''right-of-use'' in part 423 of this chapter.

Use fee means the amount due to Reclamation for the use of Federal land, facilities, or waterbodies under our jurisdiction or control. Use fees are distinct and separate from application fees and administrative costs.

Valuation means the method used to establish the fee for a use authorization by appraisal, waiver valuation, or other sound or generally accepted business practice.

Water user organization means any legal entity established under State law that has entered into a contract with the United States pursuant to the Federal reclamation laws.

We, us, or *our* mean Reclamation.

You, your, I, me, or *my,* mean an applicant, grantee, or unauthorized user.

§ 429.3 What types of uses are subject to the requirements and processes established under this part?

Possession or occupancy of, or extraction or removal of natural resources from, Reclamation land, facilities, or waterbodies require a use authorization in accordance with this part. Typical uses of or activities on Reclamation land, facilities, or waterbodies regulated by this part include, but are not limited to the following:

(a) Commercial filming and photography;

(b) Commercial guiding and outfitting;

(c) Commercial or organized sporting events;

(d) Grazing, farming, and other agricultural uses;

(e) Infrastructure, such as transportation, telecommunications, utilities, and pipelines;

(f) Organized recreational activities, public gatherings, and other special events that involve the possession or occupancy of Reclamation lands;

(g) Removal of, or exploration for, sand, gravel, and other mineral resources;

(h) Timber harvesting, or removal of commercial forest products or other vegetative resources; and

(i) Any other uses deemed appropriate by Reclamation, subject to the exclusions listed in § 429.4.

§ 429.4 What types of uses are not subject to the requirements and processes established under this part?

(a) Individual, non-commercial use of Reclamation land, facilities, or waterbodies for occasional activities such as hiking, camping for periods of 14 days or less during any period of 30 consecutive days, sightseeing, picnicking, hunting, swimming, boating, and fishing, consistent with applicable laws, regulations and policies. Public conduct associated with these activities is governed by part 423 of this chapter;

(b) Buildings and structures used by concessionaires or managing partners to facilitate their operations or that are made available by them for the general, non-exclusive use of the public. Examples include, but are not limited to the following:

(1) Boat docks available for short-term use by the public;

(2) Marina slips available for rent by the public;

(3) Publicly available boat ramps;

(4) Houseboats available for short-term rent by the public;

(5) Stores and restaurants;

(6) Employee housing; and

(7) Rental cabins, hotels, campgrounds, and other short-term lodging facilities.

(c) While not subject to other requirements and processes established under this part, the following types of uses must be in compliance with the requirements in subpart H of this part:

(1) Recreational activities at sites managed by non-Federal managing partners under Public Law 89–72, titled Federal Water Project Recreation Act, July 9, 1965;

(2) Activities managed by other Federal agencies or Interior bureaus by agreement or under other authority;

(3) Activities at sites directly managed by Reclamation where fees or fee schedules are established for general public recreation use;

(4) Uses authorized under concession contracts on Reclamation land, facilities, and waterbodies;

(5) Reclamation contracts for water supply or water operations;

(6) Authorized operation and maintenance activities on Reclamation land, facilities, and waterbodies undertaken by water user organizations, or their contractors, or by Reclamation contractors;

(7) Agreements and real property interests granted for the replacement or relocation of facilities, such as highways, railroads, telecommunication, or transmission lines or infrastructure governed by Section 14 of the Reclamation Project Act of August 4, 1939 (43 U.S.C. 389). Payments to equalize land values may still be required and administrative costs may still be recovered; and

(8) Activities specifically authorized under other Federal statutes or regulations.

§ 429.5 Who is authorized to issue use authorizations under this part?

Unless otherwise provided by law or regulation, only Reclamation or another Federal agency acting for Reclamation under delegated authority is authorized to issue use authorizations that convey an interest in Reclamation land, facilities, or waterbodies. Recreation managing partners under the Federal Water Projects Recreation Act, 16 U.S.C. 4601 *et seq.,* and water user organizations who have assumed responsibility for operation and maintenance of Reclamation land, facilities, or waterbodies, and provide a copy of the use authorization to the local Reclamation office, pursuant to a contract with Reclamation may issue limited use authorizations to third parties for activities on Reclamation land, facilities, or waterbodies when all of the following apply:

(a) The recreation managing partner or water user organization is authorized to do so under its contract with Reclamation;

(b) Such limited use authorizations do not convey ownership or other interest in the Federal real property;

(c) The uses authorized are not permanent or for an indefinite period;

(d) The limited use authorization does not provide for an automatic right of renewal;

(e) The limited use authorization is fully revocable at the discretion of Reclamation; and

(f) All revenues collected for the use of Reclamation land, facilities, and waterbodies are handled in compliance with all statutory, regulatory, and policy requirements.

§ 429.6 When must water user organizations also approve use authorizations?

(a) Use authorizations for easements and rights-of-way for periods in excess of 25 years are also subject to approval

from water user organizations under contract obligation for repayment of the project or division. This requirement does not apply to any other type of use authorizations.

(b) At a minimum, the appropriate water user organizations will be notified of all use authorizations prior to their issuance to avoid potential conflicts between the requested use authorization and the water user organizations' need to operate and maintain the facilities for which they have contractual responsibility.

(c) At the discretion of the responsible Regional Director, concurrence of the appropriate water user organizations not addressed in paragraph (a) of this section may be requested.

Subpart B—Proposed Uses Involving Reclamation Easements

§ 429.7 Can I use land where Reclamation holds an easement?

(a) To prevent conflicts where Reclamation holds an easement on land owned by others, you should submit an application for the proposed use. If after review of the application, Reclamation determines that your requested use would not unreasonably interfere with Reclamation's easement, a consent document may be issued to you. The consent document will contain the conditions with which you must comply to ensure that your use will not unreasonably interfere with Reclamation's use of its easement.

(b) In accordance with subpart C of this part, you should submit either SF 299 or Form 7–2540 to the local Reclamation office to request a consent document.

(c) If you are not the underlying landowner, you must also secure the permission of the landowner for your requested use of the area covered by Reclamation's easement.

§ 429.8 Is there a fee for uses involving a Reclamation easement?

Reclamation will not charge a use fee for a consent document. However, depending upon the complexity of your requested use and issues associated with it, Reclamation may charge an application fee and administrative costs, unless waived in accordance with subpart F of this part.

Subpart C—Requesting Authorization To Use Reclamation Land, Facilities, and Waterbodies

§ 429.9 What should I do before filing an application?

Before filing an application, it is important that you contact the local Reclamation office to discuss your proposed use. This discussion can help expedite your application process.

§ 429.10 What application form should I use?

You must use one of the following application forms depending on the nature of your requested use:

(a) Use SF 299 to request a use authorization for the placement, construction, and use of energy, transportation, water, or telecommunication systems and facilities on or across all Federal property including Reclamation land, facilities, or waterbodies.

Examples of such uses are:

(1) Canals;

(2) Communication towers;

(3) Fiber-optics cable;

(4) Pipelines;

(5) Roads;

(6) Telephone lines; and

(7) Utilities and utility corridors.

(b) Use Form 7–2540 to request any other type of use authorization. Examples of such uses are:

(1) Commercial filming and photography;

(2) Commercial guiding and outfitting;

(3) Commercial or organized sporting events;

(4) Grazing, farming, and other agricultural uses;

(5) Organized recreational activities, public gatherings, and other special events;

(6) Removal of, or exploration for, sand, gravel, and other mineral materials;

(7) Timber harvesting, or removal of commercial forest products or other vegetative resources; and

(8) Any other uses deemed appropriate by Reclamation.

(c) Application forms may not be required where Reclamation solicits competitive bids.

§ 429.11 Where can I get the application forms?

Both forms can be obtained from any Reclamation office or from our official internet Web site at *http://www.usbr.gov*. These forms contain specific instructions for application submission and describe information that you must furnish. However, when you submit either form to your local Reclamation office for review, the form must contain your original signature as the applicant.

§ 429.12 Where do I file my application?

File your completed and signed application, including the $100 nonrefundable application fee, with the Reclamation office having jurisdiction over the land, facility, or waterbody associated with your request. Reclamation office locations may be found on *http://www.usbr.gov*, the official Reclamation Internet Web site.

§ 429.13 How long will the application review process take?

(a) Reclamation will acknowledge in writing your completed and signed application and application fee within 30 calendar days of receipt. Reclamation may request additional information needed to process your application, such as legal land descriptions and detailed construction specifications.

(b) The processing time depends upon the complexity of your requested use, issues associated with it, and the need for additional information from you.

(c) Should your requested use be denied at any time during the review process, Reclamation will notify you in writing of the basis for the denial.

§ 429.14 What criteria will Reclamation consider when reviewing applications?

Reclamation will consider the following criteria when reviewing applications:

(a) Compatibility with authorized project purposes, project operations, safety, and security;

(b) Environmental compliance;

(c) Compatibility with public interests;

(d) Conflicts with Federal policies and initiatives;

(e) Public health and safety;

(f) Availability of other reasonable alternatives; and

(g) Best interests of the United States.

§ 429.15 Is Reclamation required to issue a use authorization?

No. The issuance of a use authorization is at Reclamation's discretion. At a minimum, the criteria listed at § 429.14 must be considered prior to issuance of any use authorizations. Not all requests will be authorized. If issued, Reclamation will provide only the least estate, right, or possessory interest needed to accommodate the approved use.

Subpart D—Application Fees and Administrative Costs

§ 429.16 How much is the application fee and when should it be paid?

You must remit a nonrefundable application fee of $100 to cover costs associated with our initial review of your application, unless the payment is waived pursuant to subpart F of this part. This initial review will determine if your requested use is appropriate for consideration and not likely to interfere with Reclamation project purposes or operations.

§ 429.17 When will Reclamation collect administrative costs?

Reclamation will collect, in advance, its administrative costs for processing your application, except as provided under subpart F of this part.

§ 429.18 When do I have to pay the administrative costs?

(a) Following the initial review, you will be notified in writing whether your application appears to be appropriate for further processing. At that time, Reclamation will give you an initial estimate of administrative costs required to continue processing your application.

(b) You must pay these initial, estimated administrative costs before Reclamation can continue to process your application, unless you are granted a waiver of administrative costs under subpart F of this part. If payment is not received within 90 days after the estimate is provided to you, Reclamation may close your file. If this occurs and you later wish to proceed, you must submit both a new application and another $100 nonrefundable application fee.

§ 429.19 What happens if the initial estimate for administrative costs is insufficient?

If the initial estimate to cover Reclamation's administrative costs is found to be insufficient, Reclamation will notify you in writing of the additional amount needed. You must pay the amount requested before Reclamation will continue processing your application.

§ 429.20 Can I get a detailed explanation of the administrative costs?

Yes, you are entitled to receive an explanation of all administrative costs relevant to your specific application. You must request this information in writing from the Reclamation office where you submitted your application.

§ 429.21 If I overpay Reclamation's administrative costs, can I get a refund?

If, in reviewing your application, Reclamation uses all the monies you have paid, you will not receive a refund regardless of whether you receive a use authorization. If the money collected from you exceeds administrative costs, a refund of the excess amount will be made to you consistent with Reclamation's financial policies.

§ 429.22 Can Reclamation charge me additional administrative costs after I receive a use authorization?

(a) After you receive your use authorization, Reclamation may charge you for additional administrative costs incurred for activities such as:

(1) Monitoring your authorized use over time to ensure compliance with the terms and conditions of your use authorization; and

(2) Periodic analysis of your long-term use to adjust your use fee to reflect current conditions.

(b) If your additional payment is not received by Reclamation within 90 days after notification to you in writing of the additional administrative costs, Reclamation may take action to terminate your use authorization.

Subpart E—Use Fees

§ 429.23 How does Reclamation determine use fees?

The use fee is based on a valuation or by competitive bidding. Use fees may be adjusted as deemed appropriate by Reclamation to reflect current conditions, as provided in the use authorization.

§ 429.24 When should I pay my use fee?

(a) If Reclamation offers you a use authorization, you must pay the use fee in advance, unless you are granted a waiver under subpart F of this part.

(b) Your use authorization will clearly state the use fee. Should periodic payments apply, your use authorization will also describe when you should pay those periodic use fees.

§ 429.25 How long do I have to submit my payment for the use fee and accept the offered use authorization?

You have 90 days to accept and return the use authorization and required fees, otherwise Reclamation may consider the offer to be rejected by you and your file may be closed. If this occurs and you later wish to proceed, you must submit a new application and another $100 nonrefundable application fee. You may not commence your use of Reclamation's land, facilities, or waterbodies until Reclamation has issued a use authorization to you. A use authorization will only be issued upon receipt by Reclamation of all required costs and fees, and the use authorization signed by you.

Subpart F—Reductions or Waivers of Application Fees, Administrative Costs, and Use Fees

§ 429.26 When may Reclamation reduce or waive costs or fees?

(a) As determined appropriate and approved and documented by the applicable Regional Director, the application fees may be waived, and charges for administrative costs or use fees may be waived or reduced as indicated by a ✓ in the following table:

Situations where costs and fees may be reduced or waived	Application fee	Administrative costs	Use fee
(1) The use is a courtesy to a foreign government or if comparable fees are set on a reciprocal basis with a foreign government	✓	✓	✓
(2) The use is so minor or short term that the cost of collecting fees is equal to or greater than the value of the use	✓	✓	✓
(3) The use will benefit the general public with no specific entity or group of beneficiaries readily identifiable	✓	✓	✓
(4) Applicant is a public entity or Indian tribe	✓	✓	✓
(5) Applicant is a non-profit or educational entity and the use provides a general public benefit	✓	✓	✓
(6) Applicant is a rural electric association or municipal utility or cooperative	✓	✓	✓
(7) The use directly supports United States' programs or projects	✓	✓	✓
(8) The use secures a reciprocal land use of equal or greater value to the United States	✓	✓	✓
(9) Applicant for a consent document is the underlying owner of the property subject to Reclamation's easement	✓	✓	([1])
(10) The use is issued under competitive bidding	✓	✓	([2])

[1] Not applicable.
[2] Set by Bid.

(b) When a statute, executive order, or court order authorizes the use and requires specific treatment of administrative cost recovery and collection of use fees associated with that use, that requirement will be followed by Reclamation.

Subpart G—Terms and Conditions of Use Authorizations

§ 429.27 What general information appears in use authorizations?

Each use authorization will contain:

(a) An adequate description of the land, facilities, or waterbodies where the use will occur;

(b) A description of the specific use being authorized together with applicable restrictions or conditions that must be adhered to;

(c) The conditions under which the use authorization may be renewed, terminated, amended, assigned or transferred, and/or have the use fee adjusted; and

(d) Primary points of contact and other terms and conditions.

§ 429.28 What terms and conditions apply to all use authorizations?

(a) By accepting a use authorization under this part, you agree to comply with and be bound by the following terms and conditions during all construction, operation, maintenance, use, and termination activities:

(1) The grantee agrees to indemnify the United States for, and hold the United States and all of its representatives harmless from, all damages resulting from suits, actions, or claims of any character brought on account of any injury to any person or property arising out of any act, omission, neglect, or misconduct in the manner or method of performing any construction, care, operation, maintenance, supervision, examination, inspection, or other activities of the grantee.

(2) The United States, acting through Reclamation, Department of the Interior, reserves rights to construct, operate, and maintain public works now or hereafter authorized by the Congress without liability for termination of the use authorization or other damage to the grantee's activities or facilities.

(3) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization in the event of a natural disaster, a national emergency, a need arising from security requirements, or an immediate and overriding threat to public health and safety.

(4) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization for activities other than existing authorized private exclusive recreational or residential use as defined under § 429.2 if Reclamation determines that any of the following apply:

(i) The use has become incompatible with authorized project purposes, project operations, safety, and security;

(ii) A higher public use is identified through a public process described at § 429.32(a)(1); or

(iii) Termination is necessary for operational needs of the project.

(5) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization if Reclamation determines that the grantee has failed to use the use authorization for its intended purpose. Further, failure to construct within the timeframe specified in the terms of the use authorization may constitute a presumption of abandonment of the requested use and cause termination of the use authorization.

(6) Reclamation may, at any time and at no cost or liability to the United States, terminate any use authorization if the grantee fails to comply with all applicable Federal, State, and local laws, regulations, ordinances, or terms and conditions of any use authorization, or to obtain any required permits or authorizations.

(b) The Regional Director may, upon advice of the Solicitor, modify these terms and conditions with respect to the contents of the use authorization to meet local and special conditions.

§ 429.29 What other terms and conditions may be included in my use authorization?

Reclamation may include additional terms, conditions, or requirements that address environmental law compliance, the protection of cultural and natural resources, other interests of the United States, and local laws and regulations.

§ 429.30 May use authorizations be transferred or assigned to others?

Your use authorization may not be transferred or assigned to others without prior written approval of Reclamation, unless specifically provided for in your use authorization or as provided under subpart H of this part for existing private exclusive recreational and residential uses. Should you wish to transfer or assign your use authorization to another individual or entity, you must contact the Reclamation office that issued your use authorization prior to taking such action.

Subpart H—Prohibited and Unauthorized Uses of Reclamation Land, Facilities, and Waterbodies

§ 429.31 What uses are prohibited on Reclamation land, facilities, and waterbodies?

(a) Reclamation prohibits any use that would not comply with part 423 of this chapter.

(b) Reclamation prohibits any use that would result in new private exclusive recreational or residential use of Reclamation land, facilities, or waterbodies as of the effective date of this part. Improvements that are within the terms and conditions of an existing authorization will not be considered new private exclusive recreational or residential use.

§ 429.32 How will Reclamation address currently authorized existing private exclusive recreational or residential uses?

The administration and potential renewal of use authorizations, existing as of January 1, 2008, for private exclusive recreational or residential uses of Reclamation land, facilities, and waterbodies, as defined in this part, will be administered in accordance with the following requirements.

(a) Existing private exclusive recreational or residential uses must be compatible with public needs and with authorized project purposes, project operations, safety, and security. A review of whether existing private exclusive recreational or residential uses is compatible with public needs and authorized project purposes, project operations, safety, and security will be made at least once every 20 years, except where part 21 requires a more frequent review.

(1) Reclamation will only make final determinations regarding the compatibility of existing private exclusive recreational or residential uses with public needs or project purposes through a public process involving one or more public meetings. Examples of such public processes include resource management plan development, recreation demand analysis studies, and project feasibility studies.

(2) Reclamation will notify in writing all potentially affected holders of existing authorizations for private exclusive recreational or residential use regarding the opportunities for public participation when any action is proposed that could lead to an incompatibility determination.

(3) Determinations that existing private exclusive recreational or residential uses are not compatible with public needs will be published in the **Federal Register**.

(4) If a determination of incompatibility with public needs is made, affected use authorizations may be extended up to 5 years from the date of publication in the **Federal Register**, if the Regional Director determines that such extension is necessary to the fair and efficient administration of this part.

(b) Reclamation will conduct a compliance review of all existing private exclusive recreational or residential uses at least once every 5 years to determine if the following criteria are being met:

(1) Environmental requirements;

(2) Public health and safety requirements; and

(3) Current in financial obligations to Reclamation.

(c) Reclamation will provide the holder of the use authorization with a written report of the results of the compliance review by certified mail, return receipt requested. The report will state whether the existing use meets the required criteria listed in paragraph (b) of this section and will list any deficiencies that can be corrected. A minimum of 90 days will be provided to make corrections identified in the report. Failure to correct the deficiencies within the time provided in the report will result in termination of the use authorization.

(d) In addition to the compliance reviews described above, Reclamation will initiate a review of the existing private exclusive recreational or residential uses for compliance with the required criteria listed in paragraph (b) of this section at least 6 months prior to the expiration date of the existing use authorization. Reclamation will provide the holder of the use authorization with a written report of the results of the compliance review results by certified mail, return receipt requested. The report will state whether the existing use meets the required criteria under this section as applicable and will list any deficiencies that must be corrected prior to a renewal of the use authorization. A minimum of 90 days will be provided prior to the expiration of the permit to make corrections identified in the report. In addition, this report will serve as a reminder that it is time to seek renewal of the use authorization and provide information on the process that needs to be followed.

(e) Reclamation must be notified in advance by certified mail, return receipt requested, of any transfers of use authorizations for existing private exclusive recreational or residential uses.

(f) Any renewal of use authorizations for existing private exclusive recreational or residential uses of Reclamation land, facilities, and waterbodies will not exceed 20-year terms. Any such renewals will be subject to the periodic reviews described in paragraphs (a) and (b) of this section and these reviews could potentially result in the termination of the use agreement prior to the end of the term of years.

(g) Upon non-renewal or termination of a use authorization for an existing private exclusive recreational or residential use of Reclamation land, facilities, and waterbodies, the grantee will remove any improvements from the site within 90 days from the date of termination or non-renewal of the use authorization. The grantee will return the property as near as possible to its original undisturbed condition. Any property not removed within 90 days may be removed by Reclamation at the expense of the prior grantee.

(h) Renewal decisions of use authorizations for existing private exclusive recreational or residential uses located on Reclamation land, facilities, and waterbodies will be made by the Regional Director. If the Regional Director determines that deficiencies identified under paragraph (d) of this section cannot be corrected prior to the expiration date of the use authorization, the use authorization may be extended for a period not to exceed 6 months.

(i) Requests for the renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses that expired and were not renewed prior to the effective date of this part and were not renewed or are subsequently not renewed or terminated under the procedures of this section will be considered requests for uses prohibited under § 429.31 and will not be approved. Conversely, requests for the renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses that were in existence on the effective date of these regulations and that are in compliance with all requirements of the applicable use authorization at the time a request is made will not be considered requests for uses prohibited under § 429.31. Requests for renewal, extension, or reissuance of use authorizations for private exclusive recreational or residential uses must be made by submitting Form 7–2540 as stated under § 429.10(b) and in compliance with subpart D of this part.

(j) Unauthorized existing private exclusive recreational or residential uses will be administered under §§ 429.31 and 429.33 and part 423 of this chapter.

§ 429.33 What are the consequences for using Reclamation land, facilities, and waterbodies without authorization?

(a) Reclamation may seek to collect the following:

(1) All administrative costs incurred by Reclamation in resolving the unauthorized use;

(2) All costs of removing structures, materials, improvements, or any other real or personal property;

(3) All costs of rehabilitation of the land, facilities, or waterbodies as required by Reclamation.

(4) The use fee that would have applied had your use been authorized from the date your unauthorized use began;

(5) Interest accrued on the use fee from the date your unauthorized use began as specified in paragraph (a)(4) of this section; and

(6) The interest charge rate shall be the greater of either the rate prescribed quarterly in the **Federal Register** by the Department of the Treasury for application to overdue payments or the interest rate of 0.5 percent per month. The interest charge rate will be determined as of the due date and remain fixed for the duration of the delinquent period.

(b) As an unauthorized user, you will receive a written notice in which Reclamation will outline the steps you need to perform to cease your unauthorized use.

(c) If appropriate, you will receive a final determination letter detailing the applicable costs and fees, as set forth under paragraph (a) of this section, which must be paid to Reclamation for your unauthorized use. Payment must be made within 30 days of receipt of this letter unless Reclamation extends this deadline in writing. Failure to make timely payment may result in administrative or legal action being taken against you.

(d) Reclamation may determine that issuing a use authorization to you for an existing unauthorized use is not appropriate; and may deny future use applications by you because of this behavior. As noted at § 429.15, use authorizations are always issued at Reclamation's discretion.

(e) If, however, your unauthorized use is deemed by Reclamation to be an unintentional mistake, consideration may be given to issuing a use authorization provided that you qualify and meet the criteria at § 429.14; and, in addition to the normal costs, you agree to pay the following:

(1) The use fee that would have been owed from the date your unauthorized use began; and

(2) Interest accrued on the use fee from the date your unauthorized use began as specified in paragraph (f)(1) of this section.

(f) Under no circumstances will your unauthorized use or payment of monies to the United States in association with an unauthorized use either:

(1) Create any legal interest or color of title against the United States; or

(2) Establish any right or preference to continue the unauthorized use.

(g) Under part 423 of this chapter, unauthorized use of Reclamation land, facilities, or waterbodies is a trespass against the United States. You may be subject to legal action including criminal prosecution as specified under § 423.71.

Subpart I—Decisions and Appeals

§ 429.34 Who is the decisionmaker for Reclamation's final determinations?

(a) The appropriate Regional Director, or the Regional Director's designee, makes any final determination associated with an action taken under this rule and will send that final determination in writing to you by mail.

(b) The Regional Director's final determination will take effect upon the date of the final determination letter.

§ 429.35 May I appeal Reclamation's final determination?

(a) Yes, if you are directly affected by a final determination, you may appeal by writing to the Commissioner within 30 calendar days after the postmark date of the Regional Director's determination letter.

(b) You have an additional 30 calendar days after the postmark of your written appeal to the Commissioner within which to submit any additional supporting information.

(c) The Regional Director's final determination will remain in effect until the Commissioner has reviewed your appeal and provided you with that decision, unless you specifically request a stay and a stay is granted by the Commissioner.

§ 429.36 May I appeal the Commissioner's decision?

(a) Yes, you may appeal the Commissioner's decision by writing to the Director, Office of Hearing and Appeals (OHA), U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

(b) For an appeal to be timely, OHA must receive your appeal within 30 calendar days from the date of mailing of the Commissioner's decision. Rules that govern appeals to OHA are found at part 4, subparts B and G, of this title.

(c) Notwithstanding the provisions of § 4.21(a) of this title, the Commissioner's decision will take effect upon issuance and remain in effect unless you specifically request a stay and a stay is granted under § 4.21(b) of this title.

§ 429.37 Does interest accrue on monies owed to the United States during my appeal process?

Except for any period in the appeal process during which a stay is then in effect, interest on any nonpayment or underpayment, as provided in § 429.33(a), continues to accrue during an appeal of a Regional Director's final determination, an appeal of the Commissioner's decision to OHA, or during judicial review of final agency action.

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Selection of Annuity Providers - Safe Harbor for Individual Account Plans; comments due by 12-8-08; published 10-7-08 [FR E8-23427]

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Proposed Amendment of Class E Airspace; Bethel, AK; comments due by 12-12-08; published 10-28-08 [FR E8-25714]

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Request for Information Regarding Sections 101 through 104 of the Genetic Information Nondiscrimination Act (of 2008); comments due by 12-9-08; published 10-10-08 [FR E8-24194]

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. 2040/P.L. 110–451

Civil Rights Act of 1964 Commemorative Coin Act (Dec. 2, 2008; 122 Stat. 5021)

S. 602/P.L. 110–452

Child Safe Viewing Act of 2007 (Dec. 2, 2008; 122 Stat. 5025)

S. 1193/P.L. 110–453

To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

Last List December 2, 2008

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