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## DEPARTMENT OF AGRICULTURE

### Office of Energy Policy and New Uses

### 7 CFR Part 2902

**RIN 0503–AA33**

## Designation of Biobased Items for Federal Procurement

**AGENCY:** Departmental Administration, USDA.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Agriculture (USDA) is amending its Guidelines for Designating Biobased Products for Federal Procurement, to add nine sections to designate items within which biobased products will be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002, as amended by the Food, Conservation, and Energy Act of 2008 (FCEA) (referred to in this document as ''section 9002''). USDA also is establishing a minimum biobased content for each of these items.

**DATES:** This rule is effective November 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ron Buckhalt, USDA, Office of Procurement and Property Management, 342 Reporters Building, 300 7th St. SW., Washington, DC 20024; e-mail: *biopreferred@usda.gov;* phone (202) 205–4008. Information regarding the preferred procurement program (one part of the BioPreferred Program) is available on the Internet at *http://www.biopreferred.gov.*

**SUPPLEMENTARY INFORMATION:** The information presented in this preamble is organized as follows:

I. Authority
II. Background
III. Discussion of Public Comments
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Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights
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Executive Order 12372: Intergovernmental Review of Federal Programs
Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
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### I. Authority

These items are designated under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food, Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 8102 (referred to in this document as ''section 9002'').

### II. Background

As part of the BioPreferred Program, USDA published on October 23, 2008, a proposed rule in the **Federal Register** (FR) for the purpose of designating a total of nine items for the preferred procurement of biobased products by Federal agencies (referred to hereafter in this FR notice as the ''preferred procurement program''). This proposed rule can be found at 73 FR 63298. This rulemaking is referred to in this preamble as Round 5 (RIN 0503–AA33).

In the proposed rule, USDA proposed designating the following nine items for the preferred procurement program: Chain and cable lubricants; corrosion preventatives; food cleaners; forming lubricants; gear lubricants; general purpose household cleaners; industrial cleaners; multipurpose cleaners; and parts wash solutions.

Today's final rule designates the proposed items within which biobased products will be afforded Federal procurement preference. USDA has determined that each of the items being designated under today's rulemaking meets the necessary statutory requirements; that they are being produced with biobased products; and that their procurement will carry out the following objectives of section 9002: To improve demand for biobased products; to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and to enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas.

When USDA designates by rulemaking an item (a generic grouping of products) for preferred procurement under the BioPreferred Program, manufacturers of all products under the umbrella of that item that meet the requirements to qualify for preferred procurement can claim that status for their products. To qualify for preferred procurement, a product must be within a designated item and must contain at least the minimum biobased content established for the designated item. When the designation of specific items is finalized, USDA will invite the manufacturers of these qualifying products to post information on the product, contacts, and performance testing on its BioPreferred Web site, *http://www.biopreferred.gov*. Procuring agencies will be able to utilize this Web site as one tool to determine the availability of qualifying biobased products under a designated item. Once USDA designates an item, procuring agencies are required generally to purchase biobased products within these designated items where the purchase price of the procurement item exceeds $10,000 or where the quantity of such items or of functionally equivalent items purchased over the preceding fiscal year equaled $10,000 or more.

*Subcategorization.* Most of the items USDA is considering for designation for preferred procurement cover a wide range of products. For some items, there are subgroups of products within the item that meet different markets and uses and/or different performance specifications. Where such subgroups exist, USDA intends to create subcategories within the designated items.

During the development of the proposal, USDA considered the appropriateness of creating subcategories within the general purpose household cleaners, industrial cleaners, and multipurpose cleaners items. At that time, however, USDA did not have sufficient information to justify creating subcategories within these items. In the proposed rule, USDA requested additional information on the possibility of subcategorizing these three items. USDA did not receive any additional information on these items

during the public comment period that could be used to support the creation of subcategories at this time. Thus, none of the items being designated today have subcategories. USDA will continue to consider additional information that may become available to support subcategorization of these items in the future.

*Overlap with EPA's Comprehensive Procurement Guideline program for recovered content products.* Some of the products that are biobased items designated for preferred procurement may also be items the Environmental Protection Agency (EPA) has designated under the EPA's Comprehensive Procurement Guideline (CPG) for Products Containing Recovered Materials. Where that occurs, an EPA-designated recovered content product (also known as ''recycled content products'' or ''EPA-designated products'') has priority in Federal procurement over the qualifying biobased product as identified in 7 CFR 2902.2. In situations where it believes there may be an overlap, USDA is asking manufacturers of qualifying biobased products to provide additional product and performance information to Federal agencies to assist them in determining whether the biobased products in question are, or are not, the same products for the same uses as the recovered content products. As this information becomes available, USDA will place it on the BioPreferred Web site with its catalog of qualifying biobased products.

In cases where USDA believes an overlap with EPA-designated recovered content products may occur, manufacturers are being asked to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers are being asked to provide other types of information, such as whether the product contains petroleum-based components and whether the product contains recovered materials. Federal agencies may also ask manufacturers for information on a product's biobased content and its profile against environmental and health measures and life-cycle costs (the Building for Environmental and Economic Sustainability (BEES) analysis or ASTM Standard D7075 for evaluating and reporting on environmental performance of biobased products). Such information will permit agencies to determine whether or not an overlap occurs.

Section 6002 of the Resource Conservation and Recovery Act (RCRA) requires a procuring agency purchasing an item designated by EPA generally to purchase such items composed of the highest percentage of recovered materials content practicable. However, a procuring agency may decide not to purchase such an item based on a determination that the item fails to meet the reasonable performance standards or specifications of the procuring agency. An item with recovered materials content may not meet reasonable performance standards or specifications, for example, if the use of the item with recovered materials content would jeopardize the intended end use of the item.

Where a biobased item is used for the same purposes and to meet the same Federal agency performance requirements as an EPA-designated recovered content product, the Federal agency must purchase the recovered content product. For example, if a biobased hydraulic fluid is to be used as a fluid in hydraulic systems and because ''lubricating oils containing re-refined oil'' has already been designated by EPA for that purpose, then the Federal agency must purchase the EPA-designated recovered content product, ''lubricating oils containing re-refined oil.'' If, on the other hand, that biobased hydraulic fluid is to be used to address a Federal agency's certain environmental or health performance requirements that the EPA-designated recovered content product would not meet, then the biobased product should be given preference, subject to cost, availability, and performance.

This final rule designates one item for preferred procurement for which there may be overlap with EPA-designated recovered content products. This item is gear lubricants. Depending on how they are to be used, qualifying products under this item may overlap with the EPA-designated recovered content products ''lubricating oils containing re-refined oil.'' EPA provides recovered materials content recommendations for this recovered content product in a Recovered Materials Advisory Notice (RMAN I). The RMAN recommendations for each of this CPG product can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

*Minimum Biobased Contents.* The minimum biobased contents being established with today's rulemaking are based on products for which USDA has biobased content test data. In addition to considering the biobased content test data for each item, USDA also considers other factors when establishing the minimum biobased content. These other factors include: Public comments received on the proposed minimum biobased contents; product performance information to justify the inclusion of products at lower levels of biobased content; and the range, groupings, and breaks in the biobased content test data array. Consideration of this information allows USDA to establish minimum biobased contents on a broad set of factors to assist the Federal procurement community in its decision to purchase biobased products.

USDA makes every effort to obtain biobased content test data on multiple products within each item. For most designated items, USDA has biobased content test data on more than one product within a designated item. However, USDA must rely on biobased product manufacturers to voluntarily submit product information and, in some cases, USDA has been able to obtain biobased content data for only a single product within a designated item. As USDA obtains additional data on the biobased contents for products within these nine designated items, USDA will evaluate whether the minimum biobased content for a designated item will be revised.

USDA anticipates that the minimum biobased content of an item that is based on a single product is more likely to change as additional products in those items are identified and tested. In today's rulemaking, none of the minimum biobased contents are based on a single tested product.

For all items where additional information indicates that it is appropriate to revise a minimum biobased content established under today's rulemaking, USDA will propose the change in a notice in the **Federal Register** to allow public comment on the proposed revised minimum biobased content. USDA will then consider the public comments and issue a final rulemaking on the minimum biobased content.

*Future Designations.* In making future designations, USDA will continue to conduct market searches to identify manufacturers of biobased products within items. USDA will then contact the identified manufacturers to solicit samples of their products for voluntary submission for biobased content testing or for the BEES analytical tool. Based on these results, USDA will then propose new items for designation for preferred procurement.

USDA plans to identify approximately 10–15 items in each future rulemaking. USDA has developed a preliminary list of items for future designation. This list is available on the BioPreferred Web

site. While this list presents an initial prioritization of items for designation, USDA cannot identify with any certainty which items will be presented in each of the future rulemakings. In response to comments from other Federal Agencies, USDA intends to give increased priority to those items that contain the highest biobased content. In addition, as the program matures, manufacturers of biobased products within some industry segments have become more responsive to USDA's requests for technical information than those in other segments. Thus, items with high biobased content and for which sufficient technical information can be obtained quickly may be added or moved up on the prioritization list. USDA intends to update the list of items for future designation on the Biopreferred Web site every six months, or more often if significant changes are made to the list.

*Exemptions.* In earlier item designation rules, USDA created exemptions from the preferred procurement program's requirements for procurements involving combat or combat-related missions and for spacecraft systems and launch support equipment. Since publication of those final rules in the **Federal Register**, and in response to comments from the Department of Defense (DoD), USDA has decided to create ''blanket'' exemptions for all items used in products or systems designed or procured for combat or combat-related missions, which will apply to all items designated for the procurement preference. These ''blanket'' exemptions can be found in subpart A of part 2902. Because these blanket exemptions are included in subpart A of part 2902, it is unnecessary to repeat them in the individual item designations in this final rule.

## III. Discussion of Public Comments

USDA solicited comments on the proposed rule for 60 days ending on December 22, 2008. No public comments were received and no additional technical information has been collected to justify revising the proposed rule. Thus, today's action finalizes the designation of the nine items within which biobased products will be afforded Federal procurement preference, as proposed. USDA encourages manufacturers, vendors, and purchasers of biobased products within these nine designated items to continue to submit information relative to products available within these items. If sufficient supporting information becomes available, USDA will consider amending today's rulemaking by creating subcategories within the items, raising (or lowering) the minimum biobased content, or other appropriate actions.

## IV. Regulatory Information

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

This action has been determined significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. We are not able to quantify the annual economic effect associated with this final rule. As discussed in the proposed rule, USDA made extensive efforts to obtain information on the Federal agencies' usage within the nine designated items. These efforts were largely unsuccessful. Therefore attempts to quantify the economic impact of this rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing designated items if costs are ''unreasonable,'' the product is not readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of this rulemaking. This assessment was based primarily on the offsetting nature of the program (an increase in biobased products purchased with a corresponding decrease in petroleum products purchased). Consideration was also given to the fact that agencies may choose not procure designated items due to unreasonable costs.

1. Summary of Impacts

This rulemaking is expected to have both positive and negative impacts to individual businesses, including small businesses. USDA anticipates that the biobased preferred procurement program will provide additional opportunities for businesses and manufacturers to begin supplying products under the designated biobased items to Federal agencies and their contractors. However, other businesses and manufacturers that supply only non-qualifying products and do not offer biobased alternatives may experience a decrease in demand from Federal agencies and their contractors. USDA is unable to determine the number of businesses, including small businesses, that may be adversely affected by this rule. The rule, however, will not affect existing purchase orders, nor will it preclude businesses from modifying their product lines to meet new requirements for designated biobased products. Because the extent to which procuring agencies will find the performance and costs of biobased products acceptable is unknown, it is impossible to quantify the actual economic effect of the rule.

2. Benefits of the rule

The designation of these nine items provides the benefits outlined in the objectives of section 9002: To increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products; to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and to enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas. On a national and regional level, this rule can result in expanding and strengthening markets for biobased materials used in these items.

3. Costs of the rule

Like the benefits, the costs of this rule have not been quantified. Two types of costs are involved: Costs to producers of products that will compete with the preferred products and costs to Federal agencies to provide procurement preference for the preferred products. Producers of competing products may face a decrease in demand for their products to the extent Federal agencies refrain from purchasing their products. However, it is not known to what extent this may occur. Procurement costs for Federal agencies may rise as they evaluate the availability and relative cost of preferred products before making a purchase.

### *B. Regulatory Flexibility Act (RFA)*

When an agency issues a final rule following a proposed rule, the Regulatory Flexibility Act (RFA, 5 U.S.C. 601–612) requires the agency to prepare a final regulatory flexibility analysis. 5 U.S.C. 604. However, the requirement for a final regulatory flexibility analysis does not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

USDA evaluated the potential impacts of its designation of these items to determine whether its actions would have a significant impact on a substantial number of small entities. Because the preferred procurement program established under section 9002 applies only to Federal agencies and

their contractors, small governmental (city, county, etc.) agencies are not affected. Thus, this rule will not have a significant economic impact on small governmental jurisdictions.

USDA anticipates that this program will benefit entities, both large and small, that manufacture or sell biobased products. For example, the designation of items for preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers.

The intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products. Because the program is still in its infancy, however, it is unknown how many businesses will ultimately be affected. While USDA has no data on the number of small businesses that may choose to develop and market biobased products within the items designated by this rulemaking, the number is expected to be small. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses manufacturing biobased products affected by this rulemaking is not expected to be substantial.

The preferred procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. Most manufacturers of non-biobased products within the items being designated for preferred procurement in this final rule are expected to be included under NAICS codes 324191 (Petroleum lubricating oil and grease manufacturing), 325611 (Soap and other detergent manufacturing), or 325612 (Polish and other sanitation goods manufacturing). USDA obtained information on these three NAICS categories from the U.S. Census Bureau's Economic Census database. USDA found that the Economic Census reports about 1,500 companies within these three NAICS categories and that nearly all of these companies (about 1,490) report less than 500 employees. Thus, nearly all of the businesses fall within the Small Business Administration's definition of a small business (less than 500 employees, in most NAICS categories).

USDA does not have data on the potential adverse impacts on manufacturers of non-biobased products within the items being designated, but believes that the impact will not be significant. The items being designated in this rulemaking are, in general terms, either cleaning products or lubricating products. These products are widely used by the general public and by industrial/commercial establishments that are not subject to this rulemaking. Thus, USDA believes that the number of small businesses manufacturing non-biobased products within the items being designated and selling significant quantities of those products to government agencies affected by this rulemaking to be relatively low. Also, this rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased items under certain conditions relating to the availability, performance, or cost of biobased items. This rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials. Thus, the economic impacts of this rule are not expected to be significant.

After considering the economic impacts of this rule on small entities, USDA certifies that this action will not have a significant economic impact on a substantial number of small entities.

While not a factor relevant to determining whether the rule will have a significant impact for RFA purposes, USDA has concluded that the effect of the rule will be to provide positive opportunities to businesses engaged in the manufacture of these biobased products. Purchase and use of these biobased products by procuring agencies increase demand for these products and result in private sector development of new technologies, creating business and employment opportunities that enhance local, regional, and national economies. Technological innovation associated with the use of biobased materials can translate into economic growth and increased industry competitiveness worldwide, thereby, creating opportunities for small entities.

*C. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights*

This rule has been reviewed in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that would have implications for these rights.

*D. Executive Order 12988: Civil Justice Reform*

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule does not preempt State or local laws, is not intended to have retroactive effect, and does not involve administrative appeals.

*E. Executive Order 13132: Federalism*

This rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

*F. Unfunded Mandates Reform Act of 1995*

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, for State, local, and tribal governments, or the private sector. Therefore, a statement under section 202 of UMRA is not required.

*G. Executive Order 12372: Intergovernmental Review of Federal Programs*

For the reasons set forth in the Final Rule Related Notice for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments. Although there is no statutory requirement to do so, we believe that, in the long term, many State and local governments will implement similar purchase programs based on the BioPreferred Program. USDA has been charged by Congress to share information on the BioPreferred Program with State and local governments.

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

Today's rule does not significantly or uniquely affect ''one or more Indian tribes,* * * the relationship between the Federal Government and Indian tribes, or * * * the distribution of power and responsibilities between the Federal Government and Indian tribes.'' Thus, no further action is required under Executive Order 13175.

*I. Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501

through 3520), the information collection under this rule is currently approved under OMB control number 0503–0011.

*J. E-Government Act Compliance*

The Office of Procurement and Property Management is committed to compliance with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. USDA is implementing an electronic information system for posting information voluntarily submitted by manufacturers or vendors on the products they intend to offer for preferred procurement under each designated item. For information pertinent to E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205–4008.

**List of Subjects in 7 CFR Part 2902**

Biobased products, Procurement.

■ For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR chapter XXIX as follows:

**CHAPTER XXIX—OFFICE OF ENERGY POLICY AND NEW USES**

## PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

■ 1. The authority citation for part 2902 continues to read as follows:

**Authority:** 7 U.S.C. 8102.

■ 2. Add §§ 2902.43 through 2902.51 to subpart B to read as follows:

Sec.
2902.43 Chain and cable lubricants.
2902.44 Corrosion preventatives.
2902.45 Food cleaners.
2902.46 Forming lubricants.
2902.47 Gear lubricants.
2902.48 General purpose household cleaners.
2902.49 Industrial cleaners.
2902.50 Multipurpose cleaners.
2902.51 Parts wash solutions.

### § 2902.43 Chain and cable lubricants.

(a) *Definition.* Products designed to provide lubrication in such applications as bar and roller chains, sprockets, and wire ropes and cables. Products may also prevent rust and corrosion in these applications.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 77 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased chain and cable lubricants. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased chain and cable lubricants.

### § 2902.44 Corrosion preventatives.

(a) *Definition.* Products designed to prevent the deterioration (corrosion) of metals.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 53 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased corrosion preventatives. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased corrosion preventatives.

### § 2902.45 Food cleaners.

(a) *Definition.* Anti-microbial products designed to clean the outer layer of various food products, such as fruit, vegetables, and meats.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 53 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased food cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased food cleaners.

### § 2902.46 Forming lubricants.

(a) *Definition.* Products designed to provide lubrication during metalworking applications that are performed under extreme pressure. Such metalworking applications include tube bending, stretch forming, press braking, and swaging.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 68 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased forming lubricants. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased forming lubricants.

### § 2902.47 Gear lubricants.

(a) *Definition.* Products, such as greases or oils, that are designed to reduce friction when applied to a toothed machine part (such as a wheel or cylinder) that meshes with another toothed part to transmit motion or to change speed or direction.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 58 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased gear lubricants. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of gear lubricants.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying biobased products that fall under this item may, in some cases, overlap with the following EPA-designated recovered content product: Lubricating oils containing re-refined oil. USDA is requesting that manufacturers of these qualifying biobased products provide information for the BioPreferred Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining

whether or not a qualifying biobased product overlaps with EPA-designated re-refined lubricating oils and which product should be afforded the preference in purchasing.

**Note to paragraph (d):** Biobased gear lubricant products within this designated item can compete with similar gear lubricant products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated re-refined lubricating oils containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.11.

**§ 2902.48 General purpose household cleaners.**

(a) *Definition.* Products designed to clean multiple common household surfaces. This designated item does not include products that are formulated for use as disinfectants. Task-specific cleaning products, such as spot and stain removers, upholstery cleaners, bathroom cleaners, glass cleaners, etc., are not included in this item.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 39 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased general purpose household cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased general purpose household cleaners.

**§ 2902.49 Industrial cleaners.**

(a) *Definition.* Products used to remove contaminants, such as adhesives, inks, paint, dirt, soil, and grease, from parts, products, tools, machinery, equipment, vessels, floors, walls, and other production-related work areas. The cleaning products within this item are usually solvents, but may take other forms. They may be used in either straight solution or diluted with water in pressure washers, or in hand wiping applications in industrial or manufacturing settings, such as inside vessels. Task-specific cleaners used in industrial settings, such as parts wash solutions, are not included in this definition.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 41 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased industrial cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased industrial cleaners.

**§ 2902.50 Multipurpose cleaners.**

(a) *Definition.* Products used to clean dirt, grease, and grime from a variety of items in both industrial and domestic settings. This designated item does not include products that are formulated for use as disinfectants.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 56 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased multipurpose cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased multipurpose cleaners.

**§ 2902.51 Parts wash solutions.**

(a) *Definition.* Products that are designed to clean parts in manual or automatic cleaning systems. Such systems include, but are not limited to, soak vats and tanks, cabinet washers, and ultrasonic cleaners.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 65 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than October 27, 2010, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased parts wash solutions. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased parts wash solutions.

Dated: October 21, 2009.

**Pearlie S. Reed,**

*Assistant Secretary for Administration, U.S. Department of Agriculture.*

[FR Doc. E9–25756 Filed 10–26–09; 8:45 am]

BILLING CODE 3410–GL–P

## DEPARTMENT OF HOMELAND SECURITY

## 8 CFR Parts 103, 214, 274a, and 299

**[CIS No. 2459–08; DHS Docket No. USCIS–2008–0038]**

**RIN 1615–AB76**

## Commonwealth of the Northern Mariana Islands Transitional Worker Classification

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

**ACTION:** Interim rule; solicitation of comments.

**SUMMARY:** The Department of Homeland Security (DHS) is creating a new, temporary, Commonwealth of the Northern Mariana Islands (CNMI)-only transitional worker classification (CW classification) in accordance with title VII of the Consolidated Natural Resources Act of 2008 (CNRA). The transitional worker program is intended to provide for an orderly transition from the CNMI permit system to the U.S. federal immigration system under the Immigration and Nationality Act (INA or Act). A CW transitional worker is an alien worker who is ineligible for another classification under the INA and who performs services or labor for an employer in the CNMI. The CNRA imposes a five-year transition period before the INA requirements become fully applicable in the CNMI. The new CW classification will be in effect for the duration of that transition period, unless extended by the Secretary of Labor. The rule also establishes employment authorization incident to CW status.

**DATES:** *Effective date:* This rule will be effective on November 27, 2009.

*Implementation date:* Beginning at 12:01 a.m. (CNMI local time) on November 28, 2009, U.S. Citizenship and Immigration Services will begin operation of this program and required compliance with this interim rule will begin. The existing CNMI permit program will be in effect through November 27, 2009.

*Comment date:* Written comments must be submitted on or before November 27, 2009.

Written comments on the Paperwork Reduction Act section of this rule must be submitted on or before December 28, 2009.

**ADDRESSES:** You may submit comments, identified by DHS Docket No. USCIS–2008–0038 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail:* You may submit comments directly to USCIS by e-mail at *rfs.regs@dhs.gov.* Include DHS Docket No. USCIS–2008–0038 in the subject line of the message.
- *Mail:* Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. To ensure proper handling, please reference DHS Docket No. USCIS–2008–0038 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Contact Telephone Number is (202) 272–8377.

**FOR FURTHER INFORMATION CONTACT:** Paola Rodriguez Hale, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529–2060 telephone (202) 272–1505.

**SUPPLEMENTARY INFORMATION:**

## I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. DHS also invites comments that relate to the economic or federalism effects that might result from this rule. Comments that will provide the most assistance to DHS will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

*Instructions:* All submissions received must include the agency name and DHS Docket No. USCIS–2008–0038. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, N.W., Suite 3008, Washington, DC 20529–2210.

## II. Background

The Commonwealth of the Northern Mariana Islands (CNMI) is a U.S. territory located in the Western Pacific that has been subject to most U.S. laws for many years. The CNMI has administered its own immigration system under the terms of the 1976 Covenant with the United States. *See* A Joint Resolution to Approve the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant Act), Public Law 94–241, sec. 1, 90 Stat. 263, 48 U.S.C. 1801 note (1976). On May 8, 2008, former President Bush signed into law the Consolidated Natural Resources Act of 2008 (CNRA). *See* Public Law 110–229, Title VII, 122 Stat. 754, 853 (2008). Title VII of the CNRA extends U.S. immigration laws to the CNMI. The intent of Congress in passing this legislation is to ensure effective border controls and properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI. *See* Section 701(a) of Public Law 110–229. Title VII of the CNRA includes provisions to phase-out the CNMI's nonresident contract worker program and phase in the U.S. federal immigration system in a manner that minimizes adverse economic and fiscal effects and maximizes the CNMI's potential for future economic and business growth. *Id.* (b). Congress also intends to provide the CNMI with as much flexibility as possible to maintain existing businesses and other revenue sources and develop new economic opportunities. *Id.*

Section 702 of the CNRA was scheduled to become effective approximately one year after the date of enactment, subject to certain transition provisions unique to the CNMI. On March 31, 2009, DHS announced that the Secretary of Homeland Security, in her discretion under the CNRA, had extended the effective date of the transition program from June 1, 2009 (the first day of the first full month commencing one year from the date of enactment of the CNRA) to November 28, 2009. The transition period concludes on December 31, 2014.

Since 1978, the CNMI has admitted a substantial number of foreign workers through an immigration system that provides a permit program for foreigners entering the CNMI, such as visitors, investors, and workers. Foreign workers under this program constitute a majority of the CNMI labor force. Such workers outnumber U.S. citizens and other local residents in most industries central to the CNMI's economy. The transitional worker program implemented under this rule is intended to provide for an orderly transition for those workers from the CNMI permit system to the U.S. federal immigration system under the INA, and to mitigate potential harm to the CNMI economy as employers adjust their hiring practices and as foreign workers obtain U.S. immigrant or nonimmigrant status.

Section 702(a) of the CNRA mandates that, during this transition period, the Secretary of Homeland Security must ''establish, administer, and enforce a system for allocating and determining the number, terms, and conditions of permits[1] to be issued to prospective employers'' for the transitional workers and investors.[2] The statute provides that this system is for nonimmigrant workers ''who would not otherwise be eligible for admission'' under applicable provisions of the INA. Therefore, as discussed in section III below, nonimmigrant workers seeking CW status must demonstrate that they are ineligible for admission under another INA classification, such as an H–1B, H–2A or P–1 nonimmigrant. *See* 8 U.S.C. 1101.

Section 702(a) of the CNRA further states that transitional workers may apply to USCIS during the transition period for a change of status to another nonimmigrant classification or to adjust status to an immigrant classification in accordance with the INA. Following the end of the transition period, the transitional worker program will cease to exist and transitional workers must then adjust or change status to an immigrant or another nonimmigrant status under the INA if they want to remain legally in the CNMI. Otherwise, such transitional workers must depart the CNMI or they will become subject to removal.

[1] The CNRA refers to a system of permits. Note that we have retained this language when referencing the statute. However, in this context, the use of the term ''permit'' is synonymous with CW status and the latter term is used more extensively in this discussion.

[2] DHS will promulgate separate regulations addressing transitional measures for nonimmigrant investors in the CNMI.

The rule implementing this transitional worker program is explained below.

**III. Regulation Changes**

This rule amends DHS regulations at 8 CFR 214.2 by providing a new paragraph (w). This new paragraph creates a new CNMI-only transitional worker classification for the duration of the transition period. Transitional workers will be classified using an admission code of CW–1 for principal transitional workers and CW–2 for dependents. Aliens who were previously admitted to the CNMI under the CNMI nonresident worker permit programs may be granted CW status by USCIS. To minimize adverse impact on the CNMI economy, the CW classification allows workers, who would not be eligible for any other lawful status under the INA, to enter or remain in the CNMI as a transitional worker during the transition period.[3] In this rule, DHS promulgates provisions governing CW–1 status in the section of the Code of Federal Regulations governing other INA nonimmigrant categories, and has incorporated standard elements from current nonimmigrant categories to maintain regulatory consistency, particularly with respect to petition processing procedures. This rule establishes eligibility criteria, limitations and parameters for the CW–1 nonimmigrant program as required by or consistent with an interpretation of the applicable provisions of section 702(a) of the CNRA, and prescribes procedural requirements for petitioners to follow. The specific areas that this rule implements and the rationale used by DHS are as follows:

*A. CNMI-Only Transitional Workers*

As defined by the statute, a CNMI-only transitional worker is an alien worker who is ineligible for another classification under the INA during the transition period. Section 6(d)(1) or (2) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. This rule makes aliens eligible for CW–1 status only if they are ineligible for nonimmigrant classification based upon employment activities described in section 101(a)(15) of the INA. Such nonimmigrant classifications may include, but are not limited to, a specialty occupation described in section 214(i) of the Act, temporary or seasonal agricultural work for which H–2A classification is available, and other temporary or seasonal employment for which H–2B classification is available. *See* 8 CFR 214.2(w)(2)(vi). DHS believes that this will help ensure that those who are eligible for employment-related nonimmigrant categories under the INA make use of those categories, especially the H categories, which are uncapped for employment in the CNMI during the transition period. As section 702(a) of the CNRA expressly allows transitional workers to change or adjust status under the INA, this provision is not meant to rigidly bar anyone admissible under the INA in any immigrant or other nonimmigrant category from obtaining CW–1 status. Section 6(d)(1) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. DHS envisions scenarios wherein certain professionals may not initially be eligible for H–1B status due to Federal licensing or other requirements, and believes that it is an appropriate use of the transitional worker program to allow such aliens time during the transition period to seek to satisfy such requirements. This rule does not exempt such aliens in occupations requiring licensure from complying with existing local licensure requirements. *See* 8 CFR 214.2(w)(6)(iii).

Section 702(a) further states that DHS shall set the conditions for admission to the CNMI for nonimmigrant workers. Section 6(d)(3) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. DHS is providing in this rule that, subject to numerical limitations, aliens may be classified as CW–1 nonimmigrants if, during the transition period, the alien: (1) Will enter or remain in the CNMI for the purpose of employment during the transition period in an occupational category designated by the Secretary as requiring alien workers to supplement the resident workforce; (2) has a petition submitted on his or her behalf by an employer; (3) is not present in the United States, other than the CNMI; (4) if present in the CNMI, is lawfully present in the CNMI; and (5) is not inadmissible to the United States as a nonimmigrant, except for an alien present in the CNMI who is described in section 212(a)(7)(B)(i)(II) of the Act (not in possession of valid nonimmigrant visa). *See* 8 CFR 214.2(w)(2). In order to obtain CW status, the worker must either be lawfully present in the CNMI, or must be coming from abroad to the CNMI with a CW–1 visa properly issued by the U.S. Department of State. *See* 8 CFR 214.2(w)(2)(i).

DHS has determined that requiring lawful status in the CNMI as a prerequisite for CW–1 eligibility is the most efficient means to begin the congressionally-mandated drawdown of transitional workers to zero by the end of the transition period. Furthermore, to allow workers without lawful status in the CNMI to obtain CW–1 status would encourage noncompliance with CNMI immigration law during the period before the transition program effective date by removing the incentive for such workers with lawful status to maintain or reacquire such lawful status under CNMI law prior to the transition. In order to administer this program in a manner consistent with other employment-based INA nonimmigrant classifications, this rule requires that employers petition for aliens to obtain status. Additionally, this rule requires that aliens cannot be present in the United States other than the CNMI, which DHS believes is consistent with the statutorily-mandated geographic restriction of transitional workers to the CNMI. *See* Section 6(d)(3) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229;

8 CFR 214.2(w)(2). The transition program effective date is November 28, 2009. *See* Section 6(a)(1) and (3) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. The CW classification will cease to exist at the end of the transition period, meaning that existing grants of CW status will automatically terminate, and no new grants of CW status will be made. *See* 8 CFR 214.2(w)(23). Because of the statutory restrictions on eligibility for the CW classification and to avoid the need to seek to change status or depart the CNMI at the end of the transition period, employers of nonresident workers should seek classification under another INA classification for which the workers may be eligible instead of petitioning for CW status. *See* Section 6(d)(2) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229.

*B. Employers*

As required under section 702(a) of the CNRA, DHS will not consider a business legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or local CNMI law. Section 6(d)(5)(A) of Public Law 94–241, as added by section 702(a) of Public Law 110–229.

The CNRA provides that the determination of whether a business is legitimate will be made by the Secretary

[3] On March 2, 2009, USCIS opened an Application Support Center (ASC) in Saipan that offers extended services, including the ability for individuals in the CNMI to schedule an INFOPASS appointment to speak with an immigration officer regarding non-immigrant or immigrant worker eligibility requirements under the INA. Additional information regarding such eligibility requirements can be accessed at *http://www.uscis.gov*.

of Homeland Security in the Secretary's sole discretion. Section 6(d)(5)(A) of Public Law 94–241, as added by section 702(a) of Public Law 110–229. This rule requires that eligible employers of CW transitional workers be engaged in legitimate business, and separates the definition of legitimate business into its component parts—legitimate and business. Accordingly, this rule defines legitimate business to mean ''a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity.'' *See* 8 CFR 214.2(w)(1)(v). The business must meet applicable legal requirements for doing business in the CNMI and will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. *Id.*

In addition to requiring eligible employers to be engaged in legitimate business, this rule further establishes that eligible employers must consider all available U.S. workers for positions being filled by CW–1 workers; offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the CNMI; and comply with all Federal and CNMI requirements relating to employment; including, but not limited to, nondiscrimination, occupational safety, and minimum wage requirements. *See* 8 CFR 214.2(w)(4). DHS created these parameters for eligible employers to comply with congressional intent that the CW category should ''promote the maximum use of, and * * * prevent adverse effects on wages and working conditions of, workers authorized to be employed in the United States.'' Section 6(d)(2) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229.

Congress has directed that DHS allow CW workers to transfer among employers during the transition period. Section 6(d)(4) of Public Law 94–241, as added by section 702(a) of Public Law 110–229. This rule establishes that an employer may request, and USCIS will permit, a transfer within an alien's occupational category or another occupational category that the Secretary of Homeland Security has determined requires alien workers. *See* 8 CFR 214.2(w)(7).

The CNMI currently classifies occupations by reference to the nine occupational categories listed under the U.S. Department of Labor's Dictionary of Occupational Titles (DOT). *See* 3 N. Mar. I. Code section 4412(k). This rule incorporates all occupational categories that are currently being utilized in the CNMI. *See* 8 CFR 214.2(w)(1)(viii).

The occupational categories in which nonresident workers may be needed include:

- Professional, technical, or management occupation;
- Clerical and sales occupation;
- Service occupation;
- Agricultural, fisheries, forestry, and related occupation;
- Processing occupation;
- Machine trade occupation;
- Benchwork occupation;
- Structural work occupation; and
- Miscellaneous occupation. *Id.*

The DOT provides examples of these occupations, including processing and benchwork occupations. *See* Employment and Training Administration, U. S. Department of Labor, *Dictionary of Occupational Titles* (4th ed. 1991) available at *http://www.oalj.dol.gov/libdot.htm.*

As the general meaning of processing and benchwork occupations is not clear from the title alone, additional explanation of these two particular occupational categories is provided. Processing occupations include occupations concerned with refining, mixing, compounding, chemically treating, heat treating, or similarly working with materials and products. *Id.* The DOT defines benchwork occupations as those concerned with the use of hand tools and bench machines to fit, grind, carve, mold, paint, sew, assemble, inspect, repair, and similarly work relatively small objects and materials, such as jewelry, phonographs, light bulbs, musical instruments, tires, footwear, pottery, and garments. *Id.* The work is usually performed at a set position in a mill, plant, or shop, at a bench, worktable, or conveyor. *Id.* All occupations must be for a legitimate business not engaging directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law.

DHS notes that household domestic workers are eligible for CW–1. However, DHS also notes that the definition of ''legitimate business'' may have a significant impact on domestic workers directly employed by individuals, as ''business'' is defined to mean ''a real, active, and operating commercial or entrepreneurial undertaking that produces goods or services for profit.'' *See* 8 CFR 214.2(w)(1)(v). Individual households employing individual domestic workers would not appear to be a commercial or entrepreneurial undertaking, nor would the individual household be producing goods or services for profit. Therefore, it is anticipated that qualifying domestic workers likely would be employed through a ''legitimate business'' for placement in individual households.

The rule does not exclude any specific type of employment from the occupational categories permissible for CW–1 workers. However, there are three occupational categories—dancing, domestic workers, and hospitality workers—about which DHS has particular concern. DHS notes that women seeking employment as exotic dancers in the CNMI have been particularly prone to sexual exploitation and other abuse. *See, e.g.,* Senate Hearing 110–50, Conditions in the Commonwealth of the Northern Mariana Islands (Feb. 8, 2007) (testimony of Lauri Bennett Ogumoro and Sister Mary Stella Mangona). In a discussion between DHS officials and advocates for exploited women in Saipan in July 2008, the advocates identified so-called ''cultural dancing'' as a common front occupation used to import women into the CNMI for the purposes of prostitution, in addition to the category of domestic work. Additionally, waitressing and other club and restaurant hospitality work also are known paths for exploitation and abuse. *See, e.g., United States* v. *Liu,* 538 F.3d 1078 (9th Cir. 2008). DHS is considering excluding some or all of these occupations from eligibility for CW status.

DHS also is concerned about the economic effects of blanket exclusions of all dancers, domestic workers or hospitality service workers. DHS emphasizes that, regardless of the occupational category, all employers must be engaged in legitimate business, which is defined to exclude employers that engage directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. DHS invites comments on the potential effect of excluding dancing from the list of eligible occupations. DHS also invites comments on whether DHS should exclude occupations, such as the hospitality industry, domestic service, or other occupations, to combat human trafficking and sexual exploitation.

### *C. The CNMI-Only Transitional Worker Allocation System*

Section 702(a) of the CNRA mandates that the Secretary of Homeland Security establish, administer, and enforce a system for allocating and determining the number, terms, and conditions of permits to be issued to prospective employers for the transitional workers. Section 6(d) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. The Secretary may base the system

on any reasonable method and criteria determined by the Secretary to promote the maximum use, and to prevent adverse effects on wages and working conditions, of U.S. citizens, lawful permanent residents, and lawfully admissible freely-associated state citizen labor. *Id.* The system must also provide for a reduction in the allocation of permits for such workers on an annual basis to zero during a period not to extend beyond December 31, 2014, unless extended by the Secretary of Labor. *Id.* This rule does not, for the reasons explained below, impose a specific annual reduction in allocation of permits, but does establish the numerical limitation to be utilized initially and its underlying methodologies for setting the numerical limitation throughout the transition period.

Under section 702(a) of the CNRA, between May 8, 2008 and the transition program effective date, the CNMI government must not increase the total number of alien workers present in the CNMI. Section 6(i)(1) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. Thus, the DHS-administered system, in its initial phase, will be based on the estimate from the CNMI government of the maximum number of nonresident workers in the CNMI as of May 8, 2008. That number is 22,417.[4] This rule defines the numerical limitation as the number of persons who may be granted CW–1 status and sets that number for the initial year at no higher than 22,417. *See* 8 CFR 214.2(w)(1)(vii). DHS will assess and reduce the number of grants of CW–1 status annually based, in part, on the economic conditions in the CNMI, consultation with the government of the CNMI and other Federal government agencies, and employment opportunities available for the resident workforce. *Id.* Grants of CW–1 status will be allocated based upon the availability of CW–1 permits and a showing of eligibility based upon the requirements outlined in this rule.

Specifically, 22,417 is a composite figure that includes aliens eligible for other INA categories, aliens with employment authorization for the first two years of the transition period under the ''grandfather clause'' provided by section 6(e)(2) of Public Law 94–241, as added by section 702(a) of Title VII of the CNRA, and CW–1 eligible aliens. Thus, while 22,417 could theoretically reflect the total number of CW–1 eligible aliens, setting 22,417 as the total number of CW–1 workers would artificially inflate the CW–1 eligible population by presuming that there are zero ''grandfathered'' or other INA workers. Therefore, this rule defines ''numerical limitation'' to be the maximum number of persons who may be granted CW–1 status, but for the reasons explained above, it is not expected that there will actually be 22,417 CW–1 eligible aliens to whom CW–1 status will be accorded. *Id.* DHS emphasizes that this provision is not intended to, and will not have the effect of, providing any cap on the access of CNMI employers to H and other nonimmigrant workers in the INA categories.

The Governor of the CNMI has requested that DHS not reduce the number of foreign workers available to CNMI employers in the first two years of the transition program beyond the cap currently provided by section 6(i)(1) of the Covenant Act.[5] As required by section 702(a) of the CNRA, DHS considered the request of the Governor of the CNMI in creating this rule. However, in considering this request, DHS was also bound by the statutory language mandating a reduction of numbers on an annual basis. Section 6(d)(2) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229.

In light of these interests, this rule sets the maximum number of persons who may be granted CW–1 status for the first year of the transition period at 22,417. *See* 8 CFR 214.2(w)(1)(vii)(A). For the subsequent years of the transition period, the numerical limitation will be a number less than 22,417, as determined at the discretion of the Secretary. USCIS will publish the determination as a notice in the **Federal Register.** *See* 8 CFR 214.2(w)(1)(vii)(B). DHS believes that, given the lack of specific data available both on the foreign worker population, particularly with respect to eligibility for other INA categories and the number of ''grandfathered'' workers during the first two years of the transition period, as well as the uncertainty of future economic conditions in the CNMI, determining the CW–1 numerical limitation in this manner is prudent.

*D. Petitioning Procedures*

This rule requires employers who seek to employ a CW–1 nonimmigrant worker to file a petition with USCIS requesting such status. *See* 8 CFR 214.2(w)(1)(ix). USCIS has determined that its Form I–129, Petition for a Nonimmigrant Worker, contains most of the information needed by USCIS to determine that a particular employer and its current and prospective employees are eligible as an employer and for CW–1 status, respectively. However, because the CW program is a temporary program, USCIS has decided to develop and use a separate Form I–129 called the I–129CW (''Petition for a Nonimmigrant Worker in the CNMI''), for CW petitions and will provide separate instructions for the application form for requesting CW transitional workers. The petition must be prepared in accordance with the form instructions and accompanied by the appropriate fee or a fee waiver request. USCIS will charge the current fee of $320 for Form I–129 for the Form I–129CW because the adjudicative burden is expected to be identical. In addition to the petitioning fee required for submission of a Form I–129, section 702(a) of the CNRA requires employers to pay a supplemental CNMI education funding fee of $150 per beneficiary per year. Section 6(b)(6) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229. The supplementary CNMI education funding fee is mandatory and cannot be waived.

While fee waivers are not generally available in employment-based cases, due to the unique circumstances present in the CNMI, USCIS may waive the fee for the I–129CW in certain circumstances if the petitioner is able to show inability to pay. *See* 8 CFR 103.7(c)(5)(i). Due to the inherent inconsistency between sponsoring an alien for employment and being unable to pay the requisite fee for that sponsorship, USCIS expects that the situation when an employer would adequately demonstrate an inability to pay will be extremely limited. An estimate of the information collection requirements and a request for comments are included in the Paperwork Reduction Act section of this rule. An analysis of the fee impacts of this rule are included in the summary of the costs and benefits also provided below.

Form I–129CW will require an employer to provide the full name of the beneficiaries, as well as documentation or information that is sufficient to demonstrate that the worker-beneficiaries on the petition are eligible for CW–1 status based on the criteria in this rule. This rule requires that the petitioner submit an attestation regarding the eligibility of both the employer and the beneficiary. *See* 8 CFR 214.2(w)(6)(ii). This rule requires that

[4] *See* Letter from Benigno Fitial, Governor of the Commonwealth of the Northern Mariana Islands, to Richard C. Barth, Assistant Secretary for Policy Development, and Stewart A. Baker, Assistant Secretary for Policy, Office of Policy, Department of Homeland Security (July 18, 2008) (Fitial letter) (available at *www.regulations.gov* under DHS Docket No. USCIS–2008–0038).

[5] *See* Fitial letter.

such an attestation certify that the petitioner meets the definition of an eligible employer, that the beneficiary is qualified for the position, and, if the beneficiary is present in the CNMI, that the beneficiary is in lawful CNMI status. *Id.* Finally, the rule requires a petitioner to attest that the position is nontemporary or nonseasonal, is in an occupational category as designated by the Secretary, and that qualified United States workers are not available to fill the position. *Id.* DHS believes that having an attestation is necessary to ensure eligibility of both the employer and of the beneficiary, and will obviate the need to affirmatively determine whether the applicant is eligible for status under every other conceivable INA category. Additionally, certain professions may require licensure in order to fully perform the duties of the occupation. In order to allow full and competent performance of such duties, this rule requires the petitioner to submit evidence of the beneficiary's licensure if the occupation requires a Commonwealth or local license. *See* 8 CFR 214.2(w)(6)(iii).

The rule allows a beneficiary to request, and obtain, a transfer to a new employer within an alien's occupational category or to another occupational category that the Secretary of Homeland Security has determined requires alien workers. *See* 8 CFR 214.2(w)(7). However, the rule requires that a petition for a change of employer must be filed by the new employer and an extension of the alien's stay must be requested if necessary for the validity period of the petition. *Id.* An alien who makes an unauthorized change of employment to a new employer has failed to maintain his or her status. *Id.* Further, the rule requires an employer to submit a new or amended petition for any material (i.e.—substantive) change in the terms and conditions of employment. *See* 8 CFR 214.2(w)(8). DHS believes that such requirements are consistent with other nonimmigrant categories allowing change of employers and ensures that aliens are properly complying with the terms of their admission in CW status while not making transfer between employers impermissible.

The rule also allows petitioners to file for multiple beneficiaries. *See* 8 CFR 214.2(w)(9). The rule permits a petitioning employer to include more than one beneficiary in a CW–1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location. *Id.* However, the rule does not allow employers to petition for unnamed beneficiaries. At the time of filing, the petition must include the name of each intended beneficiary and other required information, as indicated in the form instructions. *See* 8 CFR 214.2(w)(10). DHS believes that allowing multiple beneficiaries will ease the potential burden on petitioners associated with submitting multiple individual petitions for multiple beneficiaries. Requiring that such beneficiaries be named will allow USCIS to verify, when necessary, prior lawful status of the beneficiaries in the CNMI, as this rule requires.

The rule includes safeguards for the beneficiary in case of early termination. *See* 8 CFR 214.2(w)(11). The rule requires that the petitioning employer pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission. *Id.* This requirement is consistent with current employment practices in the CNMI. This requirement also protects the Federal government from the potential costs of removing indigent aliens from the CNMI and is within DHS's discretion to impose requirements for temporary transitional worker status under title VII of the CNRA and more generally under section 214 of the INA.

The rule states that, after consideration of all the evidence submitted, USCIS will issue an approval of the petition on a Form I–797, Notice of Action, or in another form as USCIS may prescribe. *See* 8 CFR 214.2(w)(12). The rule requires that the approval notice include the classification and name of the beneficiary or beneficiaries and the petition's period of validity, and that a petition for more than one beneficiary may be approved in whole or in part. *See* 8 CFR 214.2(w)(12)(i). However, the rule requires that petitioners will not be able to file for a beneficiary earlier than six months before the date of actual need for the beneficiary's services. *See* 8 CFR 214.2(w)(12)(ii). The rule further provides that, although USCIS may in its discretion permit petitions to be filed prior to November 28, 2009, USCIS will not grant CW–1 status or authorize the admission of any alien to the CNMI prior to such date. *Id.*

The rule also states that although the beneficiary may be admitted to the CNMI up to ten days before the validity period begins and may remain no later than ten days after the validity period ends, the beneficiary will only be able to work during the validity period of the petition. *See* 8 CFR 214.2(w)(13). DHS believes that this validity period is consistent with other nonimmigrant categories and permits the necessary flexibility for travel and living arrangements to be made both before and after period of authorized employment. Finally, this rule requires that USCIS reject a petition once the numerical limitation of 22,417 has been reached, but that in such cases the petition and accompanying fee will be returned along with notice that the numerical limitation has been reached. *See* 8 CFR 214.2(w)(20). DHS believes that this will allow for reduction in CW workers in accordance with the numerical limitation. An alien in the CNMI whose CW status terminates, or who is not granted CW status at all, is not lawfully present and is subject to removal if he or she does not have another status under U.S. immigration law or other lawful basis to remain.

*E. Obtaining CW Status*

Once the Form I–129CW petition is approved, the beneficiary will receive CW–1 status, and eligible family members may apply for CW–2 status for the spouse and dependents, as appropriate. *See* 8 CFR 214.2(w)(3). Dependents are spouses and minor children, as discussed more fully below in part G. Aliens who are abroad will need to apply for a CW–1 or CW–2 visa at a U.S. consulate. Aliens present in the CNMI must apply for status using Form I–129CW, and shall be required to provide biometrics along with an initial application for CW–1 or CW–2 status. *See* 8 CFR 214.2(w)(5) and (w)(15). When applicants apply overseas, USCIS will not require that the applicants provide biometrics along with Form I–129CW, although the Department of State may require biometrics at a U.S. consulate or embassy abroad as part of its routine visa processing procedures. Aliens present in the CNMI will not have previously supplied biometric information to the Federal government; therefore, because the federal government will not have conducted the attendant security checks on those aliens, USCIS will require aliens in the CNMI to provide biometrics. The applicable biometrics fee is $80. A fee waiver is available based upon a showing of inability to pay for the Form I–129CW and/or biometrics fees. *See* 8 CFR 103.7(b)(1); 8 CFR 103.7(c)(5)(i). Status will be evidenced using Form I–94 or other appropriate documents.

*F. Lawful Presence and Travel*

The transitional worker program will be available to two groups of aliens in general: (1) Those who are lawfully present in the CNMI; and (2) those who are abroad. The rule defines lawful

presence as status under the CNMI immigration laws before the transition program effective date, or status under the ''grandfather'' provision of the CNRA or U.S. immigration laws after the transition program effective date. *See* Section 6(e)(1) or (2) of Public Law 94–241, as added by sec. 702(a) of Title VII of the CNRA; 8 CFR 214.2(w)(1)(iv).

Short term visitors for business or pleasure, including individuals admitted with a Visitor Entry Permit (VEP) under CNMI law, will not be eligible to obtain CW classification, as such individuals are not part of the foreign workforce that is the subject of this rule. Once status is obtained, the CW–1 or CW–2 nonimmigrant may leave the CNMI and return, but must have the appropriate visa for readmission. *See* 8 CFR 214.2(w)(22)(ii). Such a visa requirement at the time of application for admission is consistent with current INA requirements. *See* INA sec. 212(a)(7)(B), 8 U.S.C. 1182(a)(7)(B). CW classification is valid only in the CNMI, and provides no basis for travel to any other part of the United States. *See* 8 CFR 214.2(w)(22)(i). An attempt to travel to any other part of the United States without documentation authorizing admission in another classification is a violation of the CW status that will render the alien removable. *Id.*

*G. Spouse and Minor Children of CW Transitional Worker*

Section 702(a) of the CNRA, provides that spouses and minor children of an alien in CW–1 nonimmigrant status may be authorized for admission into the CNMI as accompanying or following to join the principal CW worker, and this rule implements that authority. *See* 8 CFR 214.2(w)(3). The rule adopts the INA's definition of ''child'' for immigration purposes other than naturalization in section 101(b), adding a requirement that the child be under eighteen years of age since the statute refers to ''minor children'' rather than ''children.'' *See* Section 6(d)(6) of Public Law 94–241, as added by sec. 702(a) of Public Law 110–229; 8 CFR 214.2(w)(1)(vi). Generally, work authorization is not permitted for accompanying spouses and children of other classes of nonimmigrants as a result of their derivative status, and this rule similarly does not provide it. *See* 8 CFR 214.2(w)(22)(iii).

*H. Consideration of Petitions and Applications*

A decision to grant or deny CW–1 or CW–2 status is discretionary and USCIS may deny petitions for failure to demonstrate eligibility or other good cause. Consistent with procedures for other nonimmigrant categories, petitioners may appeal denials of Form I–129CW to the USCIS Administrative Appeals Office on Form I–290B, as provided by 8 CFR 103.7(b). Denials of Form I–539, Application to Change or Extend Nonimmigrant Status, are not appealable. *See* 8 CFR 214.2(w)(21).

*I. Change or Adjustment of Status*

Section 702(a) of the CNRA allows workers in the CW classification to change to another nonimmigrant status or to adjust to lawful permanent resident status throughout the transition period, if eligible. Section 6(d)(1) of Public Law 94–241, as added by section 702(a) of Public Law 110–229. The rule provides that an alien may legitimately be present in, or come to, the CNMI for a temporary period as a CW–1 or CW–2 nonimmigrant and, at the same time, lawfully seek to become a permanent resident of the United States provided the alien intends to depart voluntarily at the end of the alien's authorized nonimmigrant stay. *See* 8 CFR 214.2(w)(19). For purposes of qualifying for CW–1 or CW–2 classification, the alien is not required to maintain a residence abroad, and dual immigrant and nonimmigrant intent is allowed. *See* 8 CFR 214.2(w)(19).

*J. Period of Admission and Extensions of Stay*

A CW transitional worker will be admitted for an initial period of one year. *See* 8 CFR 214.2(w)(16). The spouse and children accompanying or following to join a CW transitional worker will be admitted for the same period that the principal alien is in valid CW transitional worker status, or in the case of a minor child, until the age of 18. *See* 8 CFR 214.2(w)(16). Additionally, USCIS will grant extensions of CW status in one-year increments until the end of the transition period. *See* 8 CFR 214.2(w)(17). Extensions of stay are subject to the numerical limitation and section 702(a) of the CNRA further requires that the number of permits be reduced on an annual basis. *See* 8 CFR 214.2(w)(1)(vii). A one-year validity period facilitates effective management of the number of permits issued at any given time. DHS welcomes comments on the CW–1 status validity period, its potential impacts on CNMI employers and foreign workers, and ways to mitigate these impacts while complying with the statute.

*K. Post-Transition Period*

Unless extended by the Secretary of Labor, the CNMI-only transitional worker program will end on December 31, 2014. Section 6(a)(2) of Public Law 94–241, as added by section 702(a) of Public Law 110–229. After the end of the CNMI-only transitional worker program, the CW classification will cease to exist, as existing grants of status will automatically terminate and no new ones will be issued. *See* 8 CFR 214.2(w)(23).

**IV. Technical Changes**

This rule amends the current provisions of 8 CFR 214.2 by adding paragraph (w) CNMI–Only Transitional Worker classification. *See* 8 CFR 214.2(w).

**V. Regulatory Requirements**

*A. Administrative Procedure Act*

The Administrative Procedure Act (APA) provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' *See* 5 U.S.C. 553(b)(B). For reasons discussed below, DHS finds that prepromulgation notice and comment for this rule would be impracticable, unnecessary, and contrary to the public interest.

Although Congress provided DHS with twelve months (now eighteen months under the extended transition date) to conduct and conclude the rulemaking actions necessary to implement the requirements of the CNRA, this timeframe is a relatively short timeframe to conduct a thorough review of the CNMI's immigration system and develop the complex regulatory scheme necessary to ensure a smooth transition of the CNMI to the U.S. federal immigration system and thus avoid potential adverse impacts on the CNMI economy and aliens currently residing lawfully in the CNMI. Further, in developing these regulations, DHS required sufficient time to engage in the necessary consultations with the CNMI government, Departments of State and Interior and other required stakeholders.

Under the APA, an agency is authorized to forego notice and comment in emergency situations, or where ''the delay created by the notice and comment requirements would result in serious damage to important interests.'' *Woods Psychiatric Institute* v. *United States,* 20 Cl. Ct. 324, 333 (Cl. Ct. 1990) *aff'd* 925 F.2d 1454 (Fed. Cir. 1991); *also National Fed'n of Fed. Employees* v. *National Treasury Employees Union,* 671 F.2d 607, 611 (D.C. Cir. 1982). ''[W]hen there is a lack of specific and immediate guidance

from the agency that would create confusion, economic harm, and disruption, not only to the participants of the program, who are forced to rely on antiquated standards, but would also extend to consumers in general, the good cause exception is a proper solution to ameliorate this expected harm.'' *Woods,* 20 Cl. Ct. at 333. Under the CNRA, the transition will begin on November 28, 2009, even if regulations to guide the CNMI are not yet in place. Thus, the failure to have an effective interim regulation in place by the beginning of the transition period would serve only to harm the CNMI and aliens residing in the CNMI following the transition. This would have an adverse impact on the CNMI economy in direct contrast to congressional intent under the CNRA and would be contrary to an important public interest.

Although DHS finds that good cause exists under 5 U.S.C. 553(b) to issue this rule as an interim rule, DHS nevertheless invites written comments on this interim rule and will consider those comments in the development of a final rule in this action.

*B. Executive Order 12866*

This rulemaking is not considered ''economically significant'' under Executive Order 12866 because it will not result in an annual effect on the economy of $100 million or more in any one year. However, because this rule raises novel policy issues, it is considered significant and has been reviewed by the Office of Management and Budget (OMB) under this Order. A summary of the economic impacts of this rule are presented below. For further details regarding this analysis, please refer to the complete Regulatory Assessment that has been placed in the public docket for this rulemaking.

In this analysis, we estimate the incremental costs to society, including both the CNMI and the United States, of the rule. Given the requisite reduction in the number of grants of CW status (to zero) by the end of the transition period, the most significant economic impact of the rule may result from a decrease in available foreign labor. However, we cannot reliably measure this impact for two primary reasons: (1) DHS has yet to develop a schedule for allocating and reducing the number of grants of CW status, and (2) economic models with which to estimate this impact are largely absent or cannot be developed, given the general lack of CNMI economic and production data and the changing conditions of the CNMI economy (due to changes in the two primary industries in the CNMI: Garment manufacturing and tourism, newly imposed minimum wage requirements, and the CNMI government's fiscal condition). Furthermore, whether the U.S. Department of Labor (DOL) will exercise its authority to extend the transition period beyond 2014 is unknown at this time.

DHS notes that despite these limitations and for purposes of illustration only, the U.S. Government Accountability Office (GAO) in a recent report has simulated a range of possible impacts on the CNMI economy (i.e., Gross Domestic Product) given varying rates of reduction in the number of visas for foreign workers and decisions made by DOL with respect to extending the transition period (*see* GAO–08–791, August 2008). We do not make any attempt to recreate, modify, or substantiate the GAO analysis in this report.

As a result, we have calculated the estimable incremental direct costs resulting from changes in the fees imposed for the visas required by the rule. Because of the data limitations discussed above, we qualitatively discuss the incremental effect of these costs on overall production and government revenue in the CNMI.

The analysis focuses solely on impacts likely to be incurred during the transition period beginning November 28, 2009, and ending December 31, 2014. There are four key assumptions that shape the framework and methodology of our cost analysis:

1. The number of grants of CW status available during the transition period ending December 31, 2014, will remain constant at 22,417 visas per year. We make this assumption because (1) DHS and USCIS have not yet established a schedule for allocating and reducing the number of grants of CW status; and (2) DOL has not yet decided whether or not to extend the transition period beyond 2014. We again note that GAO report 08–791 contains more information regarding possible impacts on CNMI GDP given varying rates of reduction in the number of CW visas for foreign workers and DOL with respect to extending the transition period.

2. The starting cap of 22,417 grants of CW status is sufficient to accommodate the number of foreign workers likely to require such status in 2009. We estimate that approximately 14,543 foreign workers (13,543 in-status and 1,000 out-of-status who may be brought into lawful status under CNMI law) will be granted CW status in 2009. This number is based on the total number of foreign workers present in the CNMI as of August 2008 (19,083), as reported by the CNMI government, after subtracting out: The number of garment factory workers assumed to have returned to their home countries since that time (1,500); the number of foreign workers eligible for visa classifications under the INA (2,090); and the number of foreign workers ineligible for a grant of CW status (950 private domestic household workers and other ineligible workers).

3. The number of jobs currently held by foreign workers will not change during the transition period. We assume that the number of jobs currently held by foreign workers represents the future demand for foreign workers, or the number of jobs available for such workers. We make this assumption because CNMI's economic conditions are changing, and we lack the data to definitively predict the future state of the CNMI economy and its resulting impact on the labor market for foreign workers. We also do not know the rate at which resident workers would replace foreign workers.

4. The current number of out-of-status foreign workers is 1,000. The CNMI government estimates that 1,000 out-of-status foreign workers were present in the CNMI as of August 2008. The CNMI government's established cap of 22,417 CNMI foreign work permits is sufficient to allow employers to bring all of these workers into lawful status prior to the beginning of the transition period.

Collectively, these assumptions result in a scenario where no shortage of labor is anticipated. Therefore, this analysis focuses on estimating the change in costs associated with obtaining status for foreign workers from USCIS instead of from the CNMI government. However, it is also possible that annual reductions in the number of grants of CW status could result in a shortage of labor, adversely affecting the CNMI economy. As previously described, DHS will assess and reduce the number of grants of CW–1 status annually based, in part, on the economic conditions in the CNMI, consultation with the government of the CNMI and other Federal government agencies, and employment opportunities available for the resident workforce. Consequently, we are unable to determine conclusively at this time whether a shortage of labor will take place during the transition period.

These assumptions are uncertain. Depending on how DHS reduces the number of grants of CW status during the transition period, if the CNMI economy experiences a surge in the demand for the type of foreign labor that is ineligible for visa classifications under the INA and exceeds the CNMI status cap, or if the number of out-of-status foreign workers has been underestimated by the CNMI

government, the rule could have negative impacts, perhaps significant, on the CNMI economy. The absence of a defined schedule for reducing the CW status cap, combined with the general lack of CNMI economic and production data and changing conditions of the CNMI economy, preclude a reliable analysis of alternative scenarios exploring these impacts in depth.

In our analysis, DHS first estimates the current and future baseline demand for foreign workers in the absence of the rule. In this baseline analysis, we consider the prevailing economic conditions of the CNMI to estimate the future demand for foreign workers and the total number of foreign work permits that would be issued under CNMI labor law absent the rule. Next, we characterize the number and type of CW status grants and nonimmigrant worker visas available under the INA that would be issued as a result of the rule. We consider the number of affected businesses and foreign workers as well as the foreign workers' work and professional qualifications, eligibility based on employer or occupation, and current status in the CNMI. We then estimate the component costs that CNMI employers would incur to apply for and obtain the requisite work permits (baseline regulatory environment) and CW status for foreign workers (rule). We then combine this cost information with our estimates of the number of grants of CW status that would be issued to calculate the incremental direct costs of the rule. Finally, we discuss qualitatively the potential impact of changes in labor costs on the CNMI economy and the distributive effect of the rule on the revenues of the CNMI government.

We do not consider in our analysis separate costs to the CNMI or the U.S. Federal government to administer the current CNMI permit program and this rule, respectively. We assume that the fees associated with applying for and obtaining the requisite permits and visas account for the cost to each respective government of adjudicating petitions and providing the relevant documentation.

As of November 28, 2009, the beginning of the transition period and the implementation date for this regulation, we estimate that 17,583 foreign workers and 1,176 businesses in the CNMI will be subject to the rule. Based on the available data, we estimate that approximately 2,090 of these workers may qualify for a nonimmigrant work visa available under the INA, and at least 950 private domestic household and other ineligible workers will not be eligible for CW status, leaving 14,543 foreign workers eligible for CW status. In addition, we estimate that approximately 2,100 spouses and dependent children of foreign workers will apply for admission under a second CW status category.

We consider and evaluate the following four alternatives:

*Alternative 1 (the chosen alternative):* Only aliens lawfully present in the CNMI may qualify for CW status. An employer petitioner can name more than one worker or ''beneficiary'' on a single Form I–129CW petition if the beneficiaries will be working in the same eligible occupational category, for the same period of time, and in the same location. CW status is valid for a period of 1 year.

*Alternative 2:* Same as Alternative 1, but an employer petitioner can name only one eligible beneficiary on each petition.

*Alternative 3:* Same as Alternative 1, but CW status is valid for a period of 2 years.

*Alternative 4:* Same as Alternative 1, but aliens lawfully present as well as aliens unlawfully present in the CNMI as of the beginning of the transition period (November 28, 2009) may qualify for CW status.

We estimate the incremental costs on an annual basis over the same period of time as the transition period, beginning with the year 2010 (to simplify our cost analysis by estimating the incremental costs on a calendar year basis, we assume the transition period begins 1 month later on January 1, 2010) and ending with the year 2014, in the absence of any extension made by DOL. In addition, we estimate costs for the 20-month period prior to the onset of the transition period (May 8, 2008, to December 31, 2009) to account for the incremental costs of issuing CNMI work permits to those foreign workers who are currently out-of-status in the CNMI, thus allowing them to be eligible for CW status or INA visa classifications under Alternatives 1, 2, and 3 of the rule.

The incremental costs represent the change in the cost of obtaining the necessary CW status and INA visas under the rule from the baseline cost of obtaining foreign work permits under the current CNMI system. We estimate that the baseline cost for issuing CNMI work permits to the 16,583 in-status foreign workers presently in the CNMI is about $4.9 million annually. Table 1 summarizes the results of the regulatory analysis.

TABLE 1—SUMMARY OF ESTIMABLE INCREMENTAL DIRECT COSTS OF THE RULE: NET PERMIT AND VISA COSTS INCURRED BY CNMI EMPLOYERS (CNMI BUSINESSES AND CNMI GOVERNMENT), 2009 DOLLARS IN MILLIONS

| Alternative | Year | | | | | | |
|---|---|---|---|---|---|---|---|
| | May '08–Dec '09 | 2010 | 2011 | 2012 | 2013 | 2014 | Total |
| Undiscounted | | | | | | | |
| Alternative 1 | $0.30 | $0.12 | −$3.4 | −$3.4 | −$2.6 | −$3.4 | ..... |
| Alternative 2 | 0.30 | 5.1 | 1.6 | 1.6 | 2.3 | 1.6 | ..... |
| Alternative 3 | 0.30 | 0.12 | −4.6 | −3.4 | −3.8 | −3.4 | ..... |
| Alternative 4 | 0 | 0.12 | −3.4 | −3.4 | −2.6 | −3.4 | ..... |
| 3% Discount Rate | | | | | | | |
| Alternative 1 | $0.30 | $0.11 | −$3.2 | −$3.1 | −$2.3 | −$2.9 | −$11.2 |
| Alternative 2 | 0.30 | 4.9 | 1.5 | 1.4 | 2.1 | 1.3 | 11.5 |
| Alternative 3 | 0.30 | 0.11 | −4.3 | −3.1 | −3.4 | −2.9 | −13.4 |
| Alternative 4 | 0 | 0.11 | −3.2 | −3.1 | −2.3 | −2.9 | −11.5 |
| 7% Discount Rate | | | | | | | |
| Alternative 1 | $0.30 | $0.11 | −$3.0 | −$2.8 | −$2.0 | −$2.4 | −$9.8 |

TABLE 1—SUMMARY OF ESTIMABLE INCREMENTAL DIRECT COSTS OF THE RULE: NET PERMIT AND VISA COSTS INCURRED BY CNMI EMPLOYERS (CNMI BUSINESSES AND CNMI GOVERNMENT), 2009 DOLLARS IN MILLIONS—Continued

| Alternative | Year | | | | | | |
|---|---|---|---|---|---|---|---|
| | May '08–Dec '09 | 2010 | 2011 | 2012 | 2013 | 2014 | Total |
| Alternative 2 | 0.30 | 4.7 | 1.4 | 1.3 | 1.8 | 1.1 | 10.6 |
| Alternative 3 | 0.30 | 0.11 | −4.0 | −2.8 | −2.9 | −2.4 | −11.8 |
| Alternative 4 | 0 | 0.11 | −3.0 | −2.8 | −2.0 | −2.4 | −10.1 |

**Note:** Detail may not sum to total due to independent rounding. These costs do not include the CW educational fee and the H–1B visa American Competitiveness and Worker Improvement Act (ACWIA) fee because these fees represent transfer payments under Executive Order 12866 and are redistributed in the economy. Estimated costs for the period prior to the beginning of the transition period (May 2008 through December 2009) are assumed to be largely incurred in 2009; thus, these costs are not discounted to calculate their present value in 2009.

The total present value costs of Alternatives 1, 3, and 4 are projected to range from −$9.8 million to −$13.4 million depending on the validity period of CW status (1 or 2 years), whether out-of-status aliens present in the CNMI are eligible for CW status, and the discount rate applied. These negative values indicate that society will experience a net cost savings as a result of implementing one of these three alternatives instead of the baseline. These savings are attributable to the flexibility of allowing multiple beneficiaries to be included in a single Form I–129CW petition, which is in contrast to the current CNMI permit system that requires an application and fee paid for each employee. The additional costs for applying for and obtaining CW status for spouses and children and INA visas for certain qualified foreign workers do not outweigh the benefits of submitting a single petition for multiple beneficiaries seeking CW status. In comparison to the chosen alternative (Alternative 1), increasing the CW status validity period from 1 year to 2 years (Alternative 3) results in additional cost savings of about 20 percent. Additionally, allowing out-of-status workers eligibility for CW status (Alternative 4) results in additional cost savings of about 3 percent because CNMI employers would not necessarily need to bring out-of-status workers to an in-status condition (under CNMI law) prior to the beginning of the transition period.

The total present value costs of Alternative 2 are projected to range from $10.6 million to $11.5 million depending on the discount rate applied. These costs are substantially higher than the costs estimated for the other three alternatives. The positive values represent a net cost to society, which is expected given that this alternative requires a petition for each beneficiary.

The costs presented in Table 1 do not include the statutorily required fee of $150 per beneficiary per year to fund vocational education programs in the CNMI. This fee is to be paid for each beneficiary seeking CW status. The costs also do not include the ACWIA fee required for H–1B visa applicants. Although these fees represent a cost to businesses or employer petitioners in the CNMI, we consider these fees as a transfer or redistribution of funds within the CNMI and U.S. economies and not as a component of the net costs of the rule to society. We note that from the perspective of the employers, when these fees are included, Alternatives 1, 3, and 4 are a net overall cost rather than benefit.

Ideally, we would quantify and monetize the benefits of the regulation and compare them to the costs. The intended benefits of the rule include improvements in national and homeland security and protection of human rights. First, implementation of the rule assures that the admission of nonimmigrants to the CNMI is consistent with existing Federal laws and practices intended to secure and control the borders of the United States and its territories. Second, the rule would help protect foreign workers in the CNMI from abuses such as human trafficking and other illicit activity.

Due to limitations in data and the difficulty associated with quantifying national and homeland security improvements, we describe the intended benefits of the regulation qualitatively. Moreover, under the assumptions outlined previously, because three of the four alternatives analyzed, including the chosen alternative (Alternative 1), are projected to result in net cost savings to society, the rule may produce a net overall quantifiable benefit to society. Assuming that the fees collected by the CNMI government in the baseline and by USCIS under each regulatory alternative equal the costs to the CNMI and U.S. Federal governments of administering their respective programs, the results of our analysis imply that the U.S. Federal government can more cost-effectively administer the program while also providing improved security benefits.

Notwithstanding the inestimable potential broader impacts of this regulation on the CNMI economy that would result if the availability of foreign labor is affected, the results of our analysis on the incremental societal costs of the associated visa or status fees indicate that Alternative 1 provides the most favorable combination of cost and stringency. While Alternative 2 might be considered more stringent because it requires a petition for each beneficiary, the costs are substantially higher than the other three alternatives. Alternative 3 is expected to achieve more cost savings than Alternative 1, but the 1-year status validity period under Alternative 1 facilitates USCIS's effective management of the number of grants of CW status issued at any given time and the statutory reduction on an annual basis to zero by the end of the transition period. Alternative 4 is also expected to achieve more cost savings than Alternative 1, but is considered less stringent because DHS has determined that requiring lawful status in the CNMI as a prerequisite for CW eligibility is the most efficient means to begin the Congressionally mandated drawdown of transitional workers to zero by the end of the transition period. Furthermore, to allow out-of-status workers in the CNMI to obtain CW status would encourage noncompliance with CNMI immigration law during the timeframe before the transition period effective date by removing the incentive for such workers with lawful status to maintain or reacquire such lawful status under CNMI law prior to the transition.

DHS and USCIS welcome comments on this analysis and the regulatory alternatives considered.

*C. Impacts to Small Entities*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies

to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. When an agency invokes the good cause exception under the Administrative Procedure Act (APA) to make changes effective through an interim final rule, the RFA does not require an agency to prepare a regulatory flexibility analysis. This rule makes changes for which notice and comment are not necessary, and, accordingly, DHS is not required to prepare a regulatory flexibility analysis.

However, DHS and USCIS have considered the impacts of this interim rule on small entities in the CNMI. A summary of the analysis is presented below. For further details regarding this analysis, please refer to the complete Regulatory Assessment that has been placed in the public docket for this rulemaking.

*(1) Why action by the agency is being considered:* USCIS is promulgating this regulation in response to legislation by Congress imposing Federal immigration law on the CNMI. Congressional intent in enacting this legislation is ''to ensure that effective border control procedures are implemented and observed, and that national security and homeland security issues are properly addressed.'' Please refer to Section II above for further detail.

(2) *The objectives of, and legal basis for, the rule:* On May 8, 2008, President George W. Bush signed the CNRA into law, Public Law 110–229 (CNRA). Title VII, Subtitle A of the CNRA calls for the extension of U.S. immigration laws to the CNMI, with special provisions to allow for the orderly phasing-out of CNMI's nonresident contract worker program and the orderly phasing-in of Federal responsibilities over immigration in the CNMI. Congress directs USCIS to minimize the ''potential adverse economic and fiscal effects of phasing-out'' CNMI's nonresident contract worker program and maximizing CNMI's ''potential for future economic and business growth.'' The objective of the CNMI-only transitional worker program is to provide for an orderly transition from the existing CNMI foreign worker permit system to the U.S. immigration system and to mitigate potential harm to the CNMI economy as employers adjust their hiring practices and foreign workers obtain nonimmigrant and immigrant visa classifications available under the INA. Please refer to Section II above for further detail.

(3) *The type and number of small entities to which the rule will apply:* We assume all businesses in the CNMI employ foreign workers, except those businesses with no paid employees. The data on businesses by size show that over 80 percent of businesses in the CNMI have between 1 and 19 employees. We estimate there are approximately 1,000 businesses with 1 to 19 employees in the CNMI. The 2007 economic census of the CNMI shows that businesses with 10 to 19 employees had average revenues of just over $1 million that year (smaller businesses had even lower average revenues). According to the Small Business Administration's ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes,'' other than in crop production, businesses in the vast majority of industries are considered small if they have annual revenues less than $7 million or fewer than 50 employees. In many industries, the threshold is higher. In addition, an unknown portion of the approximately 177 businesses with 20 or more employees are likely to be small according to the SBA size standards.

The CNMI government also employs foreign workers. A small governmental jurisdiction is a government representing fewer than 50,000 constituents. Under this definition, the CNMI government is not considered small, as the population of the CNMI is approximately 66,000.

Information on non-profit organizations in the CNMI is largely non-existent or incomplete. USCIS believes, however, that like virtually all entities in the CNMI, these organizations likely employ foreign workers and would likely be considered small and would be affected by this rule.

(4) *Reporting, recordkeeping and other compliance requirements:*

The forms required by this rule are expected to be submitted on paper by employers. In our analysis, we assume employees in the job category ''Management of companies and enterprises'' will be completing and filing these forms, which require basic administrative and recordkeeping skills. The skills required to complete the new I–129CW form are essentially the same as the skills required to complete the necessary paperwork under the current CNMI permit program.

As described in the previous section on Executive Order 12866, DHS and USCIS considered four regulatory alternatives.

*Alternative 1 (the chosen alternative):* Only aliens lawfully present in the CNMI may qualify for CW status. An employer petitioner can name more than one worker or ''beneficiary'' on a single Form I–129CW petition if the beneficiaries will be working in the same eligible occupational category, for the same period of time, and in the same location. CW status is valid for a period of 1 year.

*Alternative 2:* Same as Alternative 1, but an employer petitioner can name only one eligible beneficiary on each petition.

*Alternative 3:* Same as Alternative 1, but CW status is valid for a period of 2 years.

*Alternative 4:* Same as Alternative 1, but aliens lawfully present as well as aliens unlawfully present in the CNMI as of the beginning of the transition period (November 28, 2009) may qualify for CW status.

Note that in the analysis in the previous section, fees associated with CW status were considered intra-economy transfers and were thus not considered in the estimation of net costs or net benefits to society. In this analysis of small entities, however, these status fees and the $150 educational fee are considered explicitly because the fees are a direct cost a small entity will incur and a business's annual revenue and ability to hire workers will be directly impacted by these fees.

As estimated previously, businesses may experience costs in 2008 and 2009 to bring out-of-status workers into lawful CNMI status prior to the onset of the transition period (November 28, 2009) in order to avoid having to replace those workers. In 2010, businesses will obtain visas issued under the INA for eligible workers, and they will obtain CW status for the remaining eligible workers as well as their spouses and children. For the purposes of the cost analysis, we assume the INA-eligible workers will all qualify for H–1B visas (while this group may qualify for other INA classifications, we use the cost to petition for an H–1B visa because the costs for these visas are higher than for the other classifications that foreign workers may be eligible for). The H–1B visas will be renewed in 2013, while CW status will be renewed annually or biennially, depending on the regulatory alternative. Table 2 presents the annual estimable incremental costs (*i.e.,* the costs of CW status and INA visas minus the costs of CNMI permits had the rule not come into effect) for businesses of complying with the rule under the chosen alternative, Alternative 1.

TABLE 2—DISTRIBUTION OF NET PERMIT AND VISA COSTS BY BUSINESS SIZE, ALTERNATIVE 1—CHOSEN ALTERNATIVE (UNDISCOUNTED, $M, 2009)

| Business size (employees) | May '08–Dec '09 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|
| No paid employees | $0 | $0 | $0 | $0 | $0 | $0 |
| 1 to 4 | 0.02 | 0.41 | 0.03 | 0.03 | 0.18 | 0.02 |
| 5 to 9 | 0.04 | 0.45 | −0.13 | −0.14 | 0.09 | −0.15 |
| 10 to 19 | 0.07 | 0.79 | −0.24 | −0.24 | 0.16 | −0.26 |
| 20 or more | 0.17 | 2.4 | −0.86 | −0.88 | 0.80 | −0.93 |
| All businesses | 0.30 | 4.1 | −1.2 | −1.2 | 1.2 | −1.3 |

**Note:** Net permit and visa costs include the CW education fee and H–1B visa ACWIA fee.

The costs of Alternative 1, as experienced by businesses, are the highest in the first year of the transition period, when businesses obtain initial INA-eligible visas for their employees in addition to CW status and providing biometrics. In most years businesses will collectively save money compared to the baseline, as the CW status, including the education fee, are less expensive than the CNMI permits on a per-worker basis, largely because multiple beneficiaries may be included on a single I–129CW petition. However, the smallest businesses, those employing 1 to 4 workers, may experience positive costs in each year.

Alternative 2 requires businesses to file separate I–129CW petitions for each of their foreign workers (multiple beneficiaries are not permitted on a single petition). These costs, distributed by business size, are shown in Table 3.

TABLE 3—DISTRIBUTION OF NET PERMIT AND VISA COSTS BY BUSINESS SIZE, ALTERNATIVE 2 (UNDISCOUNTED, $M, 2009)

| Business size (employees) | May '08–Dec '09 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|
| No paid employees | $0 | $0 | $0 | $0 | $0 | $0 |
| 1 to 4 | 0.02 | 0.69 | 0.31 | 0.31 | 0.46 | 0.30 |
| 5 to 9 | 0.04 | 1.1 | 0.48 | 0.47 | 0.70 | 0.46 |
| 10 to 19 | 0.07 | 1.9 | 0.84 | 0.83 | 1.2 | 0.81 |
| 20 or more | 0.17 | 5.4 | 2.1 | 2.1 | 3.8 | 2.1 |
| All businesses | 0.30 | 9.0 | 3.8 | 3.7 | 6.2 | 3.6 |

**Note:** Net permit and visa costs include the CW education fee and H–1B visa ACWIA fee.

The incremental costs of Alternative 2 are positive in every year, as the transitional worker program is more expensive than the CNMI permit process in the baseline in this case. Once again, businesses face the highest costs in 2010 due to the added expense of obtaining INA visas and providing biometrics.

Under Alternative 3, CW status is valid for two years. This analysis calculates costs as if businesses will be required to pay the education fee for those two years at the same time (i.e., businesses will pay the $320 I–129CW filing fee along with $300 for two years education fee at one time). The costs of visas under existing INA classifications remain the same. The costs of Alternative 3 are shown in Table 4.

TABLE 4—DISTRIBUTION OF NET PERMIT AND VISA COSTS BY BUSINESS SIZE, ALTERNATIVE 3 (UNDISCOUNTED, $M, 2009)

| Business size (employees) | May '08–Dec '09 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|
| No paid employees | $0 | $0 | $0 | $0 | $0 | $0 |
| 1 to 4 | 0.02 | 0.59 | −0.37 | 0.20 | −0.22 | 0.02 |
| 5 to 9 | 0.04 | 0.72 | −0.57 | 0.12 | −0.34 | −0.15 |
| 10 to 19 | 0.07 | 1.3 | −1.0 | 0.21 | −0.60 | −0.26 |
| 20 or more | 0.17 | 3.7 | −2.6 | 0.28 | −0.84 | −0.93 |
| All businesses | 0.30 | 6.2 | −4.5 | 0.8 | −2.0 | −1.3 |

**Note:** Net permit and visa costs include the CW education fee and H–1B visa ACWIA fee.

Businesses experience positive costs in the years in which they pay CW status costs as well as payment of two years of education fees. In the alternate years, businesses save money by not obtaining CNMI permits for their workers. The net effect of these costs in comparison to Alternative 1 is a slight savings for businesses, as they spend half as much on I–129CW filing fees under that alternative.

Alternative 4 presents the same cost components and timing as Alternative 1 with one exception: Because out-of-status workers will be eligible for CW status, businesses have no incentive to bring those workers into status (under CNMI law) prior to the onset of the transition period. Therefore, the annual costs after the beginning of the transition period (for our cost analysis, we assume January 1, 2010), for the two alternatives are the same; only the costs

in 2008 and 2009 differ. The costs for Alternative 4 are listed in Table 5.

TABLE 5—DISTRIBUTION OF NET PERMIT AND VISA COSTS BY BUSINESS SIZE, ALTERNATIVE 4 (UNDISCOUNTED, $M, 2009)

| Business size (employees) | May '08–Dec '09 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|
| No paid employees | $0 | $0 | $0 | $0 | $0 | $0 |
| 1 to 4 | 0 | 0.41 | 0.03 | 0.03 | 0.18 | 0.02 |
| 5 to 9 | 0 | 0.45 | −0.13 | −0.13 | 0.09 | −0.15 |
| 10 to 19 | 0 | 0.79 | −0.24 | −0.24 | 0.16 | −0.26 |
| 20 or more | 0 | 2.4 | −0.86 | −0.86 | 0.80 | −0.93 |
| All businesses | 0 | 4.1 | −1.2 | −1.2 | 1.2 | −1.3 |

**Note:** Net permit and visa costs include the CW education fee and H–1B visa ACWIA fee.

Under all four alternatives, businesses experience the highest net positive costs in the first year of the transition period. Therefore, we will compare these 2010 costs to the annual revenues and payrolls for businesses of each size category. Table 6 lists the number of businesses in each size category along with the average payroll and average revenue of businesses in those size categories in 2010 dollars.

TABLE 6—AVERAGE PAYROLL AND REVENUE OF BUSINESSES

| Business size (employees) | Businesses | Average payroll ($M) | Average revenue ($M) |
|---|---|---|---|
| No paid employees | 61 | 0 | 0.096 |
| 1 to 4 | 476 | 0.034 | 0.17 |
| 5 to 9 | 244 | 0.096 | 0.66 |
| 10 to 19 | 210 | 0.17 | 1.0 |
| 20 or more | 200 | 1.0 | 4.8 |
| All businesses | 1,191 | 0.23 | 1.2 |

Average payrolls range from $34,000 per business (1 to 4 employees) to $1.0 million per business (20 or more employees). Average revenue also scales with the size of the business, from $96,000 for sole proprietorships to $4.8 million for businesses with 20 or more employees. For comparison, Table 7 presents the per-business incremental costs of each alternative and the ratio of these costs to the average payroll and revenue.

TABLE 7—ESTIMATED 2010 PERMIT AND VISA COSTS PER BUSINESS AS A PERCENTAGE OF PAYROLL AND REVENUE

| Business size (employees) | Cost/business ($) | Percent payroll | Percent revenue |
|---|---|---|---|
| Alternative 1 | | | |
| No paid employees | 0 | 0 | 0 |
| 1 to 4 | 869 | 2.6 | 0.52 |
| 5 to 9 | 1,832 | 1.9 | 0.28 |
| 10 to 19 | 3,750 | 2.2 | 0.37 |
| 20 or more | 12,230 | 1.3 | 0.26 |
| All businesses (average) | 3,438 | 1.5 | 0.29 |
| Alternative 2 | | | |
| No paid employees | 0 | 0 | 0 |
| 1 to 4 | 1,451 | 4.3 | 0.86 |
| 5 to 9 | 4,313 | 4.5 | 0.66 |
| 10 to 19 | 8,881 | 5.2 | 0.87 |
| 20 or more | 27,203 | 2.8 | 0.57 |
| All businesses (average) | 7,598 | 3.3 | 0.64 |
| Alternative 3 | | | |
| No paid employees | 0 | 0 | 0 |
| 1 to 4 | 1,241 | 3.7 | 0.74 |
| 5 to 9 | 2,938 | 3.0 | 0.45 |
| 10 to 19 | 6,028 | 3.5 | 0.59 |
| 20 or more | 18,291 | 1.9 | 0.38 |
| All businesses (average) | 5,232 | 2.3 | 0.44 |

TABLE 7—ESTIMATED 2010 PERMIT AND VISA COSTS PER BUSINESS AS A PERCENTAGE OF PAYROLL AND REVENUE—Continued

| Business size (employees) | Cost/ business ($) | Percent payroll | Percent revenue |
|---|---|---|---|
| Alternative 4 | | | |
| No paid employees | 0 | 0 | 0 |
| 1 to 4 | 869 | 2.6 | 0.52 |
| 5 to 9 | 1,832 | 1.9 | 0.28 |
| 10 to 19 | 3,750 | 2.2 | 0.37 |
| 20 or more | 12,230 | 1.3 | 0.26 |
| All businesses (average) | 3,438 | 1.5 | 0.29 |

**Note:** Net permit and visa costs include the CW status education fee and H–1B visa ACWIA fee.

Under all four alternatives, the additional costs imposed by the rule in 2010 represent less than 0.9 percent of annual revenues. Compared to payroll, however, the impacts are about 5 to 7 times higher. Under Alternative 1 (the chosen alternative) businesses of all sizes experience increased labor costs of 1.3 to 2.6 percent on average, depending on the size of the business. Considering that the payroll costs presented in Table 6 do not include benefits, the actual percentage increase in labor costs for 2010 are actually smaller than reported in the exhibit. In light of these results, it does not appear that the change from CNMI permits to USCIS status represents a large impact on small businesses.

The analysis to this point has focused on the impact of replacing the CNMI foreign worker permits with INA visas and the CW status. This change does not appear to have a large economic impact on small businesses. However, the rule also establishes the intent of USCIS to reduce the number of grants of CW status on an annual basis to zero at the conclusion of the transition period, unless the transition period is extended by the U.S. Department of Labor. Reducing the number of grants of CW status may have a larger impact. In addition, the ineligibility of certain workers (*e.g.,* domestic household workers employed directly by private residents) may have a notable economic impact.

(5) *Federal rules that may duplicate, overlap or conflict with the interim rule:* In 1976, the CNMI negotiated political union with the United States, agreeing to the Covenant to Establish a Commonwealth of the Northern Mariana Islands (CNMI) in Political Union with the United States. Under the Covenant, United States citizenship was conferred on legally qualified CNMI residents, and Federal law generally applies to the CNMI, with the exception of the income tax system, and until recently, the Federal minimum wage and immigration laws. This rule, when finalized, supersedes existing CNMI immigration law.

(6) *Significant alternatives to the interim rule that accomplish the stated objectives of applicable statutes and that minimize any economic impact to small entities:* As described above, USCIS evaluated four regulatory alternatives to consider changes in the admission and filing requirements, including those that minimize the incremental cost burden to CNMI employers and businesses, including small entities. To address Congress' requirement that USCIS minimize ''potential adverse economic and fiscal effects of phasing-out'' CNMI's nonresident contract worker program, the rule allows for multiple beneficiaries per Form I–129CW, which, as shown above, represents a cost savings over the baseline and relative to Alternative 2, where a separate Form I–129CW is required for each worker. USCIS had considered alternatives that exempt small entities from this rule; however, such alternatives would not achieve the security objective of the CNRA, which is to establish Federal responsibility over immigration throughout the CNMI, and during the transition period, provide all eligible foreign workers a temporary status to continue work in the CNMI. While USCIS cannot exempt small entities from the requirements of the rule and meet the statutory objectives of the CNRA, USCIS may grant waivers from the Form I–129CW and biometric fees on a case-by-case basis for those applicants showing an inability to pay, which has the potential to minimize the impact of the rule on small entities.

In addition, we emphasize that it is the reduction in the number of grants of CW status that will have a potentially large impact on small entities; however, the interim rule does not prescribe a schedule for allocating CW status throughout the transition period.

In summary, because the rule affects all businesses employing foreign workers, it likely affects a notable number of small entities in every industry. Based on this analysis, USCIS does not believe the requirement that businesses obtain CW status or INA visas will have a large impact on a per-business basis because it will coincide with the end of the CNMI permit program. However, the impact of the reduction in grants of available status (and thus foreign workers) is less certain. DHS and USCIS welcome comments on this analysis.

*D. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) requires agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector if the rule will result in expenditures exceeding $100 million (adjusted for inflation) in any one year. We estimate that this rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Please refer to the section above on Executive Order 12866 for further details on the potential economic impacts of this rule.

*E. Executive Order 13132*

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Executive Order 12988 Civil Justice Reform*

This rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Paperwork Reduction Act (PRA)*

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995), all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a regulatory action. The collections of information encompassed within this rule have been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

USCIS is requiring a new form, Form I–129CW, to collect the information required for an employer to petition for CW status on behalf of one or more beneficiaries. Since this is an interim rule, this information collection has been submitted and approved by OMB under the emergency review and clearance procedures covered under the PRA. During the first 60 days, USCIS is requesting comments on this information collection until December 28, 2009. When submitting comments on this information collection, your comments should address one or more of the following four points.

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this Information Collection:

a. *Type of information collection:* New information collection.

b. *Abstract:* This collection is necessary to determine whether a petitioner and beneficiary meet the eligibility criteria, limitations and parameters for the CW–1 nonimmigrant program as required by or consistent with an interpretation of the applicable provisions of section 702(a) of the CNRA.

c. *Title of Form/Collection:* Petition for a Nonimmigrant Worker in the CNMI.

d. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–129CW; U.S. Citizenship and Immigration Services.

e. *Affected public who will be asked or required to respond:* Individuals and businesses.

f. *An estimate of the total number of respondents:* 1,178 respondents.

g. *Number of Responses per Respondent:* 1.34. Responses per respondent reflect the assumption that most petitioners will have to file only one I–129CW, but some petitioners will have to file multiple forms. On average, this equals 1.34 responses per respondent.

h. *Total Annual Responses:* 1,580.

i. *Hours per Response:* 3.0 hours per response.

j. *Total Annual Reporting Burden:* 4,740.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden may be submitted to The Department of Homeland Security, USCIS, Chief, Regulatory Products Division, Clearance Office, 111 Massachusetts Avenue, Washington, DC 20529–2210.

Besides the creation of the new Form I–129CW, the information collection requirements contained in this rule have been cleared by OMB under the provisions of the Paperwork Reduction Act. 44 U.S.C. Chapter 35; 5 CFR Part 1320.

In addition, termination of the current CNMI worker program will result in employers petitioning for those employees under another visa under the INA. Termination of the CNMI worker program will increase the number of respondents submitting Form I–129, Petition for a Nonimmigrant Worker, OMB Control Number 1615–0009, and Form I–539, Application to Extend/Change Nonimmigrant Status, OMB Control Number 1615–0003. Accordingly, DHS submitted Form OMB 83–C, Correction Worksheet, to OMB to increase the number of respondents submitting Form I–129 and Form I–539.

**List of Subjects**

*8 CFR Part 103*

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of Information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

*8 CFR Part 214*

Administrative practice and procedure, Aliens, Employment, Foreign Officials, Health Professions, Reporting and recordkeeping requirements, Students.

*8 CFR Part 274a*

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

*8 CFR Part 299*

Immigration, Reporting and recordkeeping requirements.

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

## PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

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

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*), E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Section 103.7 is amended by:

■ a. Adding the entry ''I–129CW'' in proper alpha/numeric sequence, in paragraph (b)(1); and

■ b. Revising paragraph (c)(5)(i).

The revisions and additions read as follows:

**§ 103.7 Fees.**

* * * * *

(b) * * *

(1) * * *

* * * * *

Form I–129CW. For an employer to petition for CW status on behalf of one or more beneficiaries—$320 plus a supplemental CNMI education funding fee of $150 per beneficiary per year. The CNMI education funding fee cannot be waived.

* * * * *

(c) * * *

(5) * * *

(i) Biometrics; Form I–90; Form I–129CW; Form I–751; Form I–765; Form I–817; I–929; Form N–300; Form N–336; Form N–400; Form N–470; Form N–565; Form N–600; Form N–600K; and Form

I–290B and motions filed with U.S. Citizenship and Immigration Services relating to the specified forms in this paragraph (c); and

* * * * *

## PART 214—NONIMMIGRANT CLASSES

■ 3. The authority citation for part 214 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Public Law 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; Title VII of Public Law 110–229; 8 CFR part 2.

■ 4. Section 214.2 is amended by adding paragraph (w) to read as follows:

### § 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(w) *CNMI-Only Transitional Worker (CW–1)*

(1) *Definitions.* The following definitions apply to petitions for CW status for employment in the Commonwealth of the Northern Mariana Islands (the CNMI or the Commonwealth) filed under this section:

(i) *Doing business* means the regular, systematic, and continuous provision of goods or services by an employer as defined in this paragraph and does not include the mere presence of an agent or office of the employer in the CNMI.

(ii) *Employer* means a person, firm, corporation, contractor, or other association, or organization which:

(A) Engages a person to work within the CNMI; and

(B) Has or will have an employer-employee relationship with the CW–1 nonimmigrant being petitioned for.

(iii) *Employer-employee relationship* means that the employer may hire, pay, fire, supervise, or otherwise control the work of the employee.

(iv) *Lawfully present in the CNMI* means that the alien has lawfully been admitted to the CNMI under the immigration laws of the Commonwealth in a category other than short term visitor for pleasure or business (240(c), 703(A), 703(B), or 704(B) under CNMI classifications). With respect to any application for transitional worker status filed or adjudicated after the transition program effective date, lawfully present in the CNMI means that the alien:

(A) Is an alien described in section 6(e)(1) or (2) of Public Law 94–241, as added by section 702(a) of Public Law 110–229, other than an alien described in section 6(e)(1) who was admitted to the CNMI as a short term visitor for pleasure or business (240(c), 703(A), 703(B), or 704(B) under CNMI classifications); or

(B) Was lawfully admitted to the CNMI under the immigration laws on or after the transition program effective date, other than an alien admitted as a visitor for business or pleasure (B–1 or B–2 or under any visa-free travel provision).

(v) *Legitimate business* means a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity. The business must meet applicable legal requirements for doing business in the CNMI. A business will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. The Secretary will determine whether a business is legitimate.

(vi) *Minor child* means a child as defined in section 101(b)(1) of the Act who is under the age of eighteen years.

(vii) *Numerical limitation* means the maximum number of persons who may be granted CW–1 status in a given fiscal year or other period as determined by the Secretary, as follows:

(A) For the period beginning on November 28, 2009 and ending on September 30, 2010, the numerical limitation is 22,417.

(B) For each fiscal year beginning on October 1, 2010 until the end of the transition period, the numerical limitation shall be a number less than 22,417 that is determined by the Secretary and published via Notice in the **Federal Register**. The numerical limitation for any fiscal year shall be less than the number for the previous fiscal year, and shall be a number reasonably calculated in the Secretary's discretion to reduce the number of CW–1 nonimmigrants to zero by the end of the transition period.

(C) The Secretary may adjust the numerical limitation for a fiscal year or other period at her discretion at any time via Notice in the **Federal Register**, as long as such adjustment is consistent with paragraph (w)(1)(vii)(B) of this section.

(viii) *Occupational category* means those employment activities that the Secretary of Homeland Security has determined require alien workers to supplement the resident workforce and includes:

(A) Professional, technical, or management occupations;

(B) Clerical and sales occupations;

(C) Service occupations;

(D) Agricultural, fisheries, forestry, and related occupations;

(E) Processing occupations;

(F) Machine trade occupations;

(G) Benchwork occupations;

(H) Structural work occupations; and

(I) Miscellaneous occupations.

(ix) *Petition* means USCIS Form I–129CW, Petition for a Nonimmigrant Worker in the CNMI, a successor form, or other form, any supplemental information requested by USCIS, and additional evidence as prescribed by USCIS.

(x) *Transition period* means the period beginning on the transition program effective date and ending on December 31, 2014, unless the CNMI-only transitional worker program is extended by the Secretary of Labor.

(xi) *Transition program effective date* means November 28, 2009.

(xii) *United States worker* means a national of the United States, an alien lawfully admitted for permanent residence, or a national of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

(2) *Eligible aliens.* Subject to the numerical limitation, an alien may be classified as a CW–1 nonimmigrant if, during the transition period, the alien:

(i) Will enter or remain in the CNMI for the purpose of employment in the transition period in an occupational category as designated by the Secretary as requiring alien workers to supplement the resident workforce;

(ii) Is petitioned for by an employer;

(iii) Is not present in the United States, other than the CNMI;

(iv) If present in the CNMI, is lawfully present in the CNMI;

(v) Is not inadmissible to the United States as a nonimmigrant, except for an alien present in the CNMI who is described in section 212(a)(7)(B)(i)(II) of the Act (not in possession of nonimmigrant visa); and

(vi) Is ineligible for status in a nonimmigrant worker classification under section 101(a)(15) of the Act, including but not limited to, section 101(a)(15)(H) of the Act.

(3) *Derivative beneficiaries—CW–2 nonimmigrant classification.* The spouse or minor child of a CW–1 nonimmigrant may accompany or follow the alien as a CW–2 nonimmigrant if the alien:

(i) Is not present in the United States, other than the CNMI;

(ii) If present in the CNMI, is lawfully present in the CNMI; and

(iii) Is not inadmissible to the United States as a nonimmigrant, except for an alien present in the CNMI who is described in section 212(a)(7)(B) of the Act (not in possession of nonimmigrant visa).

(4) *Eligible employers.* To be eligible to petition for a CW–1 nonimmigrant worker, an employer must:

(i) Be engaged in legitimate business;

(ii) Consider all available United States workers for the positions being filled by the CW–1 worker;

(iii) Offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the CNMI; and

(iv) Comply with all Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage requirements.

(5) *Petition requirements.* An employer who seeks to classify an alien as a CW–1 worker must file a petition with USCIS and pay the requisite petition fee plus the CNMI education fee of $150 per beneficiary per year. If the beneficiary will perform services for more than one employer, each employer must file a separate petition with USCIS.

(6) *Accompanying evidence.* A petition must be accompanied by:

(i) Evidence demonstrating the petitioner meets the definition of eligible employer in this section.

(ii) An attestation by the petitioner certified as true and accurate by an appropriate official of the petitioner, of the following:

(A) Qualified United States workers are not available to fill the position;

(B) The employer is doing business as defined in 8 CFR 214.2(w)(1)(i);

(C) The employer is a legitimate business as defined in 8 CFR 214.2(w)(1)(v);

(D) The beneficiary meets the qualifications for the position;

(E) The beneficiary, if present in the CNMI, is lawfully present in the CNMI;

(F) The position is not temporary or seasonal employment, and the petitioner does not reasonably believe it to qualify for any other nonimmigrant worker classification; and

(G) The position falls within the list of occupational categories designated by the Secretary.

(iii) Evidence of licensure if an occupation requires a Commonwealth or local license for an individual to fully perform the duties of the occupation. Categories of valid licensure for CW–1 classification are:

(A) *Licensure.* An alien seeking CW–1 classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the CNMI and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and allowed for the occupation with a temporary license, USCIS may grant the petition at its discretion after considering the duties performed, the degree of supervision received, and any limitations placed on the alien by the employer and/or pursuant to the temporary license.

(C) *Duties without licensure.* If the CNMI allows an individual to fully practice the occupation that usually requires a license without a license under the supervision of licensed senior or supervisory personnel in that occupation, USCIS may grant CW–1 status at its discretion after considering the duties performed, the degree of supervision received, and any limitations placed on the alien if the facts demonstrate that the alien under supervision could fully perform the duties of the occupation.

(7) *Change of employers.* An unauthorized change of employment to a new employer will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. A CW–1 nonimmigrant may change employers if:

(i) The prospective new employer files a petition requesting the CW–1, and

(ii) An extension of the alien's stay is requested if necessary for the validity period of the petition.

(8) *Amended or new petition.* If there are any material changes in the terms and conditions of employment, the petitioner must file an amended or new petition to reflect the changes.

(9) *Multiple beneficiaries.* A petitioning employer may include more than one beneficiary in a CW–1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location.

(10) *Named beneficiaries.* The petition must include the name of the beneficiary and other required information, as indicated in the form instructions, at the time of filing. Unnamed beneficiaries will not be permitted.

(11) *Early termination.* The petitioning employer must pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission.

(12) *Approval.* USCIS will consider all the evidence submitted and such other evidence required in the form instructions to adjudicate the petition. USCIS will notify the petitioner of the approval of the petition on Form I–797, Notice of Action, or in another form as USCIS may prescribe:

(i) The approval notice will include the classification and name of the beneficiary or beneficiaries and the petition's period of validity. A petition for more than one beneficiary may be approved in whole or in part.

(ii) The petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services. USCIS may in its discretion permit petitions to be filed and take other actions under this paragraph prior to the transition program effective date, but in no case will USCIS grant CW–1 status or authorize the admission of any alien to the CNMI prior to such date.

(13) *Petition validity.* A beneficiary will be admitted to the CNMI for the validity period of the petition, plus up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition. No petition shall authorize admission as a CW–1 nonimmigrant before the transition period effective date.

(14) *Where to apply.* The beneficiary, eligible spouse and minor children may:

(i) Upon petition approval, apply for a visa at a U.S. consulate authorizing admission in CW–1 or CW–2 status, as appropriate, at a port of entry in the CNMI on or after the transition program effective date; or

(ii) If present in the CNMI, apply for classification as a CW–1 or CW–2 nonimmigrant by filing Form I–129CW (or such alternative form as USCIS may designate) with USCIS. An alien applying for CW–1 or CW–2 status is eligible for a waiver of the fee for Form I–129CW based upon inability to pay as provided by 8 CFR 103.7(c)(1).

(15) *Biometrics.* USCIS shall require a beneficiary initially applying for CW–1 or CW–2 status to submit biometric information if the beneficiary is present in the CNMI. A beneficiary present in the CNMI must pay or obtain a waiver of the biometric service fee described in 8 CFR 103.7(b)(1).

(16) *Period of admission.* (i) A CW–1 nonimmigrant will be admitted for an initial period of one year. A CW–2 spouse will be admitted for the same period as the principal alien. A CW–2

minor child will be admitted for the same period as the principal alien, but such admission shall not extend beyond the child's 18th birthday.

(ii) The temporary departure from the CNMI of the CW–1 nonimmigrant will not affect the derivative status of the CW–2 spouse and minor children, provided the familial relationship continues to exist and the principal remains eligible for admission as a CW–1 nonimmigrant.

(17) *Extension of visa petition validity and extension of stay.* (i) The petitioner may request an extension of an employee's CW–1 nonimmigrant status by filing a new petition and accompanying evidence as described in 8 CFR 214.2(w)(6)(ii).

(ii) A request for a petition extension may be filed only if the validity of the original petition has not expired.

(iii) Extensions of CW–1 status may be granted for periods of 1 year until the end of the transition period, subject to the numerical limitation.

(iv) To qualify for an extension of stay, the petitioner must demonstrate that the beneficiary or beneficiaries:

(A) Continuously maintained the terms and conditions of CW–1 status; and

(B) Remains admissible to the United States; and

(C) Remains eligible for CW–1 classification.

(v) The derivative CW–2 nonimmigrant may file an application for extension of nonimmigrant stay on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status extension may not be approved until approval of the CW–1 extension petition.

(18) *Change or adjustment of status.* A CW–1 or CW–2 nonimmigrant can apply to change nonimmigrant status under section 248 of the Act or apply for adjustment of status under section 245 of the Act, if otherwise eligible. During the transition period, CW–1 or CW–2 nonimmigrants may be petitioned for or may apply for any nonimmigrant or immigrant visa classification for which they may qualify.

(19) *Effect of filing an application for or approval of a permanent labor certification, preference petition, or filing of an application for adjustment of status on CW–1 or CW–2 classification.* An alien may legitimately come to the CNMI for a temporary period as a CW–1 or CW–2 nonimmigrant and, at the same time, lawfully seek to become a lawful permanent resident of the United States provided he or she intends to depart the CNMI voluntarily at the end of the period of authorized stay. The filing of an application for or approval of a permanent labor certification or an immigrant visa preference petition, the filing of an application for adjustment of status, or the lack of residence abroad will not be the basis for denying:

(i) A CW–1 petition filed on behalf of the alien;

(ii) A request to extend a CW–1 status pursuant to a petition previously filed on behalf of the alien; or

(iii) An application for admission as a CW–1 or CW–2 nonimmigrant.

(20) *Rejection.* USCIS may reject an employer's petition for new or extended CW–1 status if the numerical limitation has been met. In that case, the petition and accompanying fee will be rejected and returned with the notice that numbers are unavailable for the particular nonimmigrant classification. The beneficiary's application for admission based upon an approved petition will not be rejected based upon the numerical limitation.

(21) *Denial.* The ultimate decision to grant or deny CW–1 or CW–2 status is a discretionary determination, and the petition or the application may be denied for failure of the petitioner or the applicant to demonstrate eligibility or for other good cause. The denial of a CW–1 petition may be appealed to the USCIS Administrative Appeals Office. The denial of a Form I–539 application may not be appealed.

(22) *Terms and conditions of CW Nonimmigrant status.* (i) *Geographical limitations.* CW–1 and CW–2 statuses are only applicable in the CNMI. Entry, employment and residence in the rest of the United States (including Guam) require the appropriate visa or visa waiver eligibility. An alien with CW–1 or CW–2 status who enters or attempts to enter, travels or attempts to travel to any other part of the United States without the appropriate visa or visa waiver eligibility, or who violates conditions of nonimmigrant stay applicable to any such authorized status in any other part of the United States, will be deemed to have violated CW–1 or CW–2 status.

(ii) *Re-entry.* An alien with CW–1 or CW–2 status who departs the CNMI will require a CW–1 or CW–2 or other appropriate visa to be re-admitted to the CNMI.

(iii) *Employment authorization.* An alien with CW–1 nonimmigrant status is only authorized employment in the CNMI for the petitioning employer. An alien with CW–2 status is not authorized to be employed.

(23) *Expiration of transition period.* CW–1 status expires at the end of the transition period. CW–2 nonimmigrant status expires when the related CW–1 status expires or on a CW–2 minor child's 18th birthday, if sooner, or if the alien violates his or her status. No alien will be eligible for admission to the CNMI in CW–1 or CW–2 status, and no CW–1 or CW–2 visa will be valid for travel to the CNMI, after the transition period.

## PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

■ 6. Section 274a.12 is amended by adding and reserving paragraph (b)(22), and adding paragraph (b)(23), to read as follows:

### § 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(23) A Commonwealth of the Northern Mariana Islands transitional worker (CW–1) pursuant to 8 CFR 214.2(w). An alien in this status may be employed only in the CNMI during the transition period and only by the petitioner through whom the status was obtained.

* * * * *

## PART 299—IMMIGRATION FORMS

■ 7. The authority citation for part 299 continues to read as follows:

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

■ 8. Section 299.1 is amended in the table by adding Form ''I–129CW'' to the list of prescribed forms in proper alpha/numeric sequence, to read as follows:

### § 299.1 Prescribed forms.

* * * * *

| Form No. | Edition date | Title |
|---|---|---|
| * | * | * * * * * |
| I–129CW | 10–22–09 | Petition for a CNMI-Only Nonimmigrant Transitional Worker. |

| Form No. | Edition date | Title |
|---|---|---|
| * * | * * | * * * |

■ 9. Section 299.5 is amended in the table by adding the Form ''I–129CW'' in proper alpha/numeric sequence, to read as follows:

**§ 299.5 Display of control number.**

* * * * *

| Form No. | Form title | Currently assigned OMB control no. |
|---|---|---|
| * * * | * * * | * |
| I–129CW | Petition for a CNMI-Only Nonimmigrant Transitional Worker | 1615–0111 |
| * * * | * * * | * |

**Janet Napolitano,**

*Secretary.*

[FR Doc. E9–25808 Filed 10–26–09; 8:45 am]

**BILLING CODE 9111–97–P**

## FARM CREDIT ADMINISTRATION

## 12 CFR Part 604

**RIN 3052–AC58**

## Farm Credit Administration Board Meetings; Sunshine Act; Effective Date

**AGENCY:** Farm Credit Administration.

**ACTION:** Notice of effective date.

**SUMMARY:** The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), issued a direct final rule under part 604 on August 31, 2009 (74 FR 44727) amending FCA's regulations on meeting announcements to provide greater flexibility to the FCA Board in scheduling meetings. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is October 22, 2009.

**DATES:** *Effective Date:* Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR part 604 published on August 31, 2009 (74 FR 44727) is effective October 22, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Michael Wilson, Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4498, TTY (703) 883–4434; or

Mary Alice Donner, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4020.

(12 U.S.C. 2252(a)(9) and (10))

Dated: October 22, 2009.

**Roland E. Smith,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. E9–25853 Filed 10–26–09; 8:45 am]

**BILLING CODE 6705–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–0979; Directorate Identifier 2008–NM–079–AD; Amendment 39–16051; AD 2009–21–12]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A300–600 Airplanes

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

**ACTION:** Final rule.

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

Further to initial qualification tests of the spoiler actuators currently installed in position No. 3 to 7 on A300–600 and A300–600ST aircraft fleet, a life limit [of 55,750 flight hours] has been defined by the actuator manufacturer. Initially, this life limit had no repercussions, as it was situated well beyond the initial Design Service Goal (DSG) of the aircraft. However, due to the Extended Service Goal (ESG) activities, the spoiler actuator life limit can be reached in service, and therefore the spoiler actuators must be replaced before exceeding this limit.

In order to mitigate the risk to have aircraft on which the three hydraulic circuits would be impacted by affected spoiler actuators, which could result in the loss of controllability of the aircraft, this Airworthiness Directive (AD) requires actions to ensure that at least the level of safety of one hydraulic circuit will be restored within an acceptable timeframe.

* * * * *

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

**DATES:** This AD becomes effective December 1, 2009.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 1, 2009.

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

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

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 17, 2008 (73 FR 53768). That NPRM proposed to correct

an unsafe condition for the specified products. The MCAI states:

> Further to initial qualification tests of the spoiler actuators currently installed in position No. 3 to 7 on A300–600 and A300–600ST aircraft fleet, a life limit [of 55,750 flight hours] has been defined by the actuator manufacturer. Initially, this life limit had no repercussions, as it was situated well beyond the initial Design Service Goal (DSG) of the aircraft. However, due to the Extended Service Goal (ESG) activities, the spoiler actuator life limit can be reached in service, and therefore the spoiler actuators must be replaced before exceeding this limit.
>
> In order to mitigate the risk to have aircraft on which the three hydraulic circuits would be impacted by affected spoiler actuators, which could result in the loss of controllability of the aircraft, this Airworthiness Directive (AD) requires actions to ensure that at least the level of safety of one hydraulic circuit will be restored within an acceptable timeframe.
>
> EASA AD 2007–0245, issued on 05 September 2007 as an interim action, is superseded by the present [EASA] AD.

Corrective actions include replacing the spoiler actuator with a serviceable unit. You may obtain further information by examining the MCAI in the AD docket.

**Comments**

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

**Requests To Withdraw NPRM**

Air Transport Association (ATA) on behalf of its member American Airlines (AA) asks that the NPRM be withdrawn until a workable method of determining flight hours on the spoiler actuator pistons can be established. AA provides the following reasons for its request to withdraw the NPRM:

• Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007 (cited in the NPRM), specifies that operators contact Smiths Industries for guidance in determining the priority serial number to be used to identify the actuators. AA has done this for numerous actuators, and in each case, Smiths was unable to provide the guidance requested. Therefore, AA is unable to provide any meaningful data to Airbus.

We find that clarification of the guidance on identifying the actuators is necessary. Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007, was issued to provide instructions for inspecting the spoiler actuators. Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008 (cited in the NPRM), was issued to provide instructions for conducting follow-on actions, depending on the inspection results. In addition, Smiths Industries issued Service Information Letters SIL 27–01, dated June 2007; and SIL 27–02, dated May 2007; to provide operators with procedures to identify the spoiler actuators. After the spoiler actuators are identified, certain actions specified in Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008, are provided if the flight hours cannot be established; however, those flight hours can also be calculated using the subject service information letters.

We have included a new Note 1 in the AD (and re-identified subsequent notes) specifying that Smiths Service Information Letters SIL 27–01, dated June 2007; and SIL 27–02, dated May 2007; may be used as additional sources of service information to calculate the total flight hours accumulated on each spoiler actuator.

• AA also notes that, in the case where no records are available, and identification cannot be done, Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007, states that the Inspection Report Sheet should be filled in with the status ''unknown.'' The majority of the serial number identification plates is no longer installed on the actuators, and therefore, is considered to be ''unknown'' and will require replacement. According to AA, this will cause an undue burden on AA and will not increase the level of safety.

We disagree with the commenter. Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007, refers to Smiths Service Information Letter SIL 27–01, dated June 2007, which provides more than one option for identifying the spoiler actuators. The serial number may have been etched on the actuator in at least one of three places, the cylinder body, the eye end assembly, or the piston assembly. We have made no change to the AD in this regard.

• AA states that there are no data to support the premise that an individual actuator may have accumulated more flight hours than an operators'-high-time airplanes. For this reason, if the NPRM is adopted, AA proposes that operators be allowed to use fleet high time to assign the accumulated flight hours to each actuator.

We disagree with the commenter. If an airline acquired airplanes from another airline, to obtain fleet high time it would have to take into account the flight hours of the highest flight-hour airplane of all the airlines that the company is operating. This method would be difficult to calculate for this reason. We have made no change to the AD in this regard.

FedEx Express also asks that the NPRM be withdrawn and provides the following reasons:

• FedEx states that the life limit of 55,750 total flight hours is theoretical based on the testing of three spoiler actuators prior to certification of the Model A300–600 airplane. FedEx adds that at the request of Airbus and operators, the original equipment manufacturer (OEM) of the spoiler actuator is currently conducting fatigue testing to determine whether it is possible to extend that theoretical life limit on the spoiler actuators to over 80,000 flight hours beginning in mid-2009. If the NPRM is not withdrawn, FedEx recommends delaying any mandated service action until the fatigue testing currently in process by the OEM is complete. FedEx adds that if the new fatigue life limit is more than 75,000 flight hours for the new A300–600 DSG, it could prove that the NPRM is unnecessary. FedEx also states that spoiler actuators have not been life-limited parts since the beginning of the Model A300–600 program; therefore, operators have not tracked the flight time accumulated on the spoiler actuators accurately.

We agree that it may be necessary to conduct fatigue testing to eventually extend the life limit on the spoiler actuators. However, we do not agree to withdraw the NPRM until the fatigue testing currently in process by the OEM is complete. Any additional delay for further testing would result in an unacceptable level of risk, because doing so would allow the unsafe condition to continue for an indefinite length of time. However, under the provisions of paragraph (g)(1) of this AD, we will consider requests for approval of an alternative method of compliance if sufficient data are submitted to substantiate that the new fatigue life limit would provide an acceptable level of safety. We have made no change to the AD in this regard.

• FedEx and other operators also discovered that the identification labels affixed to spoiler actuators were attached with poor adhesive, which dissolved when exposed to hydraulic fluids and petroleum-based de-ice fluids. Therefore, many actuators cannot be identified while installed on the airplane because the labels are missing, so a shop visit is necessary to accomplish the identification, which is costly and time consuming because of turnaround times in excess of 45 days for each actuator. FedEx adds that, due to these factors, it may need an excess number of ''new'' OEM spoiler actuators to maintain compliance with the NPRM as currently written.

We acknowledge the commenter's concern and provide the following

clarification. As noted previously, Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007, refers to Smiths Service Information Letter SIL 27–01, dated June 2007, which provides more than one option for identifying the spoiler actuators. The serial number may have been etched on the actuator in at least one of three places—the cylinder body, the eye end assembly, or the piston assembly. In addition, we have discussed the turnaround times for a shop visit with the OEM and were told there was a miscommunication between the OEM and FedEx. The OEM has already taken steps to work with its suppliers to improve the efficiency in processing these units and reduce the turnaround time. The OEM also informed us that it can supply FedEx with the number of actuators FedEx deems necessary in order to comply with the AD. We have made no change to the AD in this regard.

• In August 2007, FedEx completed an inspection/identification of its spoiler actuators in accordance with Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007. FedEx notes that since that time many actuators have been removed and replaced through normal maintenance visits, and are tracked by an approved record-keeping system. If the NPRM is not withdrawn, FedEx recommends that we consider the timeframe between the proposed inspections and follow-on cleaning of a hydraulic system and record-keeping.

We infer that the commenter is asking that the compliance time be extended for certain actions if the AD is not withdrawn; we do not agree. Although the commenter's record-keeping may be accurate, record-keeping varies among operators, and our compliance time takes this into consideration. In developing an appropriate compliance time for this AD, we considered not only the safety implications, but the manufacturer's recommendations, and the practical aspect of accomplishing the actions within an interval of time that corresponds to typical scheduled maintenance for affected operators. However, under the provisions of paragraph (g)(1) of the AD, we may consider requests for adjustments to the compliance time if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety. We have made no change to the AD in this regard.

• FedEx has used the mechanism specified in Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008, to calculate flight hours on specific spoiler actuators with known manufacturer serial numbers. FedEx adds that the Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008, in combination with Smiths Service Information Letter SIL 27–02, dated May 2007, provides the essential data necessary to accomplish such calculations. If the NPRM is not withdrawn, FedEx recommends referencing Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008; and Smiths Service Information Letter SIL 27–02, dated May 2007; as sources of information for the calculation of flight hours.

We agree with the commenter that the subject service information should be referenced. Paragraph 3.B.(1)(a) of Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008, provides the information necessary to calculate flight hours. That paragraph also refers to Smiths Service Information Letter SIL 27–02, dated May 2007, as an additional source of service information for calculating flight hours. As noted previously, we have included a new Note 1 in the AD specifying that Smiths Service Information Letters SIL 27–01, dated June 2007; and SIL 27–02, dated May 2007; may be used as additional sources of service information to identify the total flight hours accumulated on each spoiler actuator.

**Request for Clarification of Certain Requirements**

United Parcel Service (UPS) states that the limitation specifying not to interchange or replace actuators on more than two hydraulic circuits at the same time is not presently in its Airbus A300 Aircraft Maintenance Manual (AMM). UPS requests verification that this requirement is limited to action required when all circuits have spoiler actuators installed having part numbers (P/N) P376A0002–05, –06, –07, or –09, and P/N P725A0001–00 that exceed 55,750 flight hours, or if the intent of the NPRM is to add this restriction to the existing Airbus A300 AMM.

We acknowledge the commenter's concern and provide the following clarification. The language specified in the Airbus A300 AMM already recommends not working on redundant components at the same time. In addition, Airbus added within the limitation in the service bulletin not to interchange or replace actuators on more than two hydraulic circuits at the same time; therefore, it does not need to be included in the Airbus A300 AMM. We have made no change to the AD in this regard.

UPS also asks for clarification of whether the NPRM is establishing a 55,750 flight-hour life limit on every Smiths spoiler actuator installed having affected part numbers, or whether the intention is to maintain one hydraulic circuit with spoiler actuators that do not exceed 55,750 total flight hours.

We acknowledge the commenter's concern and provide the following clarification. As specified in paragraph (f)(4) of this AD, each airplane must continue to have at least one hydraulic circuit fitted with spoiler actuators that do not exceed 55,750 total flight hours. We have made no change to the AD in this regard.

**Explanation of Change to Applicability**

We have revised the applicability in paragraph (c) of this final rule to identify model designations as published in the most recent type certificate data sheet for the affected models.

**Explanation of Change to Reporting Requirement**

This final rule does not include the reporting requirement specified in paragraph (1) of the MCAI. The MCAI carried this requirement forward from European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0245, dated September 5, 2007. We previously determined that no action was required on our part regarding EASA AD 2007–0245. Therefore, we have removed the reporting requirement specified in paragraph (g)(3) of this AD.

**Conclusion**

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

**Differences Between This AD and the MCAI or Service Information**

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

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

## Costs of Compliance

We estimate that this AD will affect 135 products of U.S. registry. We also estimate that it will take about 8 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $32,000 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $4,406,400, or $32,640 per product.

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

## Examining the AD Docket

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**2009–21–12 Airbus:** Amendment 39–16051. Docket No. FAA–2008–0979; Directorate Identifier 2008–NM–079–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective December 1, 2009.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–605R, B4–620, B4–622, B4–622R, F4–605R, F4–622R, C4–605R Variant F airplanes, all serial numbers, certificated in any category; on which Smith spoiler actuators having part number (P/N) P376A0002–05, –06, –07, or –09, or P/N P725A0001–00 are installed.

**Subject**

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

**Reason**

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

Further to initial qualification tests of the spoiler actuators currently installed in position No. 3 to 7 on A300–600 and A300–600ST aircraft fleet, a life limit [of 55,750 flight hours] has been defined by the actuator manufacturer. Initially, this life limit had no repercussions, as it was situated well beyond the initial Design Service Goal (DSG) of the aircraft. However, due to the Extended Service Goal (ESG) activities, the spoiler actuator life limit can be reached in service, and therefore the spoiler actuators must be replaced before exceeding this limit.

In order to mitigate the risk to have aircraft on which the three hydraulic circuits would be impacted by affected spoiler actuators, which could result in the loss of controllability of the aircraft, this Airworthiness Directive (AD) requires actions to ensure that at least the level of safety of one hydraulic circuit will be restored within an acceptable timeframe.

EASA AD 2007–0245, issued on 05 September 2007 as an interim action, is superseded by the present [EASA] AD.

Corrective actions include replacing the spoiler actuator with a serviceable unit.

**Actions and Compliance**

(f) Unless already done: Within 700 flight hours after the effective date of this AD, do the following actions.

(1) Identify the total flight hours accumulated on each spoiler actuator at positions 3 through 7 on the left- and right-hand sides of the airplane (FIN 22CP/23CP, 24CP/25CP, 26CP/27CP, 60CP/61CP, and 62CP/63CP), in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007.

**Note 1:** Smiths Service Information Letters SIL 27–01, dated June 2007; and SIL 27–02, dated May 2007; may be used as additional sources of guidance to identify the total flight hours accumulated on each spoiler actuator.

(2) For airplanes on which the status of any spoiler actuator is unknown (unknown number of accumulated flight hours, unknown date of manufacture, and/or unknown serial number) the actuator must be considered as having exceeded 55,750 total flight hours.

(3) For airplanes on which all three hydraulic circuits have a spoiler actuator that has accumulated or exceeds 55,000 total flight hours: Before the accumulation of 55,750 total flight hours or within 700 flight hours after the effective date of this AD, whichever occurs later, on at least one hydraulic circuit, interchange the spoiler actuator with a serviceable unit from another hydraulic circuit, or replace the spoiler actuator with a serviceable unit, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008.

(4) For airplanes on which the actions required by paragraph (f)(1) of this AD, and, as applicable, paragraph (f)(3) of this AD have been accomplished, each airplane must continue to have at least one hydraulic circuit fitted with spoiler actuators that do not exceed 55,750 total flight hours.

**Note 2:** For the purposes of this AD, a serviceable unit is a unit that has accumulated less than 55,750 flight hours.

(5) The operator must not interchange or replace spoiler actuators on more than two

hydraulic circuits at the same time. This will mitigate the risk of having a malfunction on the three hydraulic systems at the same time.

**FAA AD Differences**

**Note 3:** This AD differs from the MCAI and/or service information as follows:

This AD does not include the reporting requirement specified in paragraph (1) of the MCAI. The MCAI carried this requirement forward from European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0245, dated September 5, 2007. We previously determined that no action was required on our part regarding EASA AD 2007–0245.

**Other FAA AD Provisions**

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

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

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

**Related Information**

(h) Refer to MCAI EASA Airworthiness Directive 2008–0058, dated March 20, 2008; and Airbus Mandatory Service Bulletin A300–27–6060, dated February 18, 2008; and Airbus Mandatory Service Bulletin A300–27A6062, dated July 6, 2007; for related information.

**Material Incorporated by Reference**

(i) You must use Airbus Mandatory Service Bulletin A300–27–6060, excluding Appendix 1, dated February 18, 2008; and Airbus Mandatory Service Bulletin A300–27A6062, excluding Appendix 1, dated July 6, 2007; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Airbus SAS–EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com*; Internet *http://www.airbus.com.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 7, 2009.

**Jeffrey E. Duven,**

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

[FR Doc. E9–24938 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2009–0324; Directorate Identifier 2008–NM–186–AD; Amendment 39–16039; AD 2009–21–02]**

**RIN 2120–AA64**

# Airworthiness Directives; Airbus Model A300 B4–601, B4–603, B4–605R, B4–620, B4–622, B4–622R, F4–605R, F4–622R, and C4–605R Variant F Series Airplanes Equipped With Simmonds Precision Products, Inc., Fuel Quantity Indicating System Sensors and In-Tank Harnesses Installed in Accordance With Supplemental Type Certificate (STC) ST00092BO

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Airbus model series airplanes listed above. This AD requires revising the Airworthiness Limitations Section of the Instructions for Continuing Airworthiness to incorporate new fuel system limitations for airplanes modified in accordance with Supplemental Type Certificate (STC) ST00092BO. This AD also requires a general visual inspection for tank unit separation and compensator separation of the center, inner, and outer fuel tanks, and trim fuel tanks of the tank units, and corrective actions if necessary. This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent a potential of ignition sources inside fuel tanks, which in combination with flammable fuel vapors, could result in a fuel tank fire or explosion and consequent loss of the airplane.

**DATES:** This AD is effective December 1, 2009.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 1, 2009.

**ADDRESSES:** For service information identified in this AD, contact Goodrich Corporation, Sensors and Integrated Systems (Formerly Fuel and Utility Systems), 100 Panton Road, Vergennes, Vermont 05491–1008; telephone 802–877–4476; e-mail *sis.techpubs-vt@goodrich.com;* Internet *http://www.goodrich.com/TechPubs.*

**Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** Marc Ronell, Aerospace Engineer, ANE–150, FAA, Boston Aircraft Certification Office, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238–7776; fax (781) 238–7170.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Airbus Model A300 B4–601, B4–603, B4–605R, B4–620, B4–622, B4–622R, F4–605R, F4–622R, and C4–605R Variant F series airplanes. That NPRM was published in the **Federal Register** on April 9, 2009 (74 FR 16152). That NPRM proposed to require revising the Airworthiness Limitations Section (ALS) of the Instructions for Continuing Airworthiness to incorporate new fuel system limitations for airplanes modified in accordance with Supplemental Type Certificate (STC) ST00092BO. That NPRM also proposed to require a general visual inspection for tank unit separation and compensator separation of the center, inner, and outer fuel tanks, and trim fuel tanks of

the tank units, and corrective actions if necessary.

**Comments**

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

**Actions Since NPRM Was Issued**

Since we issued that NPRM, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) specifies the following:

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory * * * procedures * * * have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the ALS. But once the CDCCLs are incorporated into the ALS, future maintenance actions on components must be done in accordance with those CDCCLs.

We have added Note 2 to this AD to clarify the intended effect of the AD on spare and on-airplane fuel tank system components.

**Revision to Paragraph (h) of This AD**

We removed a redundant reference to the service information, ''in accordance with Section 2.2.3 of the Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008,'' from paragraph (h) of this AD.

**Revision to the Product Identification Line**

We have revised the product identification line that precedes paragraph (a) of this AD to specify Airbus. For ADs that apply to STCs installed on only one type of airplane, we identify the name of the airplane manufacturer in the product identification line.

**Revision to Paragraph (l) of this AD**

We have revised paragraph (l) of this AD to include the phrase, ''if done before the effective date of this AD.'' This text was inadvertently omitted. It was our intention to provide credit for operators which have completed the inspections specified in paragraph (h) of this AD, before the effective date of this AD, using Goodrich Service Bulletin 300723–0101–28–01, Revision 1, dated July 1, 2004.

**Conclusion**

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

**Costs of Compliance**

We estimate that this AD affects 68 airplanes of U.S. registry. We also estimate that it takes about 8 work-hours per product to comply with this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $43,520, or $640 per product.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

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

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

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

**Adoption of the Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**2009–21–02 Airbus:** Amendment 39–16039. Docket No. FAA–2009–0324; Directorate Identifier 2008–NM–186–AD.

**Effective Date**

(a) This airworthiness directive (AD) is effective December 1, 2009.

**Affected ADs**

(b) This AD affects AD 2004–05–05, Amendment 39–13499.

**Applicability**

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–605R, B4–620, B4–622, B4–622R, F4–605R, F4–622R, and C4–605R Variant F series airplanes, certificated in any category, equipped with Simmonds Precision Products, Inc., Fuel Quantity Indicating System sensors and in-tank harnesses installed in accordance with Supplemental Type Certificate (STC) ST00092BO.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c),

the operator must request approval for an alternative method of compliance according to paragraph (o) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

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

**Unsafe Condition**

(e) This AD results from fuel system reviews conducted by the manufacturer. The Federal Aviation Administration is issuing this AD to reduce the potential of ignition sources inside fuel tanks, which in combination with flammable fuel vapors, could result in fuel tank fire or explosions and consequent loss of the airplane.

**Compliance**

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

**Revision to the Airworthiness Limitations Section To Incorporate Inspections**

(g) Within 30 days after the effective date of this AD, revise the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate the inspections specified in Section 2.2.3 of the Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008.

**Inspection for Correct Separation**

(h) Within 6 months after the effective date of this AD, do a general visual inspection for tank unit separation and compensator separation of the center, inner, and outer fuel tanks, and trim fuel tanks of the tank units, in accordance with Section 2.2.3 of the Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008. If incorrect separation is found, before further flight, correct the separation in accordance with the Airplane Maintenance Manual for the corresponding inspection specified in Section 2.2.3 of the Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008. A review of airplane maintenance records is acceptable in lieu of this inspection if the requirement of Table 6 in Section 10.1 of the Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008, can be conclusively determined to have been done from that review.

**Revision to the ALS To Incorporate CDCCLs**

(i) Within 30 days after the effective date of this AD, revise the ALS of the Instructions for Continued Airworthiness to incorporate the CDCCLs, as defined in Section 10.1 of the Goodrich A300–600 Instructions for Continued Airworthiness,

Document T3012–0005–0101, Revision B, dated June 12, 2008.

(j) Except as provided by paragraph (o) of this AD: After accomplishing the actions specified in paragraphs (g) and (i) of this AD, no alternative inspection, inspection intervals, or CDCCLs may be used.

**Note 2:** Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the Airworthiness Limitations Section of the Instructions for Continuing Airworthiness, as required by paragraph (i) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the Airworthiness Limitations Section of the Instructions for Continuing Airworthiness has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

**Actions Done According to Previous Service Information**

(k) Inspections are acceptable for compliance with the requirements of paragraph (h) of this AD, if done before the effective date of this AD, in accordance with Goodrich Service Bulletin 300723–0101–28–01, dated April 15, 2004.

(l) Inspections are also acceptable for compliance with the requirements of paragraph (h) of this AD, if done before the effective date of this AD, in accordance with Goodrich Service Bulletin 300723–0101–28–01, Revision 1, dated July 1, 2004.

**Acceptable Methods of Compliance for AD 2004–05–05**

(m) Doing the inspections in Section 2.2.3 of the Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008, is considered an acceptable method of compliance with paragraphs (b) and (c) of AD 2004–05–05.

(n) Doing the inspections in accordance with Goodrich Service Bulletin 300723–0101–28–01, Revision 1, dated July 1, 2004, is an acceptable method of compliance with paragraphs (b) and (c) of AD 2004–05–05.

**Alternative Methods of Compliance (AMOCs)**

(o)(1) The Manager, Boston Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Marc Ronell, Aerospace Engineer, ANE–150, FAA, Boston ACO, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238–7776; fax (781) 238–7170.

(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 principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

**Material Incorporated by Reference**

(p) You must use Goodrich A300–600 Instructions for Continued Airworthiness, Document T3012–0005–0101, Revision B, dated June 12, 2008, to do the actions required by this AD, unless the AD specifies otherwise. (The List of Effective Pages section of this document does not include pages iii, 6, 15, and 16 of this document. Those pages are also at Revision B, dated June 12, 2008.)

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

(2) For service information identified in this AD, contact Goodrich Corporation, Sensors and Integrated Systems (Formerly Fuel and Utility Systems), 100 Panton Road, Vergennes, Vermont 05491–1008; telephone 802–877–4476; e-mail *sis.techpubs-vt@goodrich.com;* Internet *http://www.goodrich.com/TechPubs.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 18, 2009.

**Ali Bahrami,**

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

[FR Doc. E9–24011 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2009–0997; Directorate Identifier 2009–NM–158–AD; Amendment 39–16062; AD 2007–22–03 R1]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A300 Airplanes

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

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

**SUMMARY:** The FAA is revising an existing airworthiness directive (AD), which applies to all Airbus Model A300 airplanes. That AD currently requires revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems. This AD clarifies the intended effect of the AD on spare and on-airplane fuel tank system components. This AD

results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors caused by latent failures, alterations, repairs, or maintenance actions, could result in fuel tank explosions and consequent loss of the airplane.

**DATES:** This AD is effective November 12, 2009.

On November 28, 2007 (72 FR 60240, October 24, 2007), the Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD.

We must receive any comments on this AD by December 11, 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 Airbus SAS–EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

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

**SUPPLEMENTARY INFORMATION:**

## Discussion

On October 15, 2007, we issued AD 2007–22–03, amendment 39–15239 (72 FR 60240, October 24, 2007). That AD applied to all Airbus Model A300 airplanes. That AD required revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems.

Critical design configuration control limitations (CDCCLs) are limitation requirements to preserve a critical ignition source prevention feature of the fuel tank system design that is necessary to prevent the occurrence of an unsafe condition. The purpose of a CDCCL is to provide instruction to retain the critical ignition source prevention feature during configuration change that may be caused by alterations, repairs, or maintenance actions. A CDCCL is not a periodic inspection.

## Actions Since AD Was Issued

Since we issued that AD, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) specifies the following:

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory * * * procedures * * * have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the airworthiness limitations section. But once the CDCCLs are incorporated into the airworthiness limitations section, future maintenance actions on components must be done in accordance with those CDCCLs.

## FAA's Determination and Requirements of This AD

The affected product has been approved by the aviation authority of another country, and are approved for operation in the United States. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This new AD retains the requirements of the existing AD, and adds a new note to clarify the intended effect of the AD on spare and on-airplane fuel tank system components.

## Costs of Compliance

This revision imposes no additional economic burden. The current costs for this AD are repeated for the convenience of affected operators, as follows:

This AD affects about 30 airplanes of U.S. registry. The required actions 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 AD for U.S. operators is $4,800, or $160 per airplane.

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

This revision merely clarifies the intended effect on spare and on-airplane fuel tank system components, and makes no substantive change to the AD's requirements. For this reason, it is found that notice and opportunity for prior public comment for this action are unnecessary, and good cause exists for making this amendment effective in less than 30 days.

## Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0997; Directorate Identifier 2009–NM–158–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

## Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue

rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

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

## Regulatory Findings

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15239 (72 FR 60240, October 24, 2007) and adding the following new AD:

**2007–22–03 R1 Airbus:** Amendment 39–16062. Docket No. FAA–2009–0997; Directorate Identifier 2009–NM–158–AD.

**Effective Date**

(a) This airworthiness directive (AD) is effective November 12, 2009.

**Affected ADs**

(b) This AD revises AD 2007–22–03, Amendment 39–15239.

**Applicability**

(c) This AD applies to all Airbus Model A300 B2–1A, B2–1C, B2K–3C, B2–203, B4–2C, B4–103, and B4–203 airplanes, certificated in any category, except Airbus Model A300–600 airplanes.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections and critical design configuration control limitations (CDCCLs). Compliance with the operator maintenance documents is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections and CDCCLs, the operator may not be able to accomplish the inspections and CDCCLs described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (j)(1) of this AD. The request should include a description of changes to the required inspections and CDCCLs that will preserve the critical ignition source prevention feature of the affected fuel system.

**Unsafe Condition**

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors caused by latent failures, alterations, repairs, or maintenance actions, could result in fuel tank explosions and consequent loss of the airplane.

**Compliance**

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

**Restatement of AD 2007–22–03, With Certain Revised Compliance Methods**

**Revise Airworthiness Limitations Section (ALS) To Incorporate Fuel Maintenance and Inspection Tasks**

(f) Within 3 months after November 28, 2007 (the effective date of AD 2007–22–03), revise the ALS of the Instructions for Continued Airworthiness to incorporate Airbus A300 Fuel Airworthiness Limitations, Document 95A.1928/05, Issue 2, dated May 11, 2007 (approved by the European Aviation Safety Agency (EASA) on July 6, 2007), Section 1, ''Maintenance/Inspection Tasks.'' For all tasks identified in Section 1 of Document 95A.1928/05, the initial compliance times start from the later of the times specified in paragraphs (f)(1) and (f)(2) of this AD, and the repetitive inspections must be accomplished thereafter at the intervals specified in Section 1 of Document 95A.1928/05, except as provided by paragraph (g) of this AD.

(1) November 28, 2007.

(2) The date of issuance of the original French standard airworthiness certificate or the date of issuance of the original French export certificate of airworthiness.

**Note 2:** Airbus Operator Information Telex SE 999.0079/07, Revision 01, dated August 14, 2007, identifies the applicable sections of the Airbus A300 Airplane Maintenance Manual necessary for accomplishing the tasks specified in Section 1 of Document 95A.1928/05.

**Initial Compliance Time for Task 28–18–00–03–1**

(g) For Task 28–18–00–03–1 identified in Section 1 of Document 95A.1928/05, ''Maintenance/Inspection Tasks,'' of Airbus A300 Fuel Airworthiness Limitations, Document 95A.1928/05, Issue 2, dated May 11, 2007 (approved by the EASA on July 6, 2007): The initial compliance time is the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD. Thereafter, Task 28–18–00–03–1 must be accomplished at the repetitive interval specified in Section 1 of Document 95A.1928/05.

(1) Prior to the accumulation of 40,000 total flight hours.

(2) Within 72 months or 20,000 flight hours after November 28, 2007, whichever occurs first.

**Revise ALS To Incorporate CDCCLs**

(h) Within 12 months after November 28, 2007, revise the ALS of the Instructions for Continued Airworthiness to incorporate Airbus A300 Fuel Airworthiness Limitations, Document 95A.1928/05, Issue 2, dated May 11, 2007 (approved by the EASA on July 6, 2007), Section 2, ''Critical Design Configuration Control Limitations.''

**No Alternative Inspections, Inspection Intervals, or CDCCLs**

(i) Except as provided by paragraph (j) of this AD: After accomplishing the actions specified in paragraphs (f) and (h) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used.

**New Information**

**Explanation of CDCCL Requirements**

**Note 3:** Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the ALS, as required by paragraphs (f) and (h) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the ALS has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

**Alternative Methods of Compliance (AMOCs)**

(j)(1) The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

(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 principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

**Related Information**

(k) European Aviation Safety Agency Airworthiness Directive 2007–0094 R1, dated May 2, 2007, also addresses the subject of this AD.

**Material Incorporated by Reference**

(l) You must use Airbus A300 Fuel Airworthiness Limitations, Document 95A.1928/05, Issue 2, dated May 11, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register previously approved the incorporation by reference of Airbus A300 Fuel Airworthiness Limitations, Document 95A.1928/05, Issue 2, dated May 11, 2007, on November 28, 2007 (72 FR 60240, October 24, 2007).

(2) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com*; Internet *http://www.airbus.com.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 19, 2009.

**Ali Bahrami,**

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

[FR Doc. E9–25772 Filed 10–26–09; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2007–0037; Directorate Identifier 2007–NE–41–AD; Amendment 39–16052; AD 2009–22–01]**

**RIN 2120–AA64**

## Airworthiness Directives; Rolls-Royce Deutschland Ltd. & Co. KG. (RRD) Tay 650–15 Turbofan Engines

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

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

**SUMMARY:** We are superseding an existing airworthiness directive (AD) for the products listed above. That AD currently requires initial and repetitive inspections of the low-pressure (LP) turbine discs stage 2 and stage 3 for corrosion, on certain serial number engines. This AD requires the same actions, but extends the applicability to additional engine serial numbers. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Strip results from some of the engines listed in the applicability section of this directive revealed excessively corroded low-pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required. The action specified by this AD is intended to avoid a failure of a low-pressure turbine disk stage 2 or stage 3 due to potential corrosion problems which could result in uncontained engine failure and damage to the airplane.

We are issuing this AD to detect corrosion that could cause the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine.

**DATES:** This AD becomes effective November 12, 2009.

We must receive comments on this AD by November 27, 2009.

The Director of the Federal Register approved the incorporation by reference of Rolls-Royce Deutschland Alert Service Bulletin No. TAY–72–A1524, Revision 2, dated June 13, 2008, listed in the AD as of November 12, 2009.

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

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

**Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *jason.yang@faa.gov;* telephone (781) 238–7747; fax (781) 238–7199.

Contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlwitz, 15827 Blankenfelde-Mahlow, Germany; telephone 49 (0) 33–7086–1768; fax 49 (0) 33–7086–3356, for the service information referenced in this AD.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

On May 5, 2008, the FAA issued AD 2008–10–14 (Amendment 39–15521 (73 FR 29405, May 21, 2008). That AD requires initial and repetitive inspections of the LP turbine discs stage 2 and stage 3 for corrosion on 45 engines by serial number. That AD was the result of MCAI issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. That condition, if not corrected, could result in the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine.

Since AD 2008–10–14 was issued, RRD identified 34 additional engines by serial number that require the same inspections. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2008–0122, dated July 1, 2008. That MCAI

extends the applicability to include the 34 additional engine serial numbers for inspections.

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

**Relevant Service Information**

Rolls-Royce Deutschland has issued Alert Service Bulletin No. TAY–72–A1524, Revision 2, dated June 13, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

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

Although no airplanes that are registered in the United States use these RRD Tay 650–15 engines, the possibility exists that the engines could be used on airplanes that are registered in the United States in the future. The unsafe condition described previously is likely to exist or develop on other RRD Tay 650–15 engines of the same type design. We are issuing this AD to detect corrosion that could cause the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine. This AD requires initial and repetitive inspections of the LP turbine discs stage 2 and stage 3 for corrosion on certain serial number engines. You must use the service information described previously to perform the actions required by this AD.

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

Since no domestic operators use this product, notice and opportunity for public comment before issuing this AD are unnecessary. Therefore, we are adopting this regulation immediately.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–0037; Directorate Identifier 2007–NE–41–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this AD:

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

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

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

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

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

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

**Adoption of the Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Amendment 39–15521 (73 FR 29405, May 21, 2008), and by adding a new airworthiness directive, Amendment 39–16052, to read as follows:

**2009–22–01 Rolls-Royce Deutschland Ltd & Co KG (RRD) (formerly Rolls-Royce plc, Derby, England):** Amendment 39–16052. Docket No. FAA–2007–0037; Directorate Identifier 2007–NE–41–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective November 12, 2009.

**Affected ADs**

(b) This AD supersedes AD 2008–10–14, Amendment 39–15521.

**Applicability**

(c) This AD applies to RRD Tay 650–15 turbofan engines that have a serial number listed in Table 1 or Table 2 of this AD, and low-pressure (LP) turbine module M05300AA installed. These engines are installed on, but not limited to, Fokker F28 Mark 0100 airplanes.

TABLE 1—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (CARRIED FORWARD FROM AD 2008–10–14)

| Engine Serial Number |
|---|
| 17251 |
| 17255 |
| 17256 |
| 17273 |
| 17275 |
| 17280 |
| 17281 |
| 17282 |
| 17300 |
| 17301 |
| 17327 |
| 17332 |
| 17365 |
| 17393 |
| 17437 |
| 17443 |
| 17470 |
| 17520 |

TABLE 1—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (CARRIED FORWARD FROM AD 2008–10–14)—Continued

| Engine Serial Number |
|---|
| 17521 |
| 17523 |
| 17539 |
| 17542 |
| 17556 |
| 17561 |
| 17562 |
| 17563 |
| 17580 |
| 17581 |
| 17612 |
| 17618 |
| 17635 |
| 17637 |
| 17645 |
| 17661 |
| 17686 |
| 17699 |
| 17701 |
| 17702 |
| 17736 |
| 17737 |
| 17738 |
| 17739 |
| 17741 |
| 17742 |
| 17808 |

TABLE 2—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (ADDED NEW IN THIS AD)

| Engine Serial Number |
|---|
| 17249 |
| 17303 |
| 17358 |
| 17370 |
| 17425 |
| 17426 |
| 17433 |
| 17438 |
| 17445 |
| 17446 |
| 17460 |
| 17474 |
| 17478 |
| 17490 |
| 17491 |
| 17517 |
| 17518 |
| 17522 |
| 17534 |
| 17535 |
| 17536 |
| 17538 |
| 17540 |
| 17541 |
| 17552 |
| 17553 |
| 17585 |
| 17613 |
| 17723 |
| 17724 |
| 17740 |
| 17759 |

TABLE 2—AFFECTED TAY 650–15 ENGINES BY SERIAL NUMBER (ADDED NEW IN THIS AD)—Continued

| Engine Serial Number |
|---|
| 17760 |
| 17807 |

**Reason**

(d) Strip results from some of the engines listed in the applicability section of this directive revealed excessively corroded low-pressure turbine disks stage 2 and stage 3. The corrosion is considered to be caused by the environment in which these engines are operated. Following a life assessment based on the strip findings it is concluded that inspections for corrosion attack are required. The action specified by this AD is intended to avoid a failure of a low-pressure turbine disk stage 2 or stage 3 due to potential corrosion problems which could result in uncontained engine failure and damage to the airplane.

We are issuing this AD to detect corrosion that could cause the stage 2 or stage 3 disk of the LP turbine to fail and result in an uncontained failure of the engine.

**Actions and Compliance**

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

(1) Prior to accumulating 11,700 flight cycles (FC) since new, and thereafter at intervals not exceeding 11,700 FC of the engine, inspect the LP turbine disks stage 2 and stage 3 for corrosion in accordance with RRD Alert Service Bulletin No. TAY–72–A1524, Revision 2, dated June 13, 2008.

(2) For engines that already exceed 11,700 FC on the effective date of this AD, perform the inspection within 90 days after the effective date of this AD.

(3) When, during any of the inspections as required by paragraph (e)(1) of this directive, corrosion is found, replace the affected parts. The RRD TAY 650 Engine Manual—E–TAY–3RR, Tasks 72–52–23–200–000 and 72–52–24–200–000 contains guidance on performing the inspection for corrosion and rejection criteria.

**Previous Credit**

(f) Initial inspections done before the effective date of this AD on LP turbine disks stage 2 and stage 3 listed in Table 1 of this AD using RRD Alert Service Bulletin No. TAY–72–A1524, Revision 1, dated September 1, 2006, comply with the initial inspection requirements specified in this AD.

**Alternative Methods of Compliance (AMOCs)**

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

**Related Information**

(h) Refer to European Aviation Safety Agency AD 2008–0122, dated July 1, 2008, for related information.

(i) Contact Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *jason.yang@faa.gov;* telephone (781) 238–7747; fax (781) 238–7199, for more information about this AD.

**Material Incorporated by Reference**

(j) You must use Rolls-Royce Deutschland Alert Service Bulletin No. TAY–72–A1524, Revision 2, dated June 13, 2008, to do the actions required by this AD.

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

(2) For service information identified in this AD, contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlwitz, 15827 Blankenfelde-Mahlow, Germany; telephone 49 (0) 33–7086–1768; fax 49 (0) 33–7086–3356.

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

Issued in Burlington, Massachusetts, on October 8, 2009.

**Diane S. Romanosky,**

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

[FR Doc. E9–25031 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2009–0996; Directorate Identifier 2009–NM–156–AD; Amendment 39–16061; AD 2007–21–14 R1]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A310 Airplanes

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

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

**SUMMARY:** The FAA is revising an existing airworthiness directive (AD), which applies to all Airbus Model A310 airplanes. That AD currently requires revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems. This AD clarifies the intended effect of the AD on spare and on-airplane fuel tank system components. This AD results from fuel system reviews conducted by the manufacturer. We are

issuing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors caused by latent failures, alterations, repairs, or maintenance actions, could result in fuel tank explosions and consequent loss of the airplane.

**DATES:** This AD is effective November 12, 2009.

On November 20, 2007 (72 FR 58499, October 16, 2007), the Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD.

We must receive any comments on this AD by December 11, 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 Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

## 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:** Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

## Discussion

On October 5, 2007, we issued AD 2007–21–14, amendment 39–15232 (72 FR 58499, October 16, 2007). That AD applied to all Airbus Model A310 airplanes. That AD required revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems.

Critical design configuration control limitations (CDCCLs) are limitation requirements to preserve a critical ignition source prevention feature of the fuel tank system design that is necessary to prevent the occurrence of an unsafe condition. The purpose of a CDCCL is to provide instruction to retain the critical ignition source prevention feature during configuration change that may be caused by alterations, repairs, or maintenance actions. A CDCCL is not a periodic inspection.

## Actions Since AD Was Issued

Since we issued that AD, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c) specifies the following:

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory * * * procedures * * * have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the Airworthiness Limitations Section of the Instructions for Continued Airworthiness. But once the CDCCLs are incorporated into the Airworthiness Limitations Section of the Instructions for Continued Airworthiness, future maintenance actions on components must be done in accordance with those CDCCLs.

## FAA's Determination and Requirements of This AD

The affected product(s) have been approved by the aviation authority of another country, and are approved for operation in the United States. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This new AD retains the requirements of the existing AD, and adds a new note to clarify the intended effect of the AD on spare and on-airplane fuel tank system components.

## Costs of Compliance

This revision imposes no additional economic burden. The current costs for this AD are repeated for the convenience of affected operators, as follows:

This AD affects about 69 airplanes of U.S. registry. The required actions 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 AD for U.S. operators is $11,040, or $160 per airplane.

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

This revision merely clarifies the intended effect on spare and on-airplane fuel tank system components, and makes no substantive change to the AD's requirements. For this reason, it is found that notice and opportunity for prior public comment for this action are unnecessary, and good cause exists for making this amendment effective in less than 30 days.

## Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0996; Directorate Identifier 2009–NM–156–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing amendment 39–15232 (72 FR 58499, October 16, 2007) and adding the following new AD:

**2007–21–14 R1 Airbus:** Amendment 39–16061. Docket No. FAA–2009–0996; Directorate Identifier 2009–NM–156–AD.

**Effective Date**

(a) This airworthiness directive (AD) is effective November 12, 2009.

**Affected ADs**

(b) This AD revises AD 2007–21–14.

**Applicability**

(c) This AD applies to all Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes, certificated in any category.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections and critical design configuration control limitations (CDCCLs). Compliance with the operator maintenance documents is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections and CDCCLs, the operator may not be able to accomplish the inspections and CDCCLs described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (j) of this AD. The request should include a description of changes to the required inspections and CDCCLs that will preserve the critical ignition source prevention feature of the affected fuel system.

**Unsafe Condition**

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors caused by latent failures, alterations, repairs, or maintenance actions, could result in fuel tank explosions and consequent loss of the airplane.

**Compliance**

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

**Restatement of AD 2007–21–14, With No Changes**

**Revise Airworthiness Limitations Section (ALS) To Incorporate Fuel Maintenance and Inspection Tasks**

(f) Within 3 months after November 20, 2007 (the effective date of AD 2007–21–14), revise the ALS of the Instructions for Continued Airworthiness to incorporate Airbus A310 ALS Part 5—Fuel Airworthiness Limitations, dated May 31, 2006, as defined in Airbus A310 Fuel Airworthiness Limitations, Document 95A.1930/05, Issue 2, dated May 11, 2007 (approved by the European Aviation Safety Agency (EASA) on July 6, 2007), Section 1, ''Maintenance/Inspection Tasks.'' For all tasks identified in Section 1 of Document 95A.1930/05, the initial compliance times start from the later of the times specified in paragraphs (f)(1) and (f)(2) of this AD, and the repetitive inspections must be accomplished thereafter at the intervals specified in Section 1 of Document 95A.1930/05, except as provided by paragraph (g) of this AD.

(1) November 20, 2007.

(2) The date of issuance of the original French standard airworthiness certificate or the date of issuance of the original French export certificate of airworthiness.

**Note 2:** Airbus Operator Information Telex SE 999.0079/07, Revision 01, dated August 14, 2007, identifies the applicable sections of the Airbus A310 Airplane Maintenance Manual necessary for accomplishing the tasks specified in Section 1 of Document 95A.1930/05.

**Initial Compliance Time for Task 28–18–00–03–1**

(g) For Task 28–18–00–03–1 identified in Section 1 of Document 95A.1930/05, ''Maintenance/Inspection Tasks,'' of Airbus A310 Fuel Airworthiness Limitations, Document 95A.1930/05, Issue 2, dated May 11, 2007 (approved by the EASA on July 6, 2007): The initial compliance time is the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD. Thereafter, Task 28–18–00–03–1 must be accomplished at the repetitive interval specified in Section 1 of Document 95A.1930/05.

(1) Prior to the accumulation of 40,000 total flight hours.

(2) Within 72 months or 20,000 flight hours after November 20, 2007, whichever occurs first.

**Revise ALS To Incorporate CDCCLs**

(h) Within 12 months after November 20, 2007, revise the ALS of the Instructions for Continued Airworthiness to incorporate Airbus A310 ALS Part 5—Fuel Airworthiness Limitations, dated May 31, 2006, as defined in Airbus A310 Fuel Airworthiness Limitations, Document 95A.1930/05, Issue 2, dated May 11, 2007 (approved by the EASA on July 6, 2007), Section 2, ''Critical Design Configuration Control Limitations.''

**No Alternative Inspections, Inspection Intervals, or CDCCLs**

(i) Except as provided by paragraph (j) of this AD: After accomplishing the actions specified in paragraphs (f) and (h) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used.

**New Information**

**Explanation of CDCCL Requirements**

**Note 3:** Notwithstanding any other maintenance or operational requirements, components that have been identified as

airworthy or installed on the affected airplanes before the revision of the ALS, as required by paragraph (f) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the ALS has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

**Alternative Methods of Compliance (AMOCs)**

(j)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149.

(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 principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

**Related Information**

(k) EASA airworthiness directive 2007–0096 R1, dated May 2, 2007, also addresses the subject of this AD.

**Material Incorporated by Reference**

(l) You must use Airbus A310 ALS Part 5—Fuel Airworthiness Limitations, dated May 31, 2006; and Airbus A310 Fuel Airworthiness Limitations, Document 95A.1930/05, Issue 2, dated May 11, 2007; to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register previously approved the incorporation by reference of Airbus A310 ALS Part 5—Fuel Airworthiness Limitations, dated May 31, 2006; and Airbus A310 Fuel Airworthiness Limitations, Document 95A.1930/05, Issue 2, dated May 11, 2007; on November 20, 2007 (72 FR 58499, October 16, 2007).

(2) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(3) You may review copies of the 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.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 19, 2009.

**Ali Bahrami,**

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

[FR Doc. E9–25774 Filed 10–26–09; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2009–0018; Directorate Identifier 2009–NE–01–AD; Amendment 39–16044; AD 2009–21–07]**

**RIN 2120–AA64**

## Airworthiness Directives; General Electric Company CF6–80C2 Series Turbofan Engines

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for General Electric Company (GE) CF6–80C2 series turbofan engines with certain thrust reverser ballscrew gearbox assembly adjustable-length end actuators installed. This AD requires initial visual inspections and repetitive replacements of the ⅜-inch rod-ends installed on the thrust reverser ballscrew gearbox assembly adjustable-length end actuators. This AD also allows an optional terminating action to those repetitive replacements. This AD also requires initial visual inspections and replacements, if necessary, of the other hardware connecting the thrust reverser transcowls to the engine. This AD results from reports of four failures of rod-ends on certain thrust reverser ballscrew gearbox assembly adjustable-length end actuators, leading to partial or complete separation of the transcowl from the engine and airplane during thrust reversal. We are issuing this AD to prevent loss of asymmetric thrust and thrust control.

**DATES:** This AD becomes effective December 1, 2009. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of December 1, 2009.

**ADDRESSES:** You can get the service information identified in this AD from Middle River Aircraft Systems, 103 Chesapeake Park Plaza, MF 46, Baltimore, MD 21220; telephone (410) 682–0080; fax (410) 682–0100; or e-mail: *bulletins@mras-usa.com.*

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

**FOR FURTHER INFORMATION CONTACT:** Christopher J. Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov;* telephone (781) 238–7133; fax (781) 238–7199.

**SUPPLEMENTARY INFORMATION:** The FAA proposed to amend 14 CFR part 39 with a proposed AD. The proposed AD applies to GE CF6–80C2 series turbofan engines with certain thrust reverser ballscrew gearbox assembly adjustable-length end actuators installed. We published the proposed AD in the **Federal Register** on March 16, 2009 (74 FR 11043). That action proposed to require initial visual inspections and repetitive replacements of the ⅜-inch rod-ends installed on the thrust reverser ballscrew gearbox assembly adjustable-length end actuators. That action also proposed to allow optional terminating action to those repetitive replacements. That action also proposed to require initial visual inspections and replacements, if necessary, of the other hardware connecting the thrust reverser transcowls to the engine.

### Examining the AD Docket

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

### Comments

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

### Continue Operating to Next C-Check

Lufthansa Technik asks if the current risk assessment for the ⅜-inch rod-ends failure also takes into account mixed configurations, meaning lower or upper position with 7⁄16-inch or fixed configuration rod-ends. The commenter states that if so, then a mixed configuration should therefore allow the operator to continue operating until next C-Check without any higher risk.

The commenter points out that transcowl liberations were already communicated via FAA Special Airworthiness Information Bulletin No. NE–08–44 and GE All Operators Wire 07/CF6/012, where it was stated that the thrust reverser is designed to be able to continue normal operation to the next C-Check with a single failed actuator at either the upper or lower position.

We do not agree. All of the failure events occurred following the failure of only one rod-end. Additionally, two of the four failures were partial liberations, where one rod-end stayed intact, and only the section of the transcowl near the failed rod-end tore apart and liberated from the engine and aircraft. Additionally, the manufacturer's life assessment shows that a thrust reverser operating with a failed rod-end may not be capable of operating safely until the next C-Check.

**Proposal To Change Optional Terminating Action Paragraph**

Honeywell Engine Systems and Accessories proposes that the Optional Terminating Action paragraph should be changed to the following: ''As an optional terminating action to the repetitive ⅜-inch rod-end replacements required by this AD, replace the ⅜-inch adjustable rod-ends with a 7⁄16-inch adjustable rod-end and nut, P/N 3238729–1 and 3238730–1 respectively, or you may replace the adjustable end actuator P/N 3272602–2, –3 with a fixed end actuator P/N 3275538–2, –3. Use paragraph 3.E. (1) of Middle River Aircraft Systems (MRAS) Alert Service Bulletin (ASB) No CF6–80C2 S/B 78A1162, Revision 1, dated February 13, 2009, to do the replacements.'' The commenter states that a shop visit is required to upgrade ⅜-inch adjustable rod-end actuators P/N 3272602–2,–3 to the 7⁄16-inch adjustable rod-ends. In the proposed AD, there is a reference to replacing the ⅜-inch rod ends with either a fixed length rod-end, P/N 3238726–1, –2 or MS9560–08. These two parts, P/N 3238726–1,–2 and MS9560–08, are components of and designed for, the fixed length actuator P/N 3275538–2, –3. These parts will not fit onto an adjustable end actuator, P/N 3272602–2, –3.

We agree. However, we are not specifying the part numbers for the replacement rod-ends, to prevent prohibiting installation of third party equipment that has been certified to be installed on the aircraft and has not been shown to create a safety risk. We are also updating the referenced Service Bulletin to Revision 3, dated September 10, 2009, in place of Revision 1.

**Proposal To Change Applicability Paragraph**

Onur Air proposes that applicability paragraph (c) be changed to state that if the lower end actuator is a locking actuator assembly (part number 3275546–1, 3275546–2, 3275548–1, or 3275548–2), then the AD does not apply. This change would establish the same effectivity of parts for both the AD and MRAS ASB, and would eliminate confusion.

We do not agree. Even if a locking actuator assembly is installed in the lower actuator position, a ⅜-inch rod-end may be installed in the upper actuator position. MRAS ASB No. 78A1162 Revision 1, dated February 13, 2009; Revision 2, dated June 22, 2009; and Revision 3, dated September 10, 2009, clarify that reverser halves that have a locking actuator assembly installed at the lower actuator position and an adjustable-length end actuator with ⅜-inch rod-end installed at the upper actuator position, are affected. We did not change the AD.

**Request for Rod-End Serial Numbers**

Onur Air states that because the proposed AD and associated Service Bulletin require a repetitive replacement of ⅜-inch rod-ends at 11,000 flight cycle intervals, the rod-ends should have physical serial numbers associated with them. The rod-ends need to be traceable to comply with the 11,000 cycle repetitive inspection and without a serial number, replacement data cannot be monitored or proven.

We do not agree. The rod-ends themselves are not serialized, but they can be tracked through the actuator assemblies. Only one rod-end is installed per actuator, so tracking the actuator assembly will track the number of cycles that the rod-end has accumulated. We did not change the AD.

**Extend the Compliance Time to Next C-Check**

Onur Air, FedEx Express, and Lufthansa Technik suggest that the initial compliance time be extended from within 500 flight cycles from the effective date of the AD to within the next C-Check after the effective date of the AD. The commenters cite that due to some airlines not having access to the MRAS component maintenance manual, it would be difficult to replace the clevis fasteners found failed as required in proposed AD paragraph (g)(4). Additionally, some replacement work would be more suitably done off-wing as opposed to at the next on-wing inspection.

We do not agree. The compliance time of 500 flight cycles is based on component life calculations. Additionally, a C-Check is not defined consistently across the industry, and may be performed at a variety of intervals depending on the operator's maintenance schedule, some of which may be significantly longer than the 500 flight-cycle-limit mandated in this AD.

**Disagreement With the Unsafe Condition Statement**

Boeing, GE, and MRAS state that they disagree with the proposed AD unsafe condition statements of ''possible loss of thrust control, asymmetric thrust, increased stopping distance''. They state that conditions are not the expected result based on a review of the event on the Boeing 767 airplane. There was no indication, neither tactile nor flight deck light, that alerted the pilot that the event had occurred. The only effect from the failed rod-end at the airplane level was the parts on the runway. There was no reported thrust control problem or airplane control problem. The statement ''hazardous debris on the runway'' however, is accurate. The commenters state that this information was determined as not a safety matter. This was based on the analysis showing there was no control issue. Additionally, transcowl liberation does not result in the loss of engine thrust control.

We do not agree. Although one particular case may not have needed crew response, other instances of transcowl liberation that led to the development of this AD included reports of airplane yaw upon loss of the transcowl. The possibility of this occurring again led to the unsafe conditions of ''possible loss of asymmetric thrust and thrust control.'' Loss of thrust control is included, because the asymmetric thrust created by transcowl liberation is not commanded by the crew. We changed the AD to simplify the unsafe condition by addressing only the conditions that pose an immediate threat to the aircraft.

**Request To Re-Examine the Cost of Compliance**

FedEx Express, GE, and MRAS request that the FAA re-examine the criteria and considerations used to estimate the cost of compliance for accomplishing the proposed AD. The true costs to U.S. operators will be higher than the figures published in the NPRM. Revised cost estimates should be provided which also reflect transcowl rigging work-hours as well as cost for repetitive accomplishment (versus termination), reworking common end actuator hardware installed on non-

CF6–80C2 engines, and include adjustment for higher levels of discrepant clevis fastener discoveries. The commenters state that the work-hours quoted, need for repetitive inspections, percentage of transcowls needing repair work, and parts replacement are not reflective of what the actual operating fleet will encounter.

We agree. We updated the number of work-hours to provide a more accurate accounting for the cost of this AD. Our best, and most substantiated, estimate of parts expected to fail is about 10%, therefore we did not change the percentage in our calculations.

**Hardware Not Presently Installed**

FedEx Express requests that proposed AD paragraph (h) be clarified with regards to addressing what actions, if any, should be applied to end actuator assemblies with the ⅜-inch diameter rod-ends that are identical to the subject hardware specified in the proposed AD, but which are not presently installed on any CF6–80C2 series engine thrust reverser. After the initial 500 flight cycle compliance period, the installation of end actuators with such rod-ends could result in potential noncompliance with the intent of the AD. The commenter recommends additional language that will direct the inspection of such actuator rod-ends before installation on CF6–80C2 series engine thrust reversers, especially after the initial 500 flight-cycle compliance period has been exceeded.

We do not agree. This AD addresses what actions are required for end actuator assemblies installed on a CF6–80C2 engine. Any assembly installed on an engine affected by this AD is subject to the inspections and replacements as defined in this AD. Also, the AD limits which rod-ends may be installed on an engine. If an actuator assembly is to be installed on an engine, it must be verified that all parts comply with this AD. We did not change the AD.

**Include Additional Part Numbers and Define Wear Limits**

American Airlines requests that additional part numbers for replacement parts should be included in paragraphs 1.E and 2.A.(1) of MRAS ASB No. 78A1162. Also, the commenter requests that paragraph 3.D.(3) of this ASB should define wear limits to the torsion arm to prevent structurally sound torsion arms from being removed due to minor surface damage. The additional part numbers would allow parts to be purchased from vendors other than Honeywell or MRAS.

We do not agree. We are not incorporating by reference Service Bulletin paragraphs 1.E., 3.D.(3), and 2.A.(1) in the AD. Therefore, these paragraphs are not mandated by the FAA. We did not change the AD.

**Specifically Identify Items To Be Inspected**

American Airlines states that in the proposed AD in the ''FAA's Determination and Requirements of the Proposed AD'' section, it should not state generally that ''the other hardware that connects the thrust reverser transcowl to the engine'' is subject to initial inspection and replacement. Rather, this section should specifically identify the items to be targeted in the initial inspection and replacement actions.

We do not agree. The ''FAA's Determination and Requirements of the Proposed AD'' section is a summary. The specific hardware needing inspection per this AD is defined in paragraph (f) of this AD. We did not change the AD.

**Request To Reference Alert Service Bulletin Revision 2**

GE and MRAS state that all references to ASB No. S/B 78A1162, Revision 1, should be changed to ASB No. S/B 78A1162, Revision 2, before the AD is issued.

We agree that we should reference the latest revision of the ASB. We changed the AD to reference the latest ASB revision which is Revision 3, dated September 10, 2009. We also updated the previous credit paragraph (k) to include Revision 1 and Revision 2.

**Remove Phrase From Discussion Section**

GE and MRAS request that, in the proposed AD Discussion section, we remove the phrase ''or the CDU clevis pin to lose its retaining capability''. There has never been a field finding or event investigation that indicates that an actuator-out condition contributes to the CDU clevis pin losing its retaining capability.

We do not agree. Although the AD does not address the loss of CDU clevis pin retaining capability leading to the failure of an actuator rod end, the clevis pins should still be inspected to ensure the part is in good condition and is held securely in place. We did not change the AD.

**Remove Repetitive Replacements of ⅜-Inch Rod-Ends From the AD**

GE and MRAS request that we remove the repetitive replacements of ⅜-inch rod-ends from the AD. The commenters do not envision the repetitive need for on-wing replacements of ⅜-inch rod-ends, and state that the replacement of ⅜-inch rod-ends with 7⁄16-inch or fixed length rod-ends would provide terminating action.

We do not agree. Repetitively replacing the ⅜-inch rod-ends within the cyclic accumulation defined in the AD provides an adequate level of safety. Requiring replacement of all ⅜-inch rod-ends with 7⁄16-inch or fixed length rod-ends would require considerably more effort for a number of engines. Although it is an acceptable terminating action, it is not the only course of action that resolves the unsafe condition. We did not change the AD.

**Update the Applicability Section**

GE and MRAS request that the Applicability section be updated to take into account the possibility of ⅜-inch rod-ends with part numbers other than those defined in this AD being installed. They state that the AD should apply to all ⅜-inch rod-ends, including those which may be a third-party design which have not been validated through this AD.

We agree. The AD needs to ensure that all ⅜-inch rod-ends are replaced, except as noted in the AD itself. We updated the wording of the Applicability section, as well as other affected sections in the AD, to reflect this.

**Inspection and Replacement Paragraphs Should Be Expanded**

GE and MRAS state that in the compliance section, under the ''Visual Inspection and Fastening Hardware Replacements'' heading, the paragraphs used for the inspection and replacement should be expanded to read ''Use paragraph 3.B.(1) and 3.B.(2)''. Additionally, the phrase ''clevis brackets'' should be replaced with ''clevis assembly'', because this is more appropriate nomenclature. These paragraphs were omitted in the proposed AD, but are needed to provide instructions on part inspection.

We agree. We incorporated by reference these paragraphs into the AD; however, we excluded the reporting requirements in those paragraphs, as they are not required by this AD. We also changed clevis bracket to clevis assembly.

**Allow Deferral of the Repair and Deactivate the Thrust Reverser**

GE and MRAS state that in the compliance section, under the ''Visual Inspection and Fastening Hardware Replacements'' heading, the proposed AD paragraph (g)(4), should be reworded as follows: ''If loose or missing clevis fasteners are found,

remove and replace the clevis fasteners, or defer the repair and deactivate the thrust reverser per existing MEL limits. Use paragraph 3.F.(2) of MRAS CF6–80C2 ASB No. 78A1162 Revision 2, dated June 22, 2009, to do the replacements or to deactivate the thrust reverser. Deactivation is not allowed/specified if referring only to steps 3.F.(2)(a) through 3.F.(2)(c).

We agree that the AD needs to allow thrust reverser deactivation. We changed the AD to allow deactivation of the thrust reverser.

### Change the Company Contact Information

GE and MRAS request that under ''Related Information'' the company contact information be changed to ''attn: Product Support Engineering; e-mail *bulletins@mras-usa.com* for a copy of the service information identified in this AD.'' MRAS Warranty Support does not provide service information. MRAS Product Support Engineering distributes service bulletins via e-mail, not by telephone or fax.

We partially agree. We added that contact information.

### Remove Documentation Requirements

GE and MRAS request that we remove from the AD the documentation requirements that are defined in paragraphs 3.C.(3)(b) and 3.E.(5) of the Service Bulletin.

We agree. We excluded those paragraphs from the incorporation by reference of the Service Bulletin, in the AD.

### Conclusion

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

### Costs of Compliance

We estimate that this AD will affect 750 GE CF6–80C2 series turbofan engines installed on airplanes of U.S. registry. We also estimate that it will take about 1.5 work-hours per engine to perform the inspection, one work-hour per engine to perform the rod-end replacement, and 48 work-hours per engine to perform the clevis assembly replacement. The average labor rate is $80 per work-hour. Required rod-ends will cost about $508 per engine. We estimate that 75 engines will require clevis bracket replacement. Required replacement clevis assemblies and associated labor will cost about $1,246,200. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $1,777,200.

### Authority for This Rulemaking

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

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

### Regulatory Findings

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

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

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

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

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

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

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**2009–21–07 General Electric Company:** Amendment 39–16044. Docket No. FAA–2009–0018; Directorate Identifier 2009–NE–01–AD.

#### Effective Date

(a) This airworthiness directive (AD) becomes effective December 1, 2009.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to General Electric Company (GE) CF6–80C2 series turbofan engines with thrust reverser ballscrew gearbox assembly adjustable-length end actuators having ⅜-inch rod-ends installed. These engines are installed on, but not limited to, Airbus A300–600/R/F and A310–200/300, and Boeing 747–200B/300/400/400D/400F, 767–200/300/300F/400ER, and MD–11 airplanes.

#### Unsafe Condition

(d) This AD results from reports of four failures of rod-ends on certain thrust reverser ballscrew gearbox assembly adjustable-length end actuators, leading to partial or complete separation of the transcowl from the engine and airplane during thrust reversal. We are issuing this AD to prevent loss of asymmetric thrust and thrust control.

#### 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.

#### Visual Inspection and Fastening Hardware Replacements

(f) Within 500 flight cycles after the effective date of this AD, do the following:

(1) Inspect all translating cowl clevis pin retaining clips and associated fastening hardware, including those on the center drive unit (CDU), to ensure they are properly assembled and securely fastened in place. If a retaining clip is not completely covering the clevis pin and firmly attached to the clevis, remove and replace the fastening hardware. Use paragraphs 3.B.(1) and 3.B.(2), excluding 3.B.(2)(a), of Middle River Aircraft Systems (MRAS) Alert Service Bulletin (ASB) No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to do the inspections.

(2) Remove and inspect all clevis pins for physical damage or significant corrosion. Use paragraphs 3.C.(1) through 3.C.(3), excluding the recording requirement in paragraph 3.C.(3)(b) of MRAS ASB No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10,

2009, to do the removals, inspections, and part disposition as necessary.

(3) Inspect the clevis assemblies and four clevis fasteners at each of the clevis assemblies (upper, center, and lower) for structural integrity. Use paragraphs 3.F.(1), excluding 3.F.(1)(c) of MRAS ASB No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to do the inspections.

(4) If loose or missing clevis fasteners are found, remove and replace the clevis fasteners, or defer the repair and deactivate the thrust reverser. Use paragraph 3.F.(2) of MRAS ASB No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to do the replacements.

**Initial Rod-End Replacements**

(g) For all ⅜-inch translating cowl adjustable-length actuator rod-ends having more than 600 flight cycles-since-new on the effective date of this AD, replace them with P/N M81935/1–6, or other approved part number, zero time rod-ends within 500 flight cycles after the effective date of this AD. Use paragraph 3.E., excluding both 3.E.(8) and the recording requirement in paragraph 3.E.(5) of MRAS ASB No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to do the replacements.

**Repetitive ⅜-Inch Rod-End Replacements**

(h) Repetitively replace the ⅜-inch translating cowl adjustable-length actuator rod-ends that were installed as specified in paragraph (g) of this AD, before they accumulate 11,000 flight cycles, with a zero time ⅜-inch adjustable-length rod-end, P/N M81935/1–6 or other approved part number. Since the rod-ends are not serialized, track their life by using the associated actuator assembly's life. Use paragraphs 3.E., excluding both paragraph 3.E.(8) and the recording requirement in paragraph 3.E.(5), of MRAS ASB No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to do the replacements.

**Optional Terminating Action**

(i) As an optional terminating action to the repetitive ⅜-inch rod-end replacements required by this AD, replace the ⅜-inch adjustable rod-ends with a 7/16-inch adjustable rod-end and nut or you may replace the adjustable end actuator with a fixed end actuator. Use paragraph 3.E.(1) of MRAS ASB No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to do the replacements.

**Installation Prohibition**

(j) After the effective date of this AD, do not install rod-ends P/Ns KBE6–59, MS2124S06, B15946–13 or 15946000–13, on any engine subject to this AD. Rod-ends removed to comply with this AD are not eligible for installation on any aircraft.

**Previous Credit**

(k) Inspections and replacements and optional terminating action performed before the effective date of this AD using MRAS ASB No. CF6–80C2 S/B 78A1162, dated December 30, 2008; Revision 1, dated February 13, 2009; or Revision 2, dated June 22, 2009, satisfy the required initial actions and optional terminating action of this AD.

**Alternative Methods of Compliance**

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

**Related Information**

(m) Contact Christopher J. Richards, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.j.richards@faa.gov;* telephone (781) 238–7133; fax (781) 238–7199, for more information about this AD.

**Material Incorporated by Reference**

(n) You must use Middle River Aircraft Systems Alert Service Bulletin No. CF6–80C2 S/B 78A1162, Revision 3, dated September 10, 2009, to perform the actions required by this AD. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Middle River Aircraft Systems, 103 Chesapeake Park Plaza, MF 46, Baltimore, MD 21220; telephone (410) 682–0080; fax (410) 682–0100; or e-mail: *bulletins@mras-usa.com,* for a copy of this service information. You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on October 2, 2009.

**Peter A. White,**

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

[FR Doc. E9–24391 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2006–25244; Directorate Identifier 2006–NE–25–AD; Amendment 39–16054; AD 2009–22–03]**

**RIN 2120–AA64**

## Airworthiness Directives; Hartzell Propeller Inc. ()HC–()2Y(K,R)–() Series Propellers

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

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

**SUMMARY:** The FAA is superseding an existing airworthiness directive (AD) for Hartzell Propeller Inc. ()HC–()2Y()–() series propellers with non-suffix serial number (SN) propeller hubs installed on Lycoming O–, IO–, LO–, and AEIO–360 series reciprocating engines. That AD currently requires initial and repetitive eddy current inspections (ECIs) of the front cylinder half of the propeller hub for cracks and removing cracked hubs from service before further flight. In addition, that AD allows installation of an improved design propeller hub (suffix SN ''A'' or ''B'') as terminating action to the repetitive ECI. This ad requires the same actions but changes the affected propeller series designation to ()HC–()2Y(K,R)–() series propellers with non-suffix SN propeller hubs and suffix SN letter ''E'' propeller hubs. This AD also expands the engine eligibility to include Lycoming LIO–, TO–, LTO–, AIO–, and TIO–360-series engines. This AD results from the need to make changes to the affected series designation of propellers, to expand the engine applicability, and to respond to comments received on AD 2006–18–15. We are issuing this AD to prevent failure of the propeller hub causing blade separation and subsequent loss of airplane control.

**DATES:** Effective November 12, 2009. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of November 12, 2009.

We must receive any comments on this AD by December 28, 2009.

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

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

**FOR FURTHER INFORMATION CONTACT:** Tim Smyth, Senior Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; e-mail: *timothy.smyth@faa.gov;* telephone (847) 294–7132; fax (847) 294–7834.

**SUPPLEMENTARY INFORMATION:** The FAA amends 14 CFR part 39 by superseding AD 2006–18–15, Amendment 39–14754 (71 FR 52994, September 8, 2006). That AD requires initial and repetitive ECIs of the front cylinder half of the propeller hub for cracks and removing cracked hubs from service before further flight.

In addition, that AD allows installation of an improved design propeller hub (suffix SN ''A'' or ''B'') as terminating action to the repetitive ECI. That AD was the result of a report of a propeller blade separating from a propeller hub. That condition, if not corrected, could result in failure of the propeller hub causing blade separation and subsequent loss of airplane control.

**Actions Since AD 2006–18–15 Was Issued**

Since AD 2006–18–15 was issued, we discovered that we need to add Lycoming 360 engine models LIO–, TO–, LTO–, AIO–, and TIO– to the AD applicability. We also found the need to change the affected propeller series designation to ()HC–()2Y(K,R)–() series propellers with non-suffix SN propeller hubs and suffix SN letter ''E'' propeller hubs.

**Comments Received on AD 2006–18–15**

We provided the public the opportunity to comment on AD 2006–18–15, which was a final rule; request for comments AD. We have considered the comments received.

**Repetitive Inspection Interval**

Five commenters request that we change the repetitive inspection interval from within every 100 operating hours time-in-service (TIS) to an interval of within every five years, which would be less of an economic burden.

We do not agree. The repetitive interval is based on service experience and engineering analysis. The cause of the hub crack initiation is unknown, however a crack can grow to a critical failure length in an amount of time that requires a short inspection interval. We did not change the AD.

Another commenter requests that the repetitive inspection interval be associated with the hours actually used or some reasonable interval like within every 100 hours or three years. The commenter would like to see the evidence that supports a theory and the AD, that a crack will develop in a propeller hub sitting in a hangar for as little as one year with no hours flown.

We agree with the commenter that little or no propeller hub damage can be done if the airplane does not fly. The AD compliance time interval of within every 100 operating hours TIS after the last propeller hub ECI, or at every annual inspection, whichever occurs first, was based on an average general aviation airplane usage and other analysis. However, since we issued the original AD, we have re-evaluated the calendar-month interval and determined that it is not measurably contributing to the minimum level of safety. We changed the compliance interval to just every 100 operating hours TIS after the last propeller hub ECI, and we eliminated the requirement of performing ECIs at every annual inspection.

Another commenter requests that we eliminate the yearly inspection requirement and just have the 100-hour requirement. Since the annual aircraft inspections do include a visual propeller hub inspection for any cracks they would be detected at that time. The hub thickness does not allow any cracks not to be visual. The eddy current test would only reveal the instant the cracks were formed.

We agree. We have reviewed additional data, and changed the repetitive inspection interval in the AD to every 100 operating hours TIS after the last propeller hub ECI.

**Use of Other Inspection Methods**

Four commenters suggest that the use of other inspection methods such as observation of vibration during flight, visual inspections for grease, visual inspections with a 10X power inspection glass magnification, or dye penetrant inspections, would be just as effective as doing ECIs.

We do not agree. The commenters' opinions that a hub crack will leak grease, will be noticed either as a grease leak or in-flight vibration has been studied, evaluated, and determined to be unreliable to detect a hub crack prior to catastrophic failure. In the past, we imposed a similar visual inspection process, proposed by a commenter, with a 10X power inspection glass magnification and or the use of a dye penetrant inspection process to attempt to detect a hub crack prior to failure. Service experience has shown the propeller hub crack growth rate has been rapid enough at times that a missed crack detection using those inspection processes can result in a catastrophic hub failure. Use of a dye penetrant type inspection process would require a much more burdensome repetitive inspection interval than using the ECI process. Past AD service history demonstrated the dye penetrant or Zyglo inspection process to be less reliable than ECIs in finding a crack in the suspect area. We did not change the AD.

**Cost of Complying With the AD and Economic Evaluation**

Nine commenters state that the cost of complying with the AD will be a huge financial burden, and that ECIs present an unwarranted yearly investment of over $300 per inspection.

We do not agree. Based on review of service experience and inspection results over the last several years, we determined that the yearly ECI requirements can be eliminated to require inspections every 100 operating hours TIS after the last propeller hub ECI.

Another commenter states that that our evaluation of the economic impact (posted in the docket file) is seriously flawed. On one line the evaluation has 10,000 units affected, then on the next line, only 100. The commenter asks why such a discrepancy. The commenter thinks that the total of 10,000 units should actually be higher.

We do not agree our unit estimates are wrong. The 10,000 units referenced in the Economic and Regulatory Evaluation, posted in the docket file, refers to the estimated number of products on U.S.-registered aircraft. The 100 units referenced is the estimated number of hubs that we anticipate to be found cracked that will require replacement. However, as clarification, we will send to the docket file a revised Economic and Regulatory Evaluation, which will identify the total ECI costs for the U.S. fleet as the total costs of one inspection cycle.

**Question of Lack of Maintenance, or Poor Maintenance, on the Failed Propeller**

Seven commenters question if the lack of maintenance, or poor maintenance, of the propeller that failed caused the failure, and they state that the AD should provide more history of the failed propeller and history of the airplane it was installed on.

We do not agree. We do not know the cause of the hub cracking. But, we expect that the inspection defined in this AD is an effective means to detect a propeller hub crack to minimize a catastrophic propeller hub failure. The hub failure report cited in the AD resulted in a blade separation and an airplane accident. No prior warning was noted except just prior to blade separation. No in-flight corrective action was possible. The airplane crew experienced loss of normal airplane control and was only able maintain a descent to a crash landing. The accident investigation indicated that the airplane was properly maintained in accordance with 14 CFR part 43. We did not change the AD.

**Clarification Needed in Engine/Model Listing**

One commenter states that the applicable model list of aircraft and engines seems to indicate that all of the aircraft/engines mentioned are 180

horsepower, yet the propeller applicable model list covers propellers installed on counterweighted angle valve engines which are 200 horsepower. Specific inclusion or exclusion of counterweighted engines and valve configuration (whichever is the case) needs to be incorporated for clarification; or the aircraft/engine model list needs to be finite instead of, ''not limited to.''

We agree that clarification is needed to define the engine models and airplane models that are affected by this AD. We changed the AD to clarify the callouts for the engine and airplane model listing.

**AD Does Not List the Seneca I Airplane**

One commenter states that the current AD does not list the Seneca I airplane. According to the propeller number, it should. The Seneca I hubs are part numbers (P/Ns) D–2201–16 and D–2201–16F. The hubs that Hartzell wants to be used, for compliance to Service Bulletin No. HC–SB–61–269, lists hub, P/N D–6522–1. Hub, P/N D–6522–1, which happens to be a P/N that was part of another AD, (AD 2003–01–03, Directorate Identifier 2002–NE–25–AD) is to be removed and replaced. Something is wrong with the AD and the service bulletin.

We agree that the Seneca I (PA–34–200) airplane should be listed in the AD. We also agree that we need to prohibit taking a retired hub from the AD 2003–01–03 compliance effort and allowing that same model hub to be installed under this AD compliance effort. We changed this AD to add that airplane and to clarify that language.

**Question on AD Terminology**

One commenter asks if the terminology of ''front cylinder half'', in the AD, is correct. A cylinder does not have two halves. Should it instead say front half of the propeller hub? A hub has two halves.

We do not agree. The intent is to inspect the front hub half of the propeller hub. That half of the propeller hub has the cylinder installed. The terminology used in the AD is the common identification phrase used for this propeller hub part area. We did not change the AD.

**Claim That AD Is Difficult To Comply With**

One commenter states that the AD is difficult to comply with as-written with an ECI every 100 hours or annual whichever occurs first. In checking, he has not been able to find anyone who does annual inspections who can do ECIs. If an annual inspection is due in May and he got an ECI in April (at some distant prop shop and Hartzell-certified), he would need it again at an annual inspection in May.

We partially agree. Hartzell Service Bulletin No. HC–SB–61–269 was revised to allow an alternative method of compliance (AMOC), which defines a repetitive inspection interval of 100 operating hours or 12 calendar months, to eliminate the potential need for two inspections per year unless the operator exceeds 100 operating hours in that 12-calendar-month timeframe. We determined there are numerous locations throughout the U.S. that can perform this inspection using ECI equipment. We changed the repetitive inspection interval in the AD to just every 100 operating hours TIS after the last propeller hub ECI.

Another commenter states that the AD is of concern for several reasons. The commenter checked on having the ECI completed and there is not a shop within 100-plus miles that can perform the ECI. The second part is its limits where the commenter can have an annual inspection performed as the ECI is to be done at each annual inspection. It would appear that the fixed base operators (FBOs) that do offer to do the ECI will also be well booked in advance for annual inspections also. Even though it has only been three years since the commenter's propeller was overhauled, he is sure that the only solution will be replacing the hub. The commenter was quoted $4,300 plus any additional needed parts, and an ECI at Santa Monica, for $350.00.

In response, we understand the airplane owner's concerns with maintenance facility availability, but the owner and or operator is responsible for maintenance, including getting required inspections done. We determined that there are numerous facilities available to perform the ECI process. We did not change the AD.

**AD Is an Undue Burden for Low Utilization Aircraft**

One commenter states that AD paragraph (h) indicates that initial compliance is due within 50 operating hours TIS after the effective date of this AD. Under this initial requirement a low utilization aircraft operating 5 hours per year could go 10 years before initial compliance is mandatory. The commenter asks if this is truly the intent of the initial compliance portion of the AD. AD paragraph (l) appears to require a repetitive inspection within every 100 operating hours TIS after the last propeller hub inspection or at every annual inspection, whichever occurs first. The literal interpretation of this appears to be that if an operator were to accumulate 100 hours TIS within a 10 month period after an initial inspection that coincided with that operator's annual inspection and then had the repetitive completed at the 10 month point, then at that operator's annual, 2 months later, another inspection would be due. Neither paragraph (h) nor paragraph (1) appear to be worded in such a fashion to truly accomplish the intent of desired initial compliance for safety reasons nor appropriate recurring compliance without undue burden.

In response, if an owner and or operator only flies his or her airplane 5 hours per year, the likelihood of a propeller hub crack growing to catastrophic failure is reduced. The average flight time utilization of privately owned airplanes is about 62 hours per year. This average was used in part along with other service experience and engineering analysis to establish the initial and repetitive inspection intervals. Because the cause of the hub crack is unknown, we were not able to provide an inspection process that was less burdensome. However, since we issued the proposed AD, we have re-evaluated the calendar-month interval and determined that it is not measurably contributing to the minimum level of safety. We changed the compliance interval to just every 100 operating hours TIS after the last propeller hub ECI, and we eliminated the requirement of performing ECIs at every annual inspection.

**AD Does Apply to Suffix SN ''E'' Hubs**

One commenter states that the way the AD is written, it is misleading and needs further clarification: The applicability states the AD applies to propellers with non-suffix SN prop hubs. There are prop hubs out there that have the suffix SN ''E'', which the AD does apply to ''E'' suffix hubs that were originally non-suffix hubs that had an ECI in accordance with Hartzell SB No. HC–SB–61–269 and were then marked with an ''E'' to indicate the ECI was accomplished and the hub must be repetitively inspected. If a person doesn't know this, or doesn't read the service bulletin, they will look at their prop hub SN, see that it has an ''E'' and presume the AD doesn't apply.

We agree. We changed the AD applicability to state that it applies to Hartzell Propeller Inc. ()HC–()2Y(K,R)–() series propellers with non-suffix SN propeller hubs and suffix SN letter ''E'' propeller hubs, installed on Lycoming O–, IO–, LO–, LIO–, TO–, LTO–, AIO–, AEIO–, and TIO–360 series reciprocating engines.

## Conclusion

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

## Relevant Service Information

We have reviewed and approved the technical contents of Hartzell Propeller Inc. Service Bulletin No. HC–SB–61–269, Revision 3, dated September 17, 2007. That SB describes procedures for ECIs of propeller hubs on affected propellers. That SB also lists improved design replacement propeller hub part numbers.

## FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other Hartzell Propeller Inc. ()HC–()2Y(K,R)–() series propellers of the same type design. For that reason, we are issuing this AD to prevent failure of the propeller hub causing blade separation and subsequent loss of airplane control. This AD requires, within 50 operating hours TIS, an initial ECI of the front cylinder half of propeller hubs with non-suffix SNs and SNs with a suffix letter ''E'', for cracks. This AD also requires, within every 100 operating hours TIS thereafter, repetitive ECIs of the front cylinder half of propeller hubs with non-suffix SNs and SNs with a suffix letter ''E'', for cracks. This AD also requires removing cracked hubs from service before further flight. You must use the service information described previously to perform the actions required by this AD.

## FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

## Comments Invited

This AD is a final rule; request for comments that involves requirements affecting flight safety. This AD is superseding the original AD which was also a final rule; request for comments. We invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2006–25244; Directorate Identifier 2006–NE–25–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

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

## Examining the AD Docket

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

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–14754 (71 FR 52994, September 8, 2006), and by adding a new airworthiness directive, Amendment 39–16054, to read as follows:

**2009–22–03 Hartzell Propeller Inc.:** Amendment 39–16054. Docket No. FAA–2006–25244; Directorate Identifier 2006–NE–25–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective November 12, 2009.

**Affected ADs**

(b) This AD supersedes AD 2006–18–15, Amendment 39–14754.

**Applicability**

(c) This AD applies to Hartzell Propeller Inc. ()HC–()2Y(K,R)–() series propellers with

non-suffix serial number (SN) propeller hubs and propeller hubs suffix SN letter ''E'', installed on Lycoming O–, IO–, LO–, LIO–, TO–, LTO–, AIO–, AEIO–, and TIO–360 series reciprocating engines. These propellers and engines could be installed on, but not limited to:

| | | |
|---|---|---|
| O–360–A1A | Piper Aircraft | Comanche (PA–24). |
| | Lake Aircraft | Colonial (C–2, LA–4, 4A, or 4P). |
| | Mooney Aircraft | Mark ''20B'' (M–20B). |
| | Earl Horton | Pawnee (Piper PA–25). |
| | Partenavia | Oscar (P–66). |
| | Siai-Marchetti | (S–205). |
| | Procaer | Picchio (F–15–A). |
| | S.A.A.B | Safir (91–D). |
| | Malmo | Vipan (MF–10B). |
| | Aero Boero | AB–180. |
| | Beagle | Airedale (A–109). |
| | DeHavilland | Drover (DHA–3MK3). |
| | Kingsford-Smith | Bushmaster (J5–6). |
| O–360–A1AD | S.O.C.A.T.A | Tabago TB–10. |
| O–360–A1D | Piper Aircraft | Comanche (PA–24). |
| | Lake Aircraft | Colonial (LA–4, 4A, or 4P). |
| | Doyn Aircraft | Doyn-Beech (Beech 95). |
| | Mooney Aircraft | Master ''21'' (M–20E), Mark ''20B'', ''20D'', (M20B, M20C), Mooney Statesman (M–20G). |
| O–360–A1F6 | Cessna Aircraft | Cardinal. |
| O–360–A1F6D | Cessna Aircraft | Cardinal 177. |
| | Teal III | TSC (1A3). |
| O–360–A1G6 | Aero Commander. | |
| O–360–A1G6D | Beech Aircraft | Duchess 76. |
| O–360–A1H6 | Piper Aircraft | Seminole (PA–44). |
| O–360–A1P | Aviat | Husky. |
| O–360–A2A | Avion Jodel | D–140–B. |
| | S.O.C.A.T.A | Rallye Commodore (MS–893). |
| | Partenavia | Oscar (P–66). |
| | Beagle | Husky (D5–180) (J1–U). |
| O–360–A2D | Piper Aircraft | Comanche (PA–24), Cherokee ''C'' (PA–28 ''180''). |
| | Mooney Aircraft | Master ''21'' (M–20D), Mark ''21'' (M–20E). |
| O–360–A2F | Dynac Aerospace Corp | Aero Commander Model 100. |
| O–360–A2G | Beech Aircraft | Sport. |
| O–360–A3A | C.A.A.R.P.S.A.N | (M–23III). |
| | Robin | Regent (DR400/180), Remorqueur (DR400/180R), R–3170. |
| | S.O.C.A.T.A | Rallye 180GT, Sportavia Sportsman (RS–180). |
| | Norman Aeroplane Co | NAC–1 Freelance. |
| | Nash Aircraft Ltd | Petrel. |
| O–360–A3AD | S.O.C.A.T.A | TB–10. |
| | Robin | Aiglon (R–1180T). |
| O–360–A4A | Piper Aircraft | Cherokee ''D'' (PA–28 ''180''). |
| O–360–A4D | Varga | Kachina. |
| O–360–A4G | Beech Aircraft | Musketeer Custom III. |
| O–360–A4K | Grumman American | Tiger. |
| | Beech Aircraft | Sundowner 180. |
| O–360–A4M | Piper Aircraft | Archer II (PA–28 ''18''). |
| | Valmet | PIK–23. |
| O–360–A4N | Cessna Aircraft | 172 (Optional). |
| O–360–A4P | Penn Yan | Super Cub Conversion. |
| O–360–A5AD | C. Itoh and Co | Fuji FA–200. |
| O–360–B2C | Seabird Aviation | SB7L. |
| O–360–C1A | Intermountain Mfg. Co | Call Air (A–6). |
| O–360–C1E | Bellanca Aircraft | Scout (8GCBC–CS). |
| O–360–C1F | Maule | Star Rocket MX–7–180. |
| O–360–C1G | Christen | Husky (A–1). |
| O–360–C2E | Bellanca Aircraft | Scout (8GCBC FP). |
| O–360–C4F | Maule | MX–7–180A. |
| O–360–C4P | Penn Yan | Super Cub Conversion. |
| O–360–F1A6 | Cessna Aircraft | Cutlass RG. |
| O–360–J2A | Robinson | R22. |
| IO–360–B1A | Beech Aircraft | Travel-Air (B–95A). |
| | Doyn Aircraft | Doyn-Piper (PA–23 ''200''). |
| IO–360–B1B | Beech Aircraft | Travel-Air (B–95B). |
| | Doyn Aircraft | Doyn-Piper (PA–23 ''200''). |
| | Fuji | (FA–200). |
| IO–360–B1D | United Consultants | See-Bee. |
| IO–360–B1E | Piper Aircraft | Arrow (PA–28 ''180R''). |

| | | |
|---|---|---|
| IO–360–B1F | Utva | 75. |
| IO–360–B2E | C.A.A.R.P | C.A.P. (10). |
| IO–360–B1F6 | Great Lakes | Trainer. |
| IO–360–B1G6 | American Blimp | Spector 42. |
| IO–360–B2F6 | Great Lakes | Trainer. |
| IO–360–C1E6 | Piper Aircraft | Seneca I (PA–34–200). |
| LO–360–A1G6D | Beech Aircraft | Duchess. |
| LO–360–A1H6 | Piper Aircraft | Seminole (PA–44). |
| IO–360–E1A | T.R. Smith Aircraft | Aerostar. |
| IO–360–M1A | Diamond Aircraft | DA–40. |
| IO–360–M1B | Vans Aircraft | RV6, RV7, RV8. |
| | Lancair | 360. |
| AEIO–360–B1F | F.F.A | Bravo (200). |
| | Grob | G115/Sport-Acro. |
| AEIO–360–B1G6 | Great Lakes. | |
| AEIO–360–B2F | Mundry | CAP–10. |
| AEIO–360–B4A | Pitts | S–1S. |
| AEIO–360–H1A | Bellanca Aircraft | Super Decathalon (8KCAB–180). |
| AEIO–360–H1B | American Champion | Super Decathalon. |

(d) Any hub, part number (P/N) D–6522–1, retired from service under AD 2003–01–03 must not be returned to service under this AD unless an additional airworthiness determination is made and recorded in the appropriate propeller and or airplane maintenance logbook. Also, any hub, (P/N) D–6522–1, that is returned to service is still subject to the inspection requirements of this AD.

(e) The parentheses appearing in the propeller model number indicates the presence or absence of an additional letter(s) that varies the basic propeller model. This AD still applies regardless of whether these letters are present or absent in the propeller model designation.

**Propellers Not Affected by This AD**

(f) Hartzell Propeller Inc. ()HC–()2Y(K, R)–() series propellers installed on the following aircraft are not affected by this AD, but are affected by AD 2001–23–08, which addresses the same unsafe condition:

(1) Aerobatic aircraft (including certificated aerobatic aircraft, military trainers, or any aircraft routinely exposed to aerobatic usage).

(2) Agricultural aircraft.

(3) Piper PA–32() series aircraft with Lycoming 540 series reciprocating engines rated at 300 horsepower or higher.

(4) Britten Norman BN–2() series aircraft with Lycoming 540 series reciprocating engines.

**Unsafe Condition**

(g) This AD results from the need to make changes to the affected series designation of propellers, to expand the engine applicability, and to respond to comments received on AD 2006–18–15. We are issuing this AD to prevent failure of the propeller hub causing blade separation and subsequent loss of airplane control.

**Compliance**

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

**Initial Propeller Hub Eddy Current Inspection (ECI)**

(i) Within 50 operating hours time-in-service (TIS) after the effective date of this AD, perform an initial ECI of the front cylinder half of the propeller hub for cracks.

(j) Use paragraphs 3.A. through 3.A.(4)(g) of the Accomplishment Instructions of Hartzell Propeller Inc. Service Bulletin (SB) No. HC–SB–61–269, Revision 3, dated September 17, 2007, to perform the ECI.

(k) If any cracks are found, remove the propeller hub from service before further flight.

(l) If no cracks are found, mark the propeller using paragraph 3.A.(6)(a) of the Accomplishment Instructions of Hartzell Propeller Inc. SB No. HC–SB–61–269, Revision 3, dated September 17, 2007, to indicate compliance with Hartzell Propeller Inc. SB No. HC–SB–61–269, dated April 18, 2005.

**Repetitive Propeller Hub ECIs**

(m) Within every 100 operating hours TIS after the last propeller hub ECI, perform repetitive ECIs of the front cylinder half of the propeller hub for cracks.

(n) Do not repetitively mark the propeller once it is initially marked as specified in paragraph (l) of this AD.

(o) If any cracks are found, remove the propeller hub from service before further flight.

**Optional Terminating Action**

(p) As optional terminating action to the repetitive ECIs required by this AD:

(1) Replace the non-suffix SN propeller hub with a propeller hub identified by an ''A'' or ''B'' suffix letter in the propeller hub SN; except:

(2) Do not install a suffix ''A'' propeller hub that was previously installed on an aircraft affected by the original issue or later revision of Hartzell Propeller Inc. SB No. HC–SB–61–227.

(3) Replacement propeller hub part numbers can be found in paragraph 2.A., Material Information, of Hartzell Propeller Inc. SB No. HC–SB–61–269, Revision 3, dated September 17, 2007.

**Alternative Methods of Compliance**

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

**Related Information**

(r) Hartzell Propeller Inc. SB No. HC–SB–61–227, Revision 2, dated April 18, 2005, and AD 2001–23–08 pertain to the subject of this AD.

(s) Contact Tim Smyth, Senior Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; e-mail: *timothy.smyth@faa.gov;* telephone (847) 294–7132; fax (847) 294–7834, for more information about this AD.

**Material Incorporated by Reference**

(t) You must use Hartzell Propeller Inc. Service Bulletin No. HC–SB–61–269, Revision 3, dated September 17, 2007, to perform the eddy current inspections required by this AD. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Hartzell Propeller Inc. Technical Publications Department, One Propeller Place, Piqua, OH 45356; telephone (937) 778–4200; fax (937) 778–4391, for a copy of this service information. You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on October 2, 2009.

**Peter A. White,**

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

[FR Doc. E9–25290 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 301

**[TD 9460]**

**RIN 1545–BD67**

### Declaratory Judgments—Gift Tax Determinations; Correction

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

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains corrections to final regulations (TD 9460) that were published in the **Federal Register** on Wednesday, September 9, 2009 regarding petitions filed with the United States Tax Court for declaratory judgments with respect to the valuation of gifts.

**DATES:** This correction is effective on October 27, 2009 and is applicable in taxable years ending on or after September 9, 2009.

**FOR FURTHER INFORMATION CONTACT:** Juli Ro Kim or George Masnik, (202) 622–3090 (not a toll free number).

**SUPPLEMENTARY INFORMATION:**

#### Background

The final regulations (TD 9460) that are the subject of these corrections are under section 7477 of the Internal Revenue Code.

#### Need for Correction

As published on September 9, 2002 (74 FR 46347), the final regulations (TD 9460) contain errors that may prove to be misleading and are in need of clarification.

#### List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### Correction of Publication

■ Accordingly, 26 CFR part 301 is corrected by making the following correcting amendments:

### PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

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

■ **Par. 2.** Section 301.7477–1 is amended by revising the second sentence of paragraph (d)(2) to read as follows:

**§ 301.7477–1 Declaratory judgments relating to the value of certain gifts for gift tax purposes.**

* * * * *

(d) * * *

(2) * * * For purposes of this paragraph (d)(2), the term *return of tax imposed by chapter 12* means the last gift tax return (Form 709, ''United States Gift (and Generation–Skipping Transfer) Tax Return'' or such other form as may be utilized for this purpose from time to time by the IRS) for the calendar year filed on or before the due date of the return, including extensions granted if any, or, if a timely return is not filed, the first gift tax return for that calendar year filed after the due date. * * *

* * * * *

**LaNita VanDyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E9–25737 Filed 10–26–09; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 301

**[TD 9460]**

**RIN 1545–BD67**

### Declaratory Judgments—Gift Tax Determinations; Correction

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

**ACTION:** Correction to final regulations.

**SUMMARY:** This document contains corrections to final regulations (TD 9460) that were published in the **Federal Register** on Wednesday, September 9, 2009 (74 FR 46347) regarding petitions filed with the United States Tax Court for declaratory judgments with respect to the valuation of gifts.

**FOR FURTHER INFORMATION CONTACT:** Juli Ro Kim or George Masnik, (202) 622–3090 (not a toll free number).

**SUPPLEMENTARY INFORMATION:**

#### Background

The final regulations (TD 9460) that are the subject of these corrections are under section 7477 of the Internal Revenue Code.

#### Need for Correction

As published, the final regulations (TD 9460) contain errors that may prove to be misleading and are in need of clarification.

#### Correction of Publication

Accordingly, the final regulations (TD 9460), that are the subject of FR Doc. E9–21458, are corrected as follows:

1. On page 46347, in the preamble, column 1, under the caption ''For Further Information Contact'', line 1, the language ''Deborah S. Ryan'' is corrected to read ''Juli Ro Kim''.

2. On page 46347, in the preamble, column 3, under the paragraph heading ''Drafting Information'', line 2, the language ''regulations are Deborah Ryan and Juli'' is corrected to read ''regulations are George Masnik and Juli''.

**LaNita VanDyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E9–25739 Filed 10–26–09; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 147

**[Docket No. USCG–2008–1051]**

**RIN 1625–AA00**

### Safety Zone; Perdido Regional Host Outer Continental Shelf Platform, Gulf of Mexico

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is establishing a safety zone around the Perdido Regional Host (PRH), a high-production, manned oil and natural gas platform. The platform needs to be protected from vessels operating outside the normal shipping channels and fairways. Placing a safety zone around the platform will significantly reduce the threat of allisions, oil spills, and releases of natural gas, and thereby protect the safety of life, property, and the environment.

**DATES:** This rule is effective November 27, 2009.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket, are part of docket USCG–2008–1051 and are available online by going to *http://www.regulations.gov,* inserting USCG–2008–1051 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at 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.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Dr. Madeleine McNamara, U.S. Coast Guard, District Eight Waterways Management Coordinator; telephone 504–671–2103, *madeleine.w.mcnamara@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

## Regulatory Information

On February 13, 2009, we published an interim rule with a request for comments entitled, ''Safety Zone; Perdido Regional Host Outer Continental Shelf Platform in the Gulf of Mexico'' in the **Federal Register** (74 FR 7181). We received no comments on the interim rule.

## Background and Purpose

The safety zone established by this regulation is in the deepwater area of the Gulf of Mexico, located at 26°07′44″ N, 094°53′53″ W in Alaminos Canyon block 857. For the purposes of this regulation, the deepwater area is considered to be waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ), which is contiguous to the territorial sea of the United States, and extends up to 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. Navigation in the area of the safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area also includes an extensive system of fairways.

Shell Offshore, Inc. requested that the Coast Guard establish a safety zone around the Perdido Regional Host. The request for the safety zone was made due to the safety concerns for both the personnel aboard the platforms and the environment. Shell Offshore, Inc. indicated that the location, production level, and personnel levels on board the platform makes it highly likely that any allision with the platform would result in a catastrophic event. Perdido Regional Host is a high production oil and gas drilling platform producing approximately 100,000 barrels of oil per day and 200 million standard cubic feet of gas per day; it is manned with a crew of approximately 150 people.

In evaluating this request, the Coast Guard explored relevant safety factors and considered several criteria, including but not limited to: (1) The level of shipping activity around the facility; (2) safety concerns for personnel aboard the facility; (3) concerns for the environment; (4) the likeliness that an allision would result in a catastrophic event based on proximity to shipping fairways, offloading operations, production levels, and size of the crew; (5) the volume of traffic in the vicinity of the proposed area; (6) the types of vessels navigating in the vicinity of the proposed area; and, (7) the structural configuration of the facility.

Results from a thorough and comprehensive examination of the criteria, IMO guidelines, and existing regulations warrant the establishment of a safety zone of 500 meters around Perdido Regional Host at 26°07′44″ N, 094°53′53″ W.

## Discussion of Comments and Changes

We received no comments in response to the interim rule.

## 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 due to the distance of the Perdido Regional Host from both land and safety fairways. Vessels traversing waters near the safety zone will be able to safely travel around the zone without incurring additional cost.

## 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 affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in Alaminos Canyon block 857. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) This rule will enforce a safety zone around a production platform that is in an area of the Gulf of Mexico not typically frequented by vessel traffic; (2) this rule will enforce a safety zone that is not in close proximity to a safety fairway; and, (3) vessel traffic can pass safely around the safety zone without incurring additional costs.

## Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the interim rule 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.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

## Collection of Information

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

## Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and 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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards 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 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, because the rule establishes a safety zone. An environmental analysis checklist and a categorical exclusion determination are will be available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 147**

Continental shelf, Marine safety, Navigation (water).

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 147 as follows:

## PART 147—SAFETY ZONES

■ 1. The authority citation for part 147 continues to read as follows:

**Authority:** 14 U.S.C. 85; 43 U.S.C. 1333; Department of Homeland Security Delegation No. 1070.1.

■ 2. Revise § 147.845 to read as follows:

**§ 147.845 Perdido Regional Host safety zone.**

(a) *Description.* The Perdido Regional Host is located at position 26°07′44″ N, 094°53′53″ W. The area within 500 meters (1640.4 feet) from each point on the structure's outer edge is a safety zone.

(b) *Regulation.* No vessel may enter or remain in this safety zone except the following:

(1) An attending vessel;

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District or a designated representative.

Dated: September 8, 2009.

**Mary E. Landry,**

*Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.*

[FR Doc. E9–25595 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–15–P

## LIBRARY OF CONGRESS

### Copyright Office

### 37 CFR Part 201

**[Docket No. RM 2008–08]**

### Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Interim rule.

**SUMMARY:** The Librarian of Congress is extending, on an interim basis, the existing classes of works with respect to which the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses.

**DATES:** *Effective Date:* October 28, 2009.

**FOR FURTHER INFORMATION CONTACT:** David Carson, General Counsel, Copyright Office, GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

**SUPPLEMENTARY INFORMATION:** Section 1201(a)(1) of the copyright law prohibits the circumvention of technological measures that control access to works protected by copyright. It also provides that every three years, the Register of Copyrights is to conduct a rulemaking proceeding to determine whether users of particular classes of copyrighted works are, or in the next three years are likely to be, adversely affected by that prohibition in their ability to make noninfringing uses of copyrighted works. That determination is made by

the Librarian of Congress upon the recommendation of the Register of Copyrights. Section 1201(a)(1)(D) provides that ''The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.''

The Register of Copyrights is conducting the fourth of these triennial rulemaking proceedings and is in the final stages of making her recommendation to the Librarian of Congress. The rulemaking conducted in 2006 identified six classes of works to be subject to exemption from the prohibition on circumvention for the period beginning November 27, 2006, and ending October 27, 2009. Because the Register will not be able to present her recommendation to the Librarian of Congress before October 27, it is necessary to extend the effective dates of the existing regulation identifying those classes of works until the time that the Librarian acts upon the recommendation of the Register. It is anticipated that this extension will be in effect for no more than a few weeks.

Accordingly, the Register of Copyrights recommends to the Librarian of Congress that the existing regulation, codified at 37 CFR 201.40(b), be amended on an interim basis to strike the reference to the October 27, 2009, termination date for the list of classes of works identified in the regulation.

The Librarian of Congress accepts the recommendation of the Register of Copyrights and adopts the following interim rule.

### List of Subjects in 37 CFR Part 201

Cable television, Copyright, Exemptions to prohibition against circumvention, Literary works, Recordings, Satellites.

Dated: October 20, 2009.

**Marybeth Peters,**

*Register of Copyrights.*

### Interim Regulation

■ For the reasons set forth in the preamble, 37 CFR part 201 is amended as follows:

## PART 201–GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

**§ 201.40 [Amended]**

■ 2. Section 201.40 (b) introductory text is amended by removing ''from November 27, 2006, through October 27, 2009,'' and adding in its place ''commencing November 27, 2006.''

Dated: October 22, 2009.

**James H. Billington,**

*Librarian of Congress.*

[FR Doc. E9–25850 Filed 10–26–09; 8:45 am]

BILLING CODE 1410–30–P

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## POSTAL SERVICE

## 39 CFR Part 20

## Return Address Requirement —Outbound International Commercial Bulk Mailings

**AGENCY:** Postal Service™.

**ACTION:** Final rule with comment period.

**SUMMARY:** The Postal Service is revising the *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®) to require that mailpieces prepared as a commercial bulk mailing must bear a complete U.S. return address.

**DATES:** *Effective date:* January 4, 2010.

*Comment date:* Mail or deliver written comments until December 4, 2009.

**ADDRESSES:** Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza, SW., Room 3436, Washington, DC 20260–3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant Plaza, SW., 11th Floor N., Washington, DC between 9 a.m. and 4 p.m., Monday through Friday. E-mail comments, containing the name and address of the commenter, may be sent to *MailingStandards@usps.gov* with a subject line of ''Return Address Requirement—Outbound International Commercial Bulk Mailings.'' Faxed comments will not be accepted.

**FOR FURTHER INFORMATION CONTACT:** Rick Klutts at 813–877–0372.

**SUPPLEMENTARY INFORMATION:** The Postal Service is making this change to be consistent with the amended regulations of the Universal Postal Union (UPU) Proposal 25.123.2 that revises Article RL 123, Paragraph 10 of the UPU Letter Post Regulations. This revision will codify that mailpieces prepared as a commercial bulk mailing must bear a complete return address in the country of origin of the mail. For this purpose, a ''bulk mailing'' is any International Priority Airmail™ (IPA®) or International Surface Air Lift® (ISAL®) mailing, or any other mailing paid with an advance deposit account presented to the USPS for weighing and acceptance.

The Postal Service hereby adopts the following changes to *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM), which is incorporated by reference in the Code of Federal Regulations. See 39 CFR 20.1.

### List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

■ Accordingly, 39 CFR part 20 is amended as follows:

## PART 20—[AMENDED]

■ 1. The authority citation for 39 CFR part 20 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 401, 404, 407, 408, 3622, 3632, and 3633.

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

### Mailing Standards of the United States Postal Service, International Mail Manual (IMM)

### 1 International Mail Services

* * * * *

### 120 Preparation for Mailing

* * * * *

### 122 Addressing

* * * * *

### 122.2 Return Address

*[Revise 122.2 as follows:]*

Due to heightened security, many foreign postal administrations require complete sender and addressee information in roman letters and arabic numerals on postal items. The complete address of the sender, including ZIP Code and country of origin, should be shown in the upper left corner of the address side of the envelope, card, flat, or package. Only one return address may be used, and it must be located so that it does not affect either the clarity of the address of destination or the application of service labels and notations (postmarks, *etc.*). Unregistered items bearing a return address in another country are accepted only at the sender's risk. In the case of bulk mailings, all mailpieces must bear a complete U.S. return address. For the purpose of this section, a ''bulk mailing'' is any IPA or ISAL mailing, or any other mailing paid with an advance

deposit account presented to the USPS for weighing and acceptance.

* * * * *

**2 Conditions for Mailing**

* * * * *

**290 Commercial Services**

* * * * *

**292 International Priority Airmail (IPA) Service**

* * * * *

**292.4 Mail Preparation**

*[Revise the title and introductory sentence in 292.41 as follows:]*

**292.41 Addressing and Return Address**

IPA mailpieces are subject to the addressing requirements contained in 122, including the requirement of a complete U.S. return address.

* * * * *

**293 International Surface Air Lift (ISAL) Service**

* * * * *

**293.4 Mail Preparation**

*[Revise the title and introductory sentence in 293.41 as follows:]*

**293.41 Addressing and Return Address**

ISAL mailpieces are subject to the addressing requirements contained in 122, including the requirement of a complete U.S. return address.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

**Stanley F. Mires,**

*Chief Counsel.*

[FR Doc. E9–25461 Filed 10–26–09; 8:45 am]

BILLING CODE 7710–12–P

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## POSTAL SERVICE

## 39 CFR Part 111

## New Move Update Assessment Procedures for January 2010 for Automation and Presort First-Class Mail and All Standard Mail Items

**AGENCY:** Postal Service ™.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service is filing with the Postal Regulatory Commission a notice of revisions to policies and procedures for determining postage adjustments for mailings of First-Class Mail® and Standard Mail® pieces that are determined to contain a large number of address inaccuracies. Consistent with the Commission filing, this notice and final rule provides revised mailing standards and procedures for administering the Move Update standards.

**DATES:** Effective January 4, 2010.

**FOR FURTHER INFORMATION CONTACT:** Bill Chatfield, 202–268–7278.

**SUPPLEMENTARY INFORMATION:** The Postal Service previously published a final rule regarding several changes to mailing standards in support of the May 11, 2009 price change, in the **Federal Register** on April 6, 2009, and stated: * * * ''Beginning in January 2010, we establish a charge for Standard Mail mailings not meeting Move Update standards of 7 cents per piece, in addition to the applicable Standard Mail postage.'' The notice and final rule published today discusses tolerances for determining when the number of change-of-address inaccuracies in a mailing requires additional postage assessments at the time of acceptance, and also discusses how the error rate and additional postage assessment will be calculated for First-Class Mail and Standard Mail items at the time of acceptance.

This assessment approach is not designed to permit customers to substitute payment of the Move Update Assessment Charge for the implementation of appropriate processes that meet the requirements of the Move Update standard. It is designed to facilitate the acceptance of mail in the event that a Performance Based Verification (PBV) process determines that a sample of the mailing has an error rate above a tolerance specified by the Postal Service. If customers do not certify that they meet the Move Update requirement or are determined not to have met this requirement, they are subject to single-piece First-Class Mail prices on all pieces in the mailing.

We provide additional background and an explanation of the Move Update standards and new procedures, followed by changes to the mailing standards in *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®).

### Background

The Move Update standard requires periodic matching of a mailer's address records with customer-filed change-of-address (COA) orders received and maintained by the Postal Service. The mailer then is required to update the address on the mailpiece for any addressee with a COA on file. The goal is to reduce the number of mailpieces in a mailing that require forwarding or return. Mailers who claim Presorted or automation prices for First-Class Mail or any Standard Mail prices must certify that they have updated the mailing addresses contained in the mailing within the 95-day period preceding the mailing date.

All deficient mailings of commercial First-Class Mail pieces have been subject to single-piece First-Class Mail prices for each piece in the mailing. In the absence of any action, the same consequence would have applied to Standard Mail mailings that Postal Service acceptance procedures determine to be deficient. This would have been a substantial increase in postage for Standard Mail pieces found to be deficient at acceptance.

To mitigate this effect, the Postal Service announced in 2008 that we would assess 7 cents per piece for all pieces in Standard Mail mailings with an error rate (pieces with a COA that were not updated/total pieces with COAs) greater than a tolerance established by the Postal Service. The assessment was initially intended for May 2009 implementation. However, in response to strong customer concerns, we deferred implementation until January 2010 via an announcement in our April 6, 2009 **Federal Register** notice.

Consistent with the treatment of Standard Mail, the Postal Service has now decided to apply a 7-cent per piece additional postage charge for First-Class Mail pieces determined by acceptance procedures to have an error rate of greater than 30 percent, effectively lowering the additional postage assessments for First-Class Mail pieces. In addition, for both First-Class Mail and Standard Mail, the additional postage charge would apply to the percentage of the mailing, above the Postal Service-established tolerance, determined by sampling to be in error.

### Procedures

Performance-Based Verification procedures at acceptance allow the Postal Service to test a sample of the mailing and evaluate the effectiveness of a customer's Move Update processes. The addresses in the verification sample are compared to the National Change of Address (NCOA) database. To determine the change of address accuracy in the sample, the PBV process will determine the number of pieces within the sample that should have been updated with COA information (A). The PBV process will then determine the number of pieces that were not properly updated (B). The PBV process will calculate the error rate in the sample by dividing B

by A (B ÷ A = error rate). At this time the Postal Service has established an acceptable tolerance rate of 30%. In other words, only if the error rate in the sample exceeds 30% will the mailing be subject to an additional postage assessment at the time of mailing. The Postal Service has established an exception to this process for small samples: if the actual number of changes of address not updated found in the sampling is five or less (B = 5 or less), the mailing will not be subject to the assessment, regardless of the error rate.

If an assessment is warranted, the assessment depends on the extent to which the error rate exceeds the 30% tolerance. If the error rate is 50%, the assessment will apply to 20% of the pieces in that mailing (50% − 30% = 20%) and 20% of the mailpieces in that mailing will be assessed an additional 7 cents in postage. Additional examples follow.

- If 40% of COAs were not updated, then the assessment will apply to 10% (40% − 30%) of the pieces in the mailing.
- If 80% of COAs were not updated, then the assessment will apply to 50% (80% − 30%) of the pieces in the mailing.

We will analyze the results of the PBV samples periodically, and will adjust the tolerance as needed to ensure the effectiveness of mailers' Move Update processes.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

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

Administrative practice and procedure, Postal Service.

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

## PART 111—[AMENDED]

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

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

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

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

* * * * *

**200 Commercial Mail Letters and Cards**

* * * * *

**230 First-Class Mail**

**233 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for First-Class Mail Letters**

* * * * *

**3.5 Move Update Standard**

* * * * *

*[Add new 3.5.4 to read as follows:]*

**3.5.4 Basis for Additional Postage Assessments**

Pieces in mailings that were not addressed in accordance with the Move Update Standard (under 3.5) are ineligible for presort postage prices. Pieces subject to an additional postage assessment at the time of mailing for change-of-address errors are subject to additional postage of $0.07 per assessed piece according to procedures published in the Move Update Mailer Advisement Policy, available at *ribbs.usps.gov.*

* * * * *

**240 Standard Mail**

**243 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for Standard Mail Letters**

* * * * *

**3.9 Move Update Standard**

**3.9.1 Basic Standards**

* * * Addresses subject to the Move Update standard must meet these requirements:

* * * * *

*[Delete item d in its entirety.]*

* * * * *

*[Add new 3.9.4 to read as follows:]*

**3.9.4 Basis for Additional Postage Assessment**

Pieces in mailings that were not addressed in accordance with the Move Update Standard (under 3.9) are ineligible for Standard Mail prices. Pieces subject to an additional postage assessment at the time of mailing for change of address errors are subject to additional postage of $0.07 per assessed piece according to procedures published in the Move Update Mailer Advisement Policy, available at *ribbs.usps.gov.*

* * * * *

**300 Commercial Mail Flats**

* * * * *

**330 First-Class Mail**

**333 Prices and Eligibility**

* * * * *

**3.0 Eligibility Standards for First-Class Mail Flats**

* * * * *

**3.5 Move Update Standards**

* * * * *

*[Add new 3.5.4 to read as follows:]*

**3.5.4 Basis for Additional Postage Assessment**

Pieces in mailings that were not addressed in accordance with the Move Update Standard (under 3.5) are ineligible for presort postage prices. Pieces subject to an additional postage assessment at the time of mailing for change of address errors are subject to additional postage of $0.07 per assessed piece according to procedures published in the Move Update Mailer Advisement Policy, available at *ribbs.usps.gov.*

* * * * *

**340 Standard Mail**

**343 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for Standard Mail Flats**

* * * * *

**3.9 Move Update Standard**

**3.9.1 Basic Standards**

* * * Addresses subject to the Move Update standard must meet these requirements:

* * * * *

*[Delete item d in its entirety.]*

* * * * *

*[Add new 3.9.4 to read as follows:]*

**3.9.4 Basis for Additional Postage Assessment**

Pieces in mailings that were not addressed in accordance with the Move Update Standard (under 3.9) are ineligible for Standard Mail prices. Pieces subject to an additional postage assessment at the time of mailing for change of address errors are subject to additional postage of $0.07 per assessed piece according to procedures published in the Move Update Mailer Advisement Policy, available at *ribbs.usps.gov.*

* * * * *

**400 Commercial Parcels**

* * * * *

**430 First-Class Mail**

**433 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for First-Class Mail Parcels**

* * * * *

**3.5 Move Update Standard**

* * * * *

*[Add new 3.5.4 to read as follows:]*

**3.5.4 Basis for Additional Postage Assessment**

Pieces in mailings that were not addressed in accordance with the Move Update Standard (under 3.5) are ineligible for presort postage prices. Pieces subject to an additional postage assessment at the time of mailing for change of address errors are subject to additional postage of $0.07 per assessed piece according to procedures published in the Move Update Mailer Advisement Policy, available at *ribbs.usps.gov.*

* * * * *

**440 Standard Mail**

**443 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for Standard Mail Parcels**

* * * * *

**3.9 Move Update Standard**

**3.9.1 Basic Standards**

* * * Addresses subject to the Move Update standard must meet these requirements:

* * * * *

*[Delete item d in its entirety.]*

* * * * *

*[Add new 3.9.4 to read as follows:]*

**3.9.4 Basis for Additional Postage Assessment**

Pieces in mailings that were not addressed in accordance with the Move Update Standard (under 3.9) are ineligible for presort postage prices. Pieces subject to an additional postage assessment at the time of mailing for change of address errors are subject to additional postage of $0.07 per assessed piece according to procedures published in the Move Update Mailer Advisement Policy, available at *ribbs.usps.gov.*

* * * * *

We will publish an appropriate amendment to 39 CFR Part 111 to reflect these changes.

**Stanley F. Mires,**

*Chief Counsel.*

[FR Doc. E9–25462 Filed 10–26–09; 8:45 am]

BILLING CODE 7710–12–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Parts 52, 60 and 61

**[FRL–8973–6]**

## Change of Address for Region 4 State and Local Agencies; Technical Correction

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

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

**SUMMARY:** EPA is correcting the addresses for EPA Region 4 State and local agencies in EPA regulations. The jurisdiction of EPA Region 4 includes the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee. Certain EPA air pollution control regulations requiring submittal of notifications, reports and other documents to the EPA Regional office, must also be submitted to the appropriate authorized State or local agency. This technical amendment updates and corrects the addresses for submitting such information to the EPA Region 4 State and local agency offices.

**DATES:** *Effective Date:* This action is effective October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Deanne Grant, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9291. Ms. Grant can also be reached via electronic mail at *grant.deanne@epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA is correcting the addresses for EPA Region 4 State and local agencies in EPA regulations found at 40 CFR parts 52, 60 and 61. Certain EPA air pollution control regulations requiring submittal of notifications, reports and other documents to the EPA regional office, must also be submitted to the appropriate authorized State and local agency. This technical amendment updates and corrects the address for submitting such information to the EPA Region 4 State and local agency offices.

EPA has determined that today's rule falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation and section 553(d)(3) which allows an agency to make a rule effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's rule simply codifies provisions which are already in effect as a matter of law in Federal and approved State programs. Under section 553 of the APA, an agency may find good cause where procedures are ''impractical, unnecessary, or contrary to the public interest.'' Public comment is ''unnecessary'' and ''contrary to the public interest'' since the codification only reflects existing law. Immediate notice in the CFR benefits the public by updating citations.

### IV. Statutory and Executive Order Reviews

Under the CAA, 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 CAA. 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 CAA; 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 28, 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 Parts 52, 60 and 61**

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

Dated: October 15, 2009.

**Beverly H. Banister,**

*Acting Regional Administrator, Region 4.*

■ 40 CFR parts 52, 60 and 61 are 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 (B)—Alabama

■ 2. Section 52.60 is amended by revising paragraph (a) to read as follows:

**§ 52.60 Significant deterioration of air quality.**

(a) All applications and other information required pursuant to § 52.21 from sources located in the State of Alabama shall be submitted to the State agency, Alabama Department of Environmental Management, P.O. Box 301463, Montgomery, Alabama 36130–1463, rather than to EPA's Region 4 office.

* * * * *

### Subpart (K)—Florida

■ 3. Section 52.530 is amended by revising paragraph (c) to read as follows:

**§ 52.530 Significant deterioration of air quality.**

* * * * *

(c) All applications and other information required pursuant to § 52.21 of this part from sources located in the State of Florida shall be submitted to the State agency, Florida Department of Environmental Protection, Division of Air Resources Management, 2600 Blair Stone Road, MS 5500, Tallahassee, Florida 32399–2400, rather than to EPA's Region 4 office.

* * * * *

### Subpart (L)—Georgia

■ 4. Section 52.581 is amended by revising paragraph (a) to read as follows:

**§ 52.581 Significant deterioration of air quality.**

(a) All applications and other information required pursuant to § 52.21 of this part from sources located in the State of Georgia shall be submitted to the State agency, Georgia Department of Natural Resources, Environmental Protection Division, 2 Martin Luther King Jr. Drive, SE., Suite 1152 East Floyd Tower, Atlanta, Georgia 30334–9000, rather than to EPA's Region 4 office.

* * * * *

### Subpart (S)—Kentucky

■ 5. Section 52.931 is amended by adding paragraph (d) to read as follows:

**§ 52.931 Significant deterioration of air quality.**

* * * * *

(d) All applications and other information required pursuant to § 52.21 of this part from sources located in the Commonwealth of Kentucky shall be submitted to the State agency, Commonwealth of Kentucky, Energy and Environment Cabinet, Department of Environmental Protection, Division for Air Quality, 200 Fair Oaks Lane, 1st Floor, Frankfort, Kentucky 40610–1403 or local agency, Louisville Metro Air Pollution Control District, 850 Barret Avenue, Louisville, Kentucky 40204, rather than to EPA's Region 4 office.

### Subpart (Z)—Mississippi

■ 6. Section 52.1280 is amended by revising paragraph (a) to read as follows:

**§ 52.1280 Significant deterioration of air quality.**

(a) All applications and other information required pursuant to § 52.21 of this part from sources located or to be located in the State of Mississippi shall be submitted to the State agency, Mississippi Department of Environmental Quality, Office of Pollution Control, Air Division, 515 East Amite Street, Jackson, Mississippi 39201, rather than to EPA's Region 4 office.

### Subpart (II)—North Carolina

■ 7. Section 52.1778 is amended by revising paragraph (c) to read as follows:

**§ 52.1778 Significant deterioration of air quality.**

* * * * *

(c) All applications and other information required pursuant to § 52.21 of this part from sources located or to be located in the State of North Carolina shall be submitted to the State agency, North Carolina Department of Environment and Natural Resources, Division of Air Quality, 1641 Mail Service Center, Raleigh, North Carolina 27699–1641 or local agencies, Attention: Air Quality Section or Forsyth County Environmental Affairs, 537 North Spruce Street, Winston-Salem, North Carolina 27101; Mecklenburg County Air Quality, 700 N. Tryon St., Suite 205, Charlotte, North Carolina 28202–2236; Western North Carolina Regional Air Quality Agency, 49 Mount Carmel Road, Asheville, North Carolina 28806, rather than to EPA's Region 4 office.

### Subpart (PP)—South Carolina

■ 8. Section 52.2131 is amended by revising paragraph (c) to read as follows:

**§ 52.2131 Significant deterioration of air quality.**

* * * * *

(c) All applications and other information required pursuant to § 52.21 from sources located in the State of

South Carolina shall be submitted to the State agency, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina 29201, rather than to EPA's Region 4 office.

## Subpart (RR)—Tennessee

■ 9. Section 52.2233 is amended by revising paragraph (c)(1) to read as follows:

### § 52.2233 Significant deterioration of air quality.

* * * * *

(c)(1) All applications and other information required pursuant to § 52.21 of this part from sources located or to be located in the State of Tennessee shall be submitted to the State agency, Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 401 Church Street, 9th Floor, L&C Annex, Nashville, Tennessee 37243–1531, or local agencies, Knox County Air Quality Management-Department of Public Health, 140 Dameron Avenue, Knoxville, Tennessee 37917; Air Pollution Control Bureau, Metropolitan Health Department, 311 23rd Avenue North, Nashville, Tennessee 37203; Chattanooga-Hamilton County Air Pollution Control Bureau, 6125 Preservation Drive, Chattanooga, Tennessee 37416; Memphis-Shelby County Health Department-Air Pollution Control Program, 814 Jefferson Avenue, Memphis, Tennessee 38105, rather than to the EPA's Region 4 office.

## PART 60—[AMENDED]

■ 10. The authority citation for part 60 continues to read as follows:

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

## Subpart (A)—General Provisions

■ 11. Section 60.4 is amended by revising paragraphs (b)(B), (K), (L), (S), (Z), (II), (PP), and (RR) to read as follows:

### § 60.4 Address.

* * * * *

(b) * * *

(B) State of Alabama: Alabama Department of Environmental Management, P.O. Box 301463, Montgomery, Alabama 36130–1463.

* * * * *

(K) State of Florida: Florida Department of Environmental Protection, Division of Air Resources Management, 2600 Blair Stone Road, MS 5500, Tallahassee, Florida 32399–2400.

(L) State of Georgia: Georgia Department of Natural Resources, Environmental Protection Division, 2 Martin Luther King Jr. Drive, SE., Suite 1152 East Floyd Tower, Atlanta, Georgia 30334–9000.

* * * * *

(S) Commonwealth of Kentucky: Commonwealth of Kentucky, Energy and Environment Cabinet, Department of Environmental Protection, Division for Air Quality, 200 Fair Oaks Lane, 1st Floor, Frankfort, Kentucky 40610–1403.

Louisville Metro Air Pollution Control District, 850 Barret Avenue, Louisville, Kentucky 40204.

* * * * *

(Z) State of Mississippi: Mississippi Department of Environmental Quality, Office of Pollution Control, Air Division, 515 East Amite Street, Jackson, Mississippi 39201.

* * * * *

(II) State of North Carolina: North Carolina Department of Environment and Natural Resources, Division of Air Quality, 1641 Mail Service Center, Raleigh, North Carolina 27699–1641.

Forsyth County Environmental Affairs, 537 North Spruce Street, Winston-Salem, North Carolina 27101.

Mecklenburg County Air Quality, 700 N. Tryon St., Suite 205, Charlotte, North Carolina 28202–2236.

Western North Carolina Regional Air Quality Agency, 49 Mount Carmel Road, Asheville, North Carolina 28806.

* * * * *

(PP) State of South Carolina: South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina 29201.

* * * * *

(RR) State of Tennessee: Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 401 Church Street, 9th Floor, L&C Annex, Nashville, Tennessee 37243–1531.

Knox County Air Quality Management—Department of Public Health, 140 Dameron Avenue, Knoxville, TN 37917.

Air Pollution Control Bureau, Metropolitan Health Department, 311 23rd Avenue North, Nashville, TN 37203.

Chattanooga-Hamilton County Air Pollution Control Bureau, 6125 Preservation Drive, Chattanooga, TN 37416.

Memphis-Shelby County Health Department—Air Pollution Control Program, 814 Jefferson Avenue, Memphis, TN 38105.

* * * * *

## PART 61—[AMENDED]

■ 12. The authority citation for part 61 continues to read as follows:

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

## Subpart (A)—General Provisions

■ 13. Section 61.04 is amended by revising paragraphs (b)(B), (K), (L), (S), (Z), (II), (PP), and (RR) to read as follows:

### § 61.04 Address.

* * * * *

(b) * * *

(B) State of Alabama: Alabama Department of Environmental Management, P.O. Box 301463, Montgomery, Alabama 36130–1463.

* * * * *

(K) State of Florida: Florida Department of Environmental Protection, Division of Air Resources Management, 2600 Blair Stone Road, MS 5500, Tallahassee, Florida 32399–2400.

(L) State of Georgia: Georgia Department of Natural Resources, Environmental Protection Division, 2 Martin Luther King Jr. Drive, SE., Suite 1152 East Floyd Tower, Atlanta, Georgia 30334–9000.

* * * * *

(S) Commonwealth of Kentucky: Commonwealth of Kentucky, Energy and Environment Cabinet, Department of Environmental Protection, Division for Air Quality, 200 Fair Oaks Lane, 1st Floor, Frankfort, Kentucky 40610–1403.

Louisville Metro Air Pollution Control District, 850 Barret Avenue, Louisville, Kentucky 40204.

* * * * *

(Z) State of Mississippi: Mississippi Department of Environmental Quality, Office of Pollution Control, Air Division, 515 East Amite Street, Jackson, Mississippi 39201.

* * * * *

(II) State of North Carolina: North Carolina Department of Environment and Natural Resources, Division of Air Quality, 1641 Mail Service Center, Raleigh, North Carolina 27699–1641.

Forsyth County Environmental Affairs, 537 North Spruce Street, Winston-Salem, North Carolina 27101.

Mecklenburg County Air Quality, 700 N. Tryon St., Suite 205, Charlotte, North Carolina 28202–2236.

Western North Carolina Regional Air Quality Agency, 49 Mount Carmel Road, Asheville, North Carolina 28806.

* * * * *

(PP) State of South Carolina: South Carolina Department of Health and

Environmental Control, 2600 Bull St., Columbia, South Carolina 29201.

* * * * *

(RR) State of Tennessee: Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 401 Church Street, 9th Floor, L&C Annex, Nashville, Tennessee 37243–1531.

Knox County Air Quality Management—Department of Public Health, 140 Dameron Avenue, Knoxville, Tennessee 37917.

Air Pollution Control Bureau, Metropolitan Health Department, 311 23rd Avenue North, Nashville, Tennessee 37203.

Chattanooga-Hamilton County Air Pollution Control Bureau, 6125 Preservation Drive, Chattanooga, Tennessee 37416.

Memphis-Shelby County Health Department—Air Pollution Control Program, 814 Jefferson Avenue, Memphis, Tennessee 38105.

* * * * *

[FR Doc. E9–25728 Filed 10–26–09; 8:45 am]

BILLING CODE 6560–50–P

## GENERAL SERVICES ADMINISTRATION

## 41 CFR Parts 300–70, 301–2, 301–10, 301–13, 301–50, 301–70, 301–71, Appendix C to Chapter 301, 304–3, and 304–5

**[FTR Amendment 2009–06; FTR Case 2009–309; Docket Number 2009–0014, Sequence 1]**

**RIN 3090–AI98**

## Federal Travel Regulation (FTR); FTR Case 2009–309, Premium Class Travel and Transportation Allowances

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration (GSA) is amending the Federal Travel Regulation (FTR) by implementing recommendations contained in the September 2007, Government Accountability Office (GAO) report, ''Premium Class Travel: Internal Control Weaknesses Governmentwide Led to Improper and Abusive Use of Premium Class Travel'' (GAO–07–1268). This final rule strengthens the management and accountability measures related to the use of premium class transportation accommodations by Federal employees while on official business travel.

**DATES:** *Effective date*: This final rule is effective November 27, 2009. *Applicability date*: This final rule is applicable to travel performed on and after November 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** The Regulatory Secretariat (MVPR), Room 4041, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Rick Miller, Office of Governmentwide Policy, at (202) 501–3822 or e-mail at *rodney.miller@gsa.gov*. Please cite FTR Amendment 2009–06; FTR case 2009–309.

**SUPPLEMENTARY INFORMATION:**

### A. Background

This final rule implements recommendations contained in the GAO report, ''Premium Class Travel: Internal Control Weaknesses Governmentwide Led to Improper and Abusive Use of Premium Class Travel'' (GAO–07–1268). In the report, GAO made five recommendations to GSA to improve management and oversight of premium class travel. One recommendation by GAO is that GSA establish an internal central oversight office for travel management with authority over agency travel policies and programs. GSA has created the Center for Policy Evaluation which works with Federal agencies to identify opportunities for Governmentwide improvements in travel and transportation. The other four recommendations are addressed in this final rule and should strengthen requirements related to the authorization and use of premium class transportation accommodations by requiring more extensive reporting on premium class travel, including business-class, for Temporary Duty travel (TDY) and Permanent Change of Station (PCS) relocations; requiring agencies to define what constitutes a rest period upon arrival; requiring agencies to develop and issue internal guidance that explains when mission criteria and the intent of that mission call for premium class transportation accommodations; requiring annual certifications for medical disabilities or other special needs accommodations; and clarifying other specific provisions of the FTR which relate to premium class transportation accommodations. Accordingly, this final rule amends the FTR by:

1. *Section 300–70.100*—Adding the requirement that agencies report the use of all ''other than coach-class'' transportation accommodations which exceed the coach-class fare.

2. *Section 300–70.101*— Clarifies where agencies may obtain information regarding reporting requirements for use of other than coach-class transportation accommodations.

3. *Section 300–70.102*— Adding the requirement that agencies submit their other than coach-class transportation information to GSA no later than 60 days after the end of each fiscal year, including negative reports.

4. *Section 300–70.103*— Deleting the current section 300–70.103; re-designating current section 300–70.104 as section 300–70.103; replacing the words ''first-class'' with ''other than coach-class''; and clarifying the current regulation for submitting negative reports when reporting data is also protected from public disclosure.

5. *Section 301–2.5*— Replacing the words ''first-class or business-class'' with ''other than coach-class''.

6. *Section 301–10.105*— Replacing the words ''business-class or first-class'' with ''other than coach-class''.

7. *Section 301–10.121*— Revising the definition of the classes of accommodations offered by air carriers.

8. *Section 301–10.123*— Replacing the words ''first-class'' with ''other than coach-class'; reformatting and revising the current regulation to include the current provisions of section 301–10.124; adding the requirement for annual certification of a disability or special need of a traveler; and adding the requirement for a one-time certification of a disability or special need of a traveler who has a lifelong condition.

9. *Section 301–10.124*— Deleting the current regulation and replacing it with clarification regarding the use of coach-class seating upgrade programs.

10. *Section 301–10.125*— Adding a new section on clarification regarding the use of the 14-hour rule.

11. *Section 301–10.160*— Amending and re-designating current section 301–10.160 paragraphs(c) and (d) as section 301–10.160(c)(1) and (c)(2).

12. *Section 301–10.16*1 - Replacing the words ''first-class'' with ''other than coach-class''.

13. *Section 301–10.162*— Replacing the words ''first-class'' with ''other than coach-class''; clarifying the current regulation; adding the requirement for annual certification of a disability or special need of a traveler; adding the requirement for a one-time certification of a disability or special need of a traveler who has a lifelong condition; and adding a new exception as to when a traveler may use a higher class of train service.

14. *Section 301–10.164*— Clarifying the current regulation regarding the use

of a higher class of train service other than the lowest available class of accommodations.

15. *Section 301–10.182*— Replacing the words ''first-class'' with ''other than lowest first-class''.

16. *Section 301–10.183*— Replacing the words ''first-class'' with ''other than lowest first-class''; adding the requirement for annual certification of a disability or special need of a traveler; and adding the requirement for a one-time certification of a disability or special need of a traveler who has a lifelong condition.

17. *Section 301–13.3*— Replacing the term ''Premium-class'' with ''other than coach-class''.

18. *Section 301–50.8*—Replacing the words ''first-class or business-class'' with ''other than coach-class''.

19. *Section 301–70.102*— Adding the requirement that agencies develop and publish internal guidance that identify the specific mission criteria that justify the authorization and use of other than coach-class or lowest first-class transportation accommodations. Adding the requirement that agencies develop and define what constitutes a rest period upon arrival at a temporary duty location.

20. *Section 301–71.105*— Replacing the words ''first-class or business-class'' with ''other than coach-class''.

21. *Appendix C to Chapter 301, Standard Data Elements for Federal Travel*—Renaming Table entitled ''Travel Expense Information (Standard Data Elements for Federal Travel'') to read ''Standard Expense Data for Federal Travel (Travel Expense Information''); and replacing the words ''First-class and Business-class'' with ''Other than coach-class'' and replacing the words ''Non-first-class and Non-business-class'' with the words ''Coach-class'' in Tables ''Standard Data Elements for Federal Travel (Commercial Transportation Information)'' and newly designated ''Standard Data Expense for Federal Travel (Travel Expense Information)''.

22. *Section 304–3.9*—Replacing the words ''business-class'' with ''other than coach-class'' and reformatting and revising the current regulation to include the current provisions of section 304–3.10.

23. *Section 304–3.10*—Removing and reserving section 304–3.10.

24. *Section 304–5.5*—Replacing the words ''business-class'' with ''other than coach-class'' and reformatting and revising the current regulation to include the current provisions of section 304–5.6.

25. *Section 304–5.6*—Deleting the current section 304–5.6 and re-designating current section 304–5.7 as section 304–5.6.

**B. Executive Order 12866**

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This final rule is not a major rule under 5 U.S.C. 804.

**C. Regulatory Flexibility Act**

This final rule is not required to be published in the **Federal Register** for notice and comment, therefore, the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, does not apply.

**D. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**E. Small Business Regulatory Enforcement Fairness Act**

This final rule is also exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

**List of Subjects in 41 CFR Parts 300–70, 301–2, 301–10, 301–13, 301–50, 301–70, 301–71, Appendix C to Chapter 301, 304–3, and 304–5.**

Government employees, Travel and transportation expenses.

Dated: September 4, 2009.

**Paul F. Prouty,**

*Acting Administrator of General Services*

■ For the reasons set forth in the preamble, under 5 U.S.C. 5701–5709 and 31 U.S.C. 1353, GSA amends 41 CFR Parts 300–70, 301–2, 301–10, 301–13, 301–50, 301–70, 301–71, Appendix C to Chapter 301, 304–3, and 304–5 to read as follows:

## PART 300–70—AGENCY REPORTING REQUIREMENTS

■ 1. The authority citation for 41 CFR Part 300–70 is revised to read as follows:

**Authority:** 5 U.S.C. 5707; 5 U.S.C. 5738, 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; 40 U.S.C. 121(c); 49 U.S.C. 40118; E.O. 11609, as amended, 3 CFR, 1971–1973 Comp. p. 586.

### Subpart B [Amended]

■ 2. Amend the heading to Subpart B by removing ''First-Class'' and adding ''Other Than Coach-Class'' in its place.

#### § 300–70.100 [Amended]

■ 3. Amend § 300–70.100, in the section heading, by removing ''first-class'' and adding ''other than coach-class'' in its place.

■ 4. Revise § 300–70.101 to read as follows:

#### § 300–70.101 Where can we find what information we are required to report?

GSA will issue a Bulletin which will inform agencies of the required information and reporting format(s) for any trip in which the agency authorized and paid for transportation that exceeded the use of coach-class or lowest first-class accommodations. Negative submissions are required. Bulletins regarding the Federal Travel Regulation are located on the Internet at *www.gsa.gov/bulletin*.

■ 5. Revise § 300–70.102 to read as follows:

#### § 300–70.102 How often must we report the required information?

You must annually submit the required information to GSA no later than 60 days after the end of each fiscal year.

#### § 300–70.103 [Removed]

■ 6. Remove § 300–70.103.

#### § 300–70.104 [Redesignated as § 300–70.103]

■ 7. Section § 300–70.104 is redesignated as § 300–70.103.

■ 8. Revise the newly-designated § 300–70.103 to read as follows:

#### § 300–70.103 Are there any exceptions to the reporting requirement?

Yes. You are not required to report data that is protected from public disclosure by statute or Executive Order. However, you are required to submit, in a cover letter to GSA, the following aggregate information.

(a) Aggregate number of authorized other than coach-class trips that are protected from disclosure;

(b) Total cost of actual other than coach-class fares paid that exceeded the coach-class fare; and

(c) Total cost of coach class fares that would have been paid for the same travel.

**NOTE to § 300–70.103**: If the aggregate information is also protected from public disclosure then a negative report must be submitted to GSA.

**CHAPTER 301—TEMPORARY DUTY (TDY) TRAVEL ALLOWANCES**

## PART 301–2—GENERAL RULES

■ 9. The authority citation for 41 CFR Part 301–2 continues to read as follows:

**Authority:** 5 U.S.C 5707; 31 U.S.C. 1353; 49 U.S.C. 40118.

■ 10. Amend § 301–2.5 by revising paragraph (a) to read as follows:

### § 301–2.5 What travel arrangements require specific authorization or prior approval?

* * * * *

(a) Use of other than coach-class service on common carrier transportation;

* * * * *

## PART 301–10—TRANSPORTATION EXPENSES

■ 11. The authority for 41 CFR Part 301–10 continues to read as follows:

**Authority:** 5 U.S.C. 5707; 40 U.S.C. 121(c); 40 U.S.C. 40118, Office of Management and Budget Circular No. A–126, ''Improving the Management and Use of Government Aircraft.'' Revised April 28, 2006.

■ 12. Amend § 301–10.105 by revising paragraph (b) to read as follows:

### § 301–10.105 What are the basic requirements for using airlines?

* * * * *

(b) Using coach-class service, unless other than coach-class service is authorized:

* * * * *

■ 13. Revise § 301–10.121 to read as follows:

### § 301–10.121 What classes of airline accommodations are available?

Airlines are constantly updating their offerings. However, for the purposes of this regulation, the classes of available air accommodations are identified and defined as follows:

(a) *Coach-class.* The basic class of accommodation by airlines that is normally the lowest fare offered regardless of airline terminology used. For reference purposes only, coach-class may also be referred to by airlines as ''tourist class,'' ''economy class,'' or as ''single class'' when the airline offers only one class of accommodations to all travelers.

(b) *Other than coach-class.* Any class of accommodations above coach-class, *e.g.*, first-class or business-class.

(1) *First-class.* The highest class of accommodation offered by the airlines in terms of cost and amenities. This is generally termed ''first-class'' by airlines and reservation systems.

(2) *Business-class.* A class of accommodation offered by airlines that is higher than coach and lower than first-class, in both cost and amenities. This class of accommodation is generally referred to as ''business, business elite, business first, world business, connoisseur, or envoy'' depending on the airline.

**Note to § 301–10.121**: If an airline flight has only two classes of accommodations available, *i.e.*, two ''cabins'', with two distinctly different seating types (such as girth and pitch) and the front cabin is termed ''business-class'' or higher by the airline and the tickets are fare-coded as business-class, then the front of the cabin is deemed to be other than coach-class. Alternatively, if an airline flight has only two cabins available but equips both with one type of seating, (*i.e.*, seating girth and pitch are the same in both cabins), and the seats in the front of the airplane are fare coded as full-fare economy class, and only restricted economy fares are available in the back of the aircraft, then the entire aircraft is to be classified as coach-class seating. In this second situation, qualifying for other than coach-class travel is not required to purchase a non-restricted economy fare seat in the front of the aircraft as the entire aircraft is considered ''coach-class.''

■ 14. Revise § 301–10.123 to read as follows:

### § 301–10.123 When may I use other than coach-class airline accommodations?

Government travelers are required to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business when making official travel arrangements, and therefore, should consider the least expensive class of travel that meets their needs. You may use the lowest other than coach-class airline accommodations only when your agency specifically authorizes/approves such use as specified in paragraphs (a) and (b) of this section.

(a) Your agency may authorize/approve first class accommodations if any of the following apply:

(1) No coach-class accommodations are reasonably available. ''Reasonably available'' means available on an airline that is scheduled to leave within 24 hours of your proposed departure time, or scheduled to arrive within 24 hours of your proposed arrival time;

(2) When use of other than coach-class is necessary to accommodate a medical disability or other special need.

(i) A disability must be certified annually in a written statement by a competent medical authority. However, if the disability is a lifelong condition, then a one-time certification statement is required. Certification statements must include at a minimum:

(A) A written statement by a competent medical authority stating that special accommodation is necessary;

(B) An approximate duration of the special accommodation; and

(C) A recommendation as to the suitable class of transportation accommodations based on the disability.

(ii) A special need must be certified annually in writing according to your agency's procedures. However, if the special need is a lifelong condition, then a one-time certification statement is required;

(iii) If you are authorized under § 301–13.3(a) of this Subchapter to have an attendant accompany you, your agency may also authorize the attendant to use other than coach-class accommodations if you require the attendant's services en route;

(3) When exceptional security circumstances require other than coach-class airline accommodations. Exceptional security circumstances are determined by your agency and should only be authorized up to the minimum other than coach-class accommodation necessary. These circumstances include, but are not limited to:

(i) Use of coach-class accommodations would endanger your life or Government property;

(ii) You are an agent on protective detail and you are accompanying an individual authorized to use other than coach-class accommodations; or

(iii) You are a courier or control officer accompanying controlled pouches or packages;

(4) When required because of agency mission, consistent with your agency's internal procedures pursuant to § 301–70.102(i).

(b) Your agency may authorize/approve business-class accommodations if any of the following apply:

(1) When use of other than coach-class is necessary to accommodate a medical disability or other special need.

(i) A disability must be certified annually in a written statement by a competent medical authority. However, if the disability is a lifelong condition, then a one-time certification statement is required. Certification statements must include at a minimum:

(A) A written statement by a competent medical authority stating that special accommodation is necessary;

(B) An approximate duration of the special accommodation; and

(C) A recommendation as to the suitable class of transportation accommodations based on the disability.

(ii) A special need must be certified annually in writing according to your

agency's procedures. However, if the special need is a lifelong condition, then a one-time certification statement is required;

(iii) If you are authorized under § 301–13.3(a) of this Subchapter to have an attendant accompany you, your agency may also authorize the attendant to use other than coach-class accommodations if you require the attendant's services en route;

(2) When exceptional security circumstances require other than coach-class airline accommodations. Exceptional security circumstances are determined by your agency and should only be authorized to the minimum other than coach-class accommodation necessary to meet the agency's mission. These circumstances include, but are not limited to:

(i) Use of coach-class accommodations would endanger your life or Government property;

(ii) You are an agent on protective detail and you are accompanying an individual authorized to use other than coach-class accommodations; or

(iii) You are a courier or control officer accompanying controlled pouches or packages;

(3) Coach-class accommodations on an authorized/approved foreign air carrier do not provide adequate sanitation or health standards;

(4) Regularly scheduled flights between origin/destination points (including connecting points) provide only other than coach-class accommodations and you certify such on your voucher;

(5) Your transportation costs are paid in full through agency acceptance of payment from a non-Federal source in accordance with Chapter 304 of this Title;

(6) Where the origin and/or destination are OCONUS, and the scheduled flight time, including stopovers and change of planes, is in excess of 14 hours, in accordance with § 301–10.125;

(7) The use results in an overall cost savings to the Government by avoiding additional subsistence costs, overtime, or lost productive time while awaiting coach-class accommodations;

(8) No space is available in coach-class accommodations in time to accomplish the mission, which is urgent and cannot be postponed; or

(9) When required because of agency mission, consistent with your agency's internal procedures pursuant to § 301–70.102(i).

**Note 1 to § 301–10.123**: You may upgrade to other than coach-class accommodations at your personal expense, including through redemption of frequent flyer benefits.

**Note 2 to § 301–10.123**: Blanket authorization of other than coach-class transportation accommodations is prohibited and shall be authorized on an individual trip-by-trip basis, unless the traveler has an up-to-date documented disability or special need.

■ 15. Revise § 301–10.124 to read as follows:

**§ 301–10.124 What are coach-class Seating Upgrade Programs?**

Sometimes these programs are called ''Coach Elite,'' ''Coach Plus,'' ''Preferred Coach'' or some other identifier. Under these airline programs, a passenger may obtain for a fee a more desirable seat choice within the coach-class cabin. These airline upgrade or preferred seat choices are generally available for an annual fee, at an airport kiosk or gate or as a frequent flier perk. These coach upgrade options are not considered a new or higher class of accommodation since the seating is still in the coach cabin. However, the use of these upgraded/preferred coach seating options is generally a traveler's personal choice and therefore is at the traveler's personal expense. An agency travel authorization approving official or his/her designee (*e.g.*, supervisor of the traveler) may authorize and reimburse the additional seat choice fee, according to internal agency policy.

■ 16. Add § 301–10.125 to read as follows:

**§ 301–10.125 When may I use the 14-hour rule to travel other than coach-class (see § 301–10.123(b)(6))?**

(a) You may use the 14-hour rule to travel via other than coach-class when:

(1) The origin and/or destination are OCONUS; and

(2) The scheduled flight time, including non-overnight stopovers and change of planes, is in excess of 14 hours; and

(3) You are required to report to duty the following day or sooner.

(b) Scheduled flight time is the flight time between the originating departure point and the ultimate arrival point including scheduled non-overnight time spent at airports during plane changes. Scheduled non-overnight time does not include time spent at the originating or ultimate arrival airports.

(c) If other than coach-class accommodation is authorized based on the 14-hour rule then you will not be eligible for a rest stop en route or a rest period upon arrival at your duty site, in accordance with internal agency procedures pursuant to § 301–70.102(j).

■ 17. Amend § 301–10.160 by revising paragraph (c), removing paragraph (d), and adding a note to the section to read as follows:

**§ 301–10.160 What classes of train accommodations are available?**

* * * * *

(c) Other than coach-class - Any class of accommodations above coach, *e.g.*, first-class or business-class.

(1) First-class—Includes bedrooms, roomettes, club service, parlor car accommodations or other premium accommodations.

(2) Business-class—A class of extra fare train service that is offered above coach class, but is lower than first-class, as described above.

**Note to § 301–10.160**: If a train only has two classes of accommodations available, *i.e.*, first and business class, then the business class is deemed to be classified as coach-class for purposes of official travel, as it is the lowest class offered.

■ 18. Revise § 301–10.161 to read as follows:

**§ 301–10.161 What class of train accommodations must I use?**

You must use coach-class accommodations for all train travel, except when your agency authorizes other than coach-class service.

■ 19. Revise § 301–10.162 to read as follows:

**§ 301–10.162 When may I use other than coach-class train accommodations?**

You may use other than coach-class train accommodations only when your agency specifically authorizes/approves this use under paragraphs (a) through (e) of this section.

(a) No coach-class accommodations are reasonably available on a train that is scheduled to leave within 24 hours of your proposed departure time, or scheduled to arrive within 24 hours of your proposed arrival time;

(b) When use of other than coach-class accommendations is necessary to accommodate a medical disability or other special need.

(1) A disability must be certified annually in a written statement by a competent medical authority. However, if the disability is a lifelong condition, then a one-time certification statement is required. Certification statements must include at a minimum:

(i) A written statement by a competent medical authority stating that special accommodation is necessary;

(ii) An approximate duration of the special accommodation; and

(iii) A recommendation as to the suitable class of transportation accommodations based on the disability.

(2) A special need must be certified annually in writing according to your agency's procedures. However, if the special need is a lifelong condition, then

a one-time certification statement is required;

(3) If you are authorized under § 301–13.3(a) of this Subchapter to have an attendant accompany you, your agency may also authorize the attendant to use other than coach-class accommodations if you require the attendant's services en route;

(c) When exceptional security circumstances require other than coach-class rail accommodations. Exceptional security circumstances are determined by your agency and should only be authorized to the minimum other than coach-class accommodation necessary to meet the agency's mission. These circumstances include, but are not limited to:

(1) Use of coach-class accommodations would endanger your life or Government property;

(2) You are an agent on protective detail and you are accompanying an individual authorized to use other than coach-class accommodations; or

(3) You are a courier or control officer accompanying controlled pouches or packages;

(d) Coach-class accommodations on an authorized/approved foreign rail carrier do not provide adequate sanitation or health standards; or

(e) When required because of agency mission, consistent with your agency's internal procedures pursuant to § 301–70.102(i).

■ 20. Revise § 301–10.164 to read as follows:

**§ 301–10.164 When may I use extra-fare train service?**

You may use extra-fare train service whenever your agency determines it is more advantageous to the Government or is required for security reasons. Extra-fare train service is considered to be a class above the lowest class offered on any particular train and must be authorized/approved as provided in § 301–10.162.

■ 21. Amend § 301–10.182 by revising paragraphs (a) and (b) to read as follows:

**§ 301–10.182 What classes of ship accommodations are available?**

* * * * *

(a) *Other than lowest first-class*—All classes above the lowest first-class, includes but is not limited to a suite.

(b) *Lowest first-class*—The least expensive class of reserved accommodations available on a ship.

■ 22. Amend § 301–10.183 by revising the introductory paragraph and paragraphs (b) and (c), and adding paragraph (d), to read as follows:

**§ 301–10.183 What class of ship accommodations must I use?**

You must use the lowest first-class accommodations when traveling by ship, except when your agency specifically authorizes/approves your use of other than lowest first-class ship accommodations under paragraphs (a) through (d) of this section.

* * * * *

(b) When use of other than lowest first-class accommodations is necessary to accommodate a medical disability or other special need.

(1) A disability must be certified annually in a written statement by a competent medical authority. However, if the disability is a lifelong condition, then a one-time certification statement is required. Certification statements must include at a minimum:

(i) A written statement by a competent medical authority stating that special accommodation is necessary;

(ii) An approximate duration of the special accommodation; and

(iii) A recommendation as to the suitable class of transportation accommodations based on the disability.

(2) A special need must be certified annually in writing according to your agency's procedures. However, if the special need is a lifelong condition, then a one-time certification statement is required;

(3) If you are authorized under § 301–13.3(a) of this Subchapter to have an attendant accompany you, your agency may also authorize the attendant to use other than lowest first-class class accommodations if you require the attendant's services en route;

(c) When exceptional security circumstances require other than lowest first-class travel. Exceptional security circumstances are determined by your agency and should only be authorized to the minimum other than lowest first-class travel accommodation necessary to meet the agency's mission. These circumstances include, but are not limited to:

(1) The use of lowest first-class accommodations would endanger your life or Government property; or

(2) You are an agent on protective detail and you are accompanying an individual authorized to use other than lowest first-class accommodations; or

(3) You are a courier or control officer accompanying controlled pouches or packages.

(d) When required because of agency mission, consistent with your agency's internal procedures pursuant to § 301–70.102(i).

## PART 301–13—TRAVEL OF AN EMPLOYEE WITH SPECIAL NEEDS

■ 23. The authority citation for 41 CFR Part 301–13 continues to read as follows:

**Authority:** 5 U.S.C. 5707.

■ 24. Amend § 301–13.3 by revising paragraph (f) to read as follows:

**§ 301–13.3 What additional travel expenses may my agency pay under this Part?**

* * * * *

(f) Other than coach-class accommodations to accommodate your special need, under Subpart B of Part 301–10 of this Subchapter; and

* * * * *

## PART 301–50—ARRANGING FOR TRAVEL SERVICES

■ 25. The authority citation for 41 CFR Part 301–50 continues to read as follows:

**Authority:** 5 U.S.C. 5707; 40 U.S.C. 121(c).

■ 26. Amend § 301–50.8 by revising paragraph (a)(2) to read as follows:

**§ 301–50.8 Are there any limits on travel arrangements I may make?**

* * * * *

(a) * * *

(2) You may use other than coach-class accommodations only under §§ 301–10.123 and 301–10.162, and lowest first-class accommodations only under § 301–10.183 of this Chapter; and

* * * * *

## PART 301–70—INTERNAL POLICY AND PROCEDURE REQUIREMENTS

■ 27. The authority citation for 41 CFR Part 301–70 is revised to read as follows:

**Authority:** 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701, note), Office of Management and Budget Circular No. A–126, ''Improving the Management and Use of Government Aircraft,'' revised May 22, 1992 and OMB Circular No. A–123, Appendix B, ''Improving the Management of Government Charge Card Programs,'' revised January 15, 2009.

■ 28. Amend § 301–70.102 by revising paragraph (b)(1); removing ''and'' at the end of paragraph (g); removing the period at the end of paragraph (h)(3) and adding a semicolon in its place; and adding paragraphs (i) and (j) to read as follows:

**§ 301–70.102 What governing policies must we establish for authorization and payment of transportation expenses?**

* * * * *

(b) * * *

(1) Use of other than coach-class transportation accommodations for air and rail under §§ 301–10.123 and 301–10.162, and lowest first-class accommodations for ship under § 301–10.183 of this chapter.

* * * * *

(i) Develop and issue internal guidance on what specific mission criteria justify approval of the use of other than coach-class transportation under §§ 301–10.123(a)(4), 301–10.123(b)(9), and 301–10.162(e) or the use of other than lowest first-class under § 301–10.183(d). The justification criteria shall be entered in the remarks section of the traveler's travel authorization; and

(j) Develop and publish internal guidance regarding what constitutes a rest period upon arrival at a temporary duty location.

## PART 301–71–AGENCY TRAVEL ACCOUNTABILITY REQUIREMENTS

■ 29. The authority citation for 41 CFR Part 301–71 continues to read as follows:

**Authority:** 5 U.S.C 5707; 40 U.S.C. 121(c); Sec 2., Pub L. 105–264, 112 Stat. 2350 (5 U.S.C 5701, note).

■ 30. Amend § 301–71.105 by revising paragraph (a) to read as follows:

### § 301–71.105 Must we issue a written or electronic travel authorization in advance of travel?

* * * * *

(a) Use of other than coach-class service accommodation on common carriers or use of other than lowest first-class accommodation on ships;

* * * * *

■ 31. Amend Appendix C to Chapter 301 by revising the tables under the headings ''Commercial Transportation Information'' and ''Travel Expense Information'' to read as follows:

### Appendix C to Chapter 301—Standard Data Elements for Federal Travel

* * * * *

COMMERCIAL TRANSPORTATION INFORMATION

| Group name | Data elements | Description |
|---|---|---|
| Transportation Payment | | Method employee used to purchase transportation tickets. |
| Method Indicator | GTR | U.S. Government Transportation Request. |
| | Central Billing Account | A contractor centrally billed account. |
| | Government Charge Card. | In accordance with and as provided by agency guidelines. |
| | Cash | |
| Transportation Payment Identification Number | Payment ID Number | A number that identifies the payment for the transportation tickets, according to agency guidelines, *e.g.*, GTR number, Govt. contractor-issued charge card number. |
| Transportation Method Indicator | Air (other than coach-class). | Common carrier used as transportation to TDY location. |
| | Air (coach-class) | |
| | Non-contract Air, Train, Other. | |
| Local Transportation Indicator | POV, Car rental, Taxi, Other. | Identifies local transportation used while on TDY. |

TRAVEL EXPENSE INFORMATION

| Group name | Data elements | Description |
|---|---|---|
| Per Diem | Total Number of Days | The number of days traveler claims to be on per diem status, for each official travel location. |
| | Total Amount Claimed | The amount of money traveler claims as per diem expense. |
| | Lodging, Meals & Incidentals. | |
| Travel Advance | Advance Outstanding | The amount of travel advance outstanding, when the employee files the travel claim. |
| | Remaining Balance | The amount of the travel advance that remains outstanding. |
| Subsistence | Actual Days | Total number of days the employee charged actual subsistence expenses. |
| | | The number of days must be expressed as a whole number. |
| | Total Actual Amount | Total amount of actual subsistence expenses claimed as authorized. Actual subsistence rate, per day, may not exceed the maximum subsistence expense rate established for official travel by the Federal Travel Regulation. |
| Transportation Method Cost | Air (other than coach-class). | The amount of money the transportation actually cost the traveler, entered according to method of transportation. |
| | Air (coach-class) | |
| | Non-contract Air, Train | |
| | Other | Bus or other form of transportation. |
| Local Transportation (in, around, or about the temporary duty station) | POV mileage | Total number of miles driven in POV. |

TRAVEL EXPENSE INFORMATION—Continued

| Group name | Data elements | Description |
|---|---|---|
| | POV mileage expense .. | Total amount claimed as authorized based on mileage rate. Different mileage rates apply based on type and use of the POV. |
| Constructive cost | Car rental, Taxis, Other Constructive cost | The difference between the amount authorized to spend versus the amount claimed. |
| Reclaim | Reclaim amount | An amount of money previously denied as reimbursement for which additional justification is now provided. |
| Total Claim | Total claim | The sum of the amount of money claimed for per diem, actual subsistence, mileage, transportation method cost, and other expenses. |

* * * * *

## PART 304–3—EMPLOYEE RESPONSIBILITY

■ 32. The authority citation for 41 CFR Part 304–3 continues to read as follows:

**Authority:** 5 U.S.C. 5707; 31 U.S.C. 1353.

■ 33. Revise § 304–3.9 to read as follows:

**§ 304–3.9 May I use other than coach-class accommodation on common carriers or other than lowest first-class accommodations on ships when a non-Federal source pays in full for my transportation expenses to attend a meeting?**

Yes, you may use other than coach-class accommodation on common carriers if you meet one of the criteria contained in § 301–10.123 or § 301–10.162 or you may use other than lowest first-class travel if you meet one of the criteria contained in § 301–10.183 of this Title, and are authorized to do so by your agency in accordance with § 304–5.5 of this Chapter.

**§ 304–3.10 [Removed and Reserved]**

■ 34. Remove and reserve § 304–3.10.

## PART 304–5—AGENCY RESPONSIBILITIES

■ 35. The authority citation for 41 CFR Part 304–5 continues to read as follows:

**Authority:** 5 U.S.C. 5707; 31 U.S.C. 1353

■ 36. Revise § 304–5.5 to read as follows:

**§ 304–5.5 May we authorize an employee to travel by other than coach-class on common carriers or other than lowest first-class on ships if we accept payment in full from a non-Federal source for such transportation expenses?**

Yes, you may authorize an employee to travel by other than coach-class on common carriers or other than lowest first-class on ships as long as the:

(a) Non-Federal source makes full payment for such transportation services in advance of travel; and

(b) Transportation accommodations furnished are comparable in value to those offered to, or purchased by other similarly situated meeting attendees; and

(c) Travel meets at least one of the conditions in §§ 301–10.123, 301–10.162, and 301–10.183 of this Title.

**§ 304–5.6 [Removed]**

■ 37. Remove § 304–5.6.

**§ 304–5.7 [Redesignated as § 304–5.6]**

■ 38. Section § 304–5.7 is redesignated as § 304–5.6.

[FR Doc. E9–25749 Filed 10–26–09; 8:45 am]

BILLING CODE 6820–14–S

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 64

**[Docket ID FEMA–2008–0020; Internal Agency Docket No. FEMA–8101]**

### Suspension of Community Eligibility

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

**DATES:** *Effective Dates:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

**FOR FURTHER INFORMATION CONTACT:** If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their

eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

*National Environmental Policy Act.* This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

*Regulatory Flexibility Act.* The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

*Regulatory Classification.* This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 13132, Federalism.* This rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This rule meets the applicable standards of Executive Order 12988.

*Paperwork Reduction Act.* This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

## PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

### § 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

| State and location | Community No. | Effective date authorization/cancellation of sale of flood insurance in community | Current effective map date | Date certain Federal assistance no longer available in SFHAs |
|---|---|---|---|---|
| **Region IV** | | | | |
| Alabama: | | | | |
| Andalusia, City of, Covington County ... | 010331 | February 26, 1999, Emerg; N/A, Reg; November 4, 2009, Susp. | Nov. 4, 2009 ..... | Nov. 4, 2009 |
| Benton, Town of, Lowndes County ..... | 015002 | February 25, 1972, Emerg; April 6, 1973, Reg; November 4, 2009, Susp. | *.....do ..... | Do. |
| Conecuh County, Unincorporated Areas | 010319 | March 31, 1998, Emerg; N/A, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Covington County, Unincorporated Areas. | 010244 | August 4, 1989, Emerg; September 1, 1990, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Evergreen, City of, Conecuh County .... | 010051 | September 3, 1976, Emerg; May 26, 1998, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Lowndes County, Unincorporated Areas | 010272 | December 11, 1975, Emerg; August 15, 1984, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Opp, City of, Covington County ..... | 010241 | October 20, 1975, Emerg; July 18, 1985, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Red Level, Town of, Covington County | 010243 | May 3, 1999, Emerg; N/A, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| River Falls, Town of, Covington County | 010054 | December 24, 1975, Emerg; July 8, 1977, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| North Carolina: | | | | |
| Ashe County, Unincorporated Areas ..... | 370007 | August 4, 1975, Emerg; August 16, 1988, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Jefferson, Town of, Ashe County ..... | 370008 | September 5, 1975, Emerg; August 16, 1988, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Lansing, Town of, Ashe County ..... | 370374 | September 4, 1975, Emerg; August 5, 1986, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| West Jefferson, Town of, Ashe County | 370009 | August 21, 1975, Emerg; June 4, 1987, Reg; November 4, 2009, Susp. | .....do ..... | Do. |

| State and location | Community No. | Effective date authorization/cancellation of sale of flood insurance in community | Current effective map date | Date certain Federal assistance no longer available in SFHAs |
|---|---|---|---|---|
| **Region V** | | | | |
| Wisconsin: | | | | |
| Brandon, Village of, Fond Du Lac County. | 550132 | March 31, 1975, Emerg; September 16, 1988, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Campbellsport, Village of, Fond Du Lac County. | 550133 | May 13, 1975, Emerg; May 15, 1978, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Fond Du Lac, City of, Fond Du Lac County. | 550136 | March 8, 1974, Emerg; January 3, 1979, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Fond Du Lac County, Unincorporated Areas. | 550131 | April 2, 1974, Emerg; July 19, 1982, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Kewaskum, Village of, Washington County. | 550474 | July 7, 1975, Emerg; January 6, 1982, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Mount Calvary, Village of, Fond Du Lac County. | 550137 | August 1, 1975, Emerg; September 30, 1976, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| North Fond Du Lac, Village of, Fond Du Lac County. | 550138 | March 27, 1975, Emerg; December 4, 1979, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Ripon, City of, Fond Du Lac County ..... | 550140 | July 2, 1975, Emerg; August 15, 1980, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Rosendale, Village of, Fond Du Lac County. | 550141 | October 20, 1975, Emerg; September 29, 1989, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| St. Cloud, Village of, Fond Du Lac County. | 550142 | April 23, 1976, Emerg; July 1, 1987, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Waupun, City of, Fond Du Lac County | 550108 | January 21, 1975, Emerg; August 15, 1984, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| **Region VII** | | | | |
| Kansas: | | | | |
| McLouth, City of, Jefferson County ..... | 200148 | July 21, 1975, Emerg; July 20, 1984, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Oskaloosa, City of, Jefferson County .... | 200151 | November 21, 1975, Emerg; August 3, 1984, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Missouri:. | | | | |
| Marthasville, City of, Warren County .... | 290444 | September 14, 1983, Emerg; September 14, 1983, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Warren County, Unincorporated Areas | 290443 | June 1, 1984, Emerg; April 3, 1985, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Wright City, City of, Warren County ..... | 290654 | NA, Emerg; March 26, 2008, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| **Region VIII** | | | | |
| South Dakota: | | | | |
| Big Stone City, City of, Grant County ... | 460156 | July 11, 1995, Emerg; July 1, 1998, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Milbank, City of, Grant County ..... | 460200 | April 23, 1980, Emerg; December 9, 1985, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Revillo, Town of, Grant County ..... | 460031 | June 30, 1975, Emerg; October 1, 1986, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Wyoming: | | | | |
| Converse County, Unincorporated Areas. | 560082 | April 22, 1983, Emerg; April 5, 1988, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Douglas, City of, Converse County ..... | 560013 | October 2, 1975, Emerg; October 17, 1978, Reg; November 4, 2009, Susp. | .....do ..... | Do. |
| Glenrock, Town of, Converse County ... | 560014 | June 2, 1975, Emerg; November 15, 1985, Reg; November 4, 2009, Susp. | .....do ..... | Do. |

*.....Do = Ditto.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: October 9, 2009.

**Edward L. Connor,**

*Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E9–25835 Filed 10–26–09; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 65

**[Docket ID FEMA–2008–0020; Internal Agency Docket No. FEMA–B–1070]**

## Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

**DATES:** These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the FEMA Assistant Administrator for Mitigation reconsider the changes. The modified BFEs may be changed during the 90-day period.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Kevin C. Long, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820.

**SUPPLEMENTARY INFORMATION:** The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by the other Federal, State, or regional entities. The changes in BFEs are in accordance with 44 CFR 65.4.

*National Environmental Policy Act.* This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act.* As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

*Regulatory Classification.* This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 13132, Federalism.* This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

*Executive Order 12988, Civil Justice Reform.* This interim rule meets the applicable standards of Executive Order 12988.

### List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

### § 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

| State and county | Location and case No. | Date and name of newspaper where notice was published of sale of flood insurance in community | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Colorado: | | | | | |
| Arapahoe | City of Aurora (09–08–0620P). | July 2, 2009; July 9, 2009; *Aurora Sentinel.* | The Honorable Ed Tauer, Mayor, City of Aurora, 15151 East Alameda Parkway, Aurora, CO 80012. | June 23, 2009 | 080002 |
| Arapahoe | City of Sheridan (09–08–0267P). | June 12, 2009; June 19, 2009; *Englewood Herald.* | The Honorable Mary Carter, Mayor, City of Sheridan, 4101 South Federal Boulevard, Sheridan, CO 80110. | October 19, 2009 | 080018 |
| Denver | City and County of Denver (09–08–0620P). | July 2, 2009; July 9, 2009; *Denver Post.* | The Honorable John W. Hickenlooper, Mayor, City and County of Denver, 1437 Bannock Street, Suite 350, Denver, CO 80202. | June 23, 2009 | 080046 |
| Florida: | | | | | |
| Marion | City of Ocala (09–04–0503P). | June 25, 2009; July 2, 2009; *Star Banner.* | The Honorable Randy Ewers, Mayor, City of Ocala, P.O. Box 1270, Ocala, FL 34478. | June 12, 2009 | 120330 |

| State and county | Location and case No. | Date and name of newspaper where notice was published of sale of flood insurance in community | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Orange | City of Orlando (09–04–3112P). | July 9, 2009; July 16, 2009; *Orlando Weekly*. | The Honorable Buddy Dyer, Mayor, City of Orlando, 400 South Orange Avenue, Orlando, FL 32802. | September 28, 2009 | 120186 |
| Sumter | Unincorporated areas of Sumter County (09–04–3548P). | July 9, 2009; July 16, 2009; *Sumter County Times*. | The Honorable Richard Hoffman, Commissioner, District 1, Sumter County Board of Commissioners, 910 North Main Street, Bushnell, FL 33513. | June 30, 2009 | 120296 |
| Illinois: | | | | | |
| DuPage | Village of Villa Park (08–05–4476P). | July 10, 2009; July 17, 2009; *Villa Park Argus*. | The Honorable Joyce Stupegia, Village President, Village of Villa Park, 20 South Ardmore Avenue, Villa Park, IL 60181. | June 29, 2009 | 170217 |
| Will | Unincorporated areas of Will County (09–05–3443P). | July 6, 2009; July 13, 2009; *The Herald News*. | The Honorable Lawrence M. Walsh, Will County Executive, 302 North Chicago Street, Joliet, IL 60432. | November 10, 2009 | 170695 |
| Indiana: | | | | | |
| Elkhart | City of Elkhart (09–05–0815P). | July 3, 2009; July 10, 2009; *The Elkhart Truth*. | The Honorable David Miller, Mayor, City of Elkhart, Municipal Building, 229 South 2nd Street, Elkhart, IN 46516. | November 9, 2009 | 180057 |
| Elkhart | Unincorporated areas of Elkhart County (09–05–0815P). | July 3, 2009; July 10, 2009; *The Elkhart Truth*. | The Honorable Terry Rodino, President, Elkhart County Board of Commissioners, 117 North 2nd Street, Goshen, IN 46526. | November 9, 2009 | 180056 |
| Kansas: McPherson | City of McPherson (09–07–0243P). | July 7, 2009; July 14, 2009; *McPherson Sentinel*. | The Honorable Thomas A. Brown, Mayor, City of McPherson, P.O. Box 1008, McPherson, KS 67460. | June 26, 2009 | 200217 |
| Minnesota: | | | | | |
| Anoka | City of Blaine (08–05–4922P). | March 27, 2009; April 3, 2009; *Blaine-Spring Lake Park Life*. | The Honorable Thomas Ryan, Mayor, City of Blaine, 12147 Radisson Road Northeast, Blaine, MN 55449. | July 27, 2009 | 270007 |
| Anoka | City of Coon Rapids (08–05–4922P). | March 27, 2009; April 3, 2009; *Coon Rapids Herald*. | The Honorable Tim Howe, Mayor, City of Coon Rapids, 11155 Robinson Drive, Coon Rapids, MN 55433. | July 27, 2009 | 270011 |
| Mississippi: Rankin | City of Richmond (09–04–2764P). | July 8, 2009; July 15, 2009; *Rankin County News*. | The Honorable Shirley Hall, Mayor, City of Richland, P.O. Box 180609, Richland, MS 39218. | July 30, 2009 | 280299 |
| Montana: Carbon | City of Red Lodge (09–08–0545P). | June 11, 2009; June 18, 2009; *Carbon County News*. | The Honorable Betsy Scanlin, Mayor, City of Red Lodge, P.O. Box 9, Red Lodge, MT 59068. | October 16, 2009 | 300007 |
| Ohio: | | | | | |
| Franklin | City of Dublin (08–05–2843P). | June 17, 2009; June 24, 2009; *The Dublin News*. | The Honorable Mary Chinnici-Zuercher, Mayor, City of Dublin, 5200 Emerald Parkway, Dublin, OH 43017. | October 22, 2009 | 390673 |
| Hancock | Unincorporated areas of Hancock County (09–05–2984P). | June 30, 2009; July 7, 2009; *The Courier*. | The Honorable Edward D. Ingold, Hancock County Commissioner, 322 South Main Street, Findlay, OH 45840. | November 4, 2009 | 390767 |
| South Carolina: Lancaster. | Unincorporated areas of Lancaster County (09–04–1036P). | June 8, 2009; June 15, 2009; *Rock Hill Herald*. | The Honorable Steve Willis, County Administrator, Lancaster County, P.O. Box 1809, Lancaster, SC 29721. | October 13, 2009 | 450120 |
| Texas: | | | | | |
| Bexar | Unincorporated areas of Bexar County (08–06–2311P). | July 6, 2009; July 13, 2009; *Daily Commercial Recorder*. | The Honorable Nelson W. Wolff, Bexar County Judge, Bexar County Courthouse, 100 Dolorosa Street, Suite 120, San Antonio, TX 78205. | July 30, 2009 | 480035 |
| Collin | City of Plano (08–06–2741P). | July 3, 2009; July 10, 2009; *Plano Star Courier*. | The Honorable Phil Dyer, Mayor, City of Plano, 1520 Avenue K, Plano, TX 75074. | November 9, 2009 | 480140 |
| Travis | City of Austin (08–06–3046P). | May 12, 2009; May 19, 2009; *Austin American Statesman*. | The Honorable Will Wynn, Mayor, City of Austin, P.O. Box 1088, Austin, TX 78767. | April 30, 2009 | 480624 |
| Webb | City of Laredo (09–06–0689P). | June 11, 2009; June 18, 2009; *Laredo Morning Times*. | The Honorable Raul G. Salinas, Mayor, City of Laredo, 1110 Houston Street, Laredo, TX 78040. | October 16, 2009 | 480651 |
| Virginia: | | | | | |
| Prince Edward | Town of Farmville (08–03–1396P). | July 1, 2009; July 8, 2009; *Farmville Herald*. | The Honorable Sydnor C. Newman, Jr., Mayor, Town of Farmville, 116 North Main Street, Farmville, VA 23901. | October 3, 2009 | 510118 |
| Independent City | City of Harrisonburg (09–03–0277P). | June 26, 2009; July 3, 2009; *Daily News-Record*. | The Honorable Kai Degner, Mayor, City of Harrisonburg, 345 South Main Street, Harrisonburg, VA 22801. | November 2, 2009 | 510076 |
| Independent City | City of Waynesboro (09–03–0235P). | June 8, 2009; June 15, 2009; *The News Virginian*. | The Honorable Timothy D. Williams, Mayor, City of Waynesboro, P.O. Box 1028, Waynesboro, VA 22980. | June 29, 2009 | 515532 |

| State and county | Location and case No. | Date and name of newspaper where notice was published of sale of flood insurance in community | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Wisconsin: Dane ..... | Unincorporated areas of Dane County (08–05–5051P). | June 26, 2009; July 3, 2009; *Wisconsin State Journal.* | The Honorable Kathleen Falk, Dane County Executive, City County Building, Room 421, 210 Martin Luther King Jr. Boulevard, Madison, WI 53703. | November 2, 2009 ..... | 550077 |

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

**Deborah S. Ingram,**

*Acting Deputy Assistant Administrator for Mitigation, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E9–25858 Filed 10–26–09; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 65

**Docket ID FEMA–2008–0020; Internal Agency Docket No. FEMA–B–1067]**

## Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

**DATES:** These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the FEMA Assistant Administrator for Mitigation reconsider the changes. The modified BFEs may be changed during the 90-day period.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Kevin C. Long, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2820.

**SUPPLEMENTARY INFORMATION:** The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by the other Federal, State, or regional entities. The changes in BFEs are in accordance with 44 CFR 65.4.

*National Environmental Policy Act.* This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act.* As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

*Regulatory Classification.* This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 13132, Federalism.* This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

*Executive Order 12988, Civil Justice Reform.* This interim rule meets the applicable standards of Executive Order 12988.

### List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

### § 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

| State and county | Location and case No. | Date and name of newspaper where notice was published | Chief executive officer of community | Effective date of modication | Community No. |
|---|---|---|---|---|---|
| Alabama: Shelby ..... | City of Montevallo (08–04–6211P). | June 11, 2009; June 18, 2009; *The Birmingham News.* | The Honorable Ben McCrory, Mayor, City of Montevallo, 545 Main Street, Montevallo, AL 35115. | October 16, 2009 ..... | 010349 |
| California: | | | | | |

| State and county | Location and case No. | Date and name of newspaper where notice was published | Chief executive officer of community | Effective date of modication | Community No. |
|---|---|---|---|---|---|
| San Bernardino | City of Redlands (09–09–0076P). | June 11, 2009; June 18, 2009; *Redlands Daily Facts*. | The Honorable Jon Harrison, Mayor, City of Redlands, 35 Cajon Street, Suite 200, Redlands, CA 92373. | May 29, 2009 | 060279 |
| San Diego | City of San Diego (09–09–0194P). | June 10, 2009; June 17, 2009; *San Diego Transcript*. | The Honorable Jerry Sanders, Mayor, San Diego County, 202 C Street, 11th Floor, San Diego, CA 92101. | October 15, 2009 | 060295 |
| San Diego | Unincorporated areas of San Diego County (09–09–0374P). | June 17, 2009; June 24, 2009; *San Diego Transcript*. | The Honorable Dianne Jacob, Chairwoman, San Diego County Board of Supervisors, 1600 Pacific Highway, Room 335, San Diego, CA 92101. | October 22, 2009 | 060284 |
| Ventura | City of Oxnard (09–09–1399P). | June 11, 2009; June 18, 2009; *Ventura Star*. | The Honorable Thomas Holden, Mayor, City of Oxnard, 300 West 3rd Street, Oxnard, CA 93030. | May 29, 2009 | 060417 |
| Colorado: Adams & Arapahoe. | City of Aurora (09–08–0361P). | June 11, 2009; June 18, 2009; *Aurora Sentinel*. | The Honorable Ed Tauer, Mayor, City of Aurora, 15151 East Alameda Parkway, Aurora, CO 80012. | October 16, 2009 | 080002 |
| Connecticut: | | | | | |
| Hartford | Town of Farmington (09–01–0125P). | March 23, 2009; March 30, 2009; *The Hartford Courant*. | The Honorable Michael Clark, Chair, Town of Farmington Council, 1 Monteith Drive, Farmington, CT 06032. | July 28, 2009 | 090029 |
| New Haven | Town of Branford (09–01–0507P). | June 11, 2009; June 18, 2009; *Branford Sound*. | The Honorable Anthony DaRos, First Selectman, Town of Branford, P.O. Box 150, Branford, CT 06405. | May 29, 2009 | 090073 |
| Colorado: | | | | | |
| Douglas | Unincorporated areas of Douglas County (09–08–0431P). | May 21, 2009; May 28, 2009; *Douglas County News Press*. | The Honorable Jack Hilbert, Chairman, Douglas County Board of Commissioners, 100 3rd Street, Castle Rock, CO 80104. | September 25, 2009 | 080049 |
| Douglas | Town of Parker (09–08–0431P). | May 21, 2009; May 28, 2009; *Douglas County News Press*. | The Honorable David Casiano. Mayor, Town of Parker, 20120 East Main Street, Parker, CO 80138. | September 25, 2009 | 080310 |
| Summit | Town of Silverthorne (08–08–0785P). | June 5, 2009; June 12, 2009; *Summit County Journal*. | The Honorable David Koop, Mayor, Town of Silverthorne, P.O. Box 1309, Silverthorne, CO 80498. | May 22, 2009 | 080201 |
| Delaware: New Castle. | Unincorporated areas of New Castle County (09–03–0923P). | June 9, 2009; June 16, 2009; *The News Journal*. | Mr. Christopher Coons, County Executive, New Castle County, 87 Reads Way Corporate Commons, New Castle, DE 19720. | October 13, 2009 | 105085 |
| Florida: Lee | Unincorporated areas of Lee County (09–04–3111P). | June 8, 2009; June 15, 2009; *Fort Myers News-Press*. | The Honorable Ray Judah, Chairman, Lee County, Board of Commissioners, Post Office Box 398, Fort Myers, FL 33902. | May 27, 2009 | 125124 |
| Georgia: | | | | | |
| Columbia | Unincorporated areas of Columbia County (09–04–2902P). | June 14, 2009; June 21, 2009; *Columbia County News Times*. | The Honorable Ron C. Cross, Chairman, Columbia County Board of Commissioners, P.O. Box 498, Evans, GA 30809. | May 29, 2009 | 130059 |
| Columbia | City of Grovetown (09–04–2902P). | June 14, 2009; June 21, 2009; *Columbia County News Times*. | The Honorable George W. James III, Mayor, City of Grovetown, 201 Williams Street, Grovetown, GA 30813. | May 29, 2009 | 130265 |
| Idaho: Canyon | Unincorporated areas of Canyon County (08–10–0685P). | May 11, 2009; May 18, 2009; *Idaho Press Tribune*. | The Honorable David Ferdinand, Chairman, Canyon County Board of Commissioners, 1115 Albany Street, Caldwell, ID 83605. | April 30, 2009 | 160208 |
| Kansas: | | | | | |
| Sedgwick | Unincorporated areas of Sedgwick County (08–07–1331P). | April 20, 2009, April 27, 2009, *Wichita Eagle*. | The Honorable Kelly Parks, Chairman, Sedgwick County Board of Commissioners, County Courthouse, 525 North Main Street, Wichita, KS 67203. | August 25, 2009 | 200321 |
| Sedgwick | City of Valley Center (08–07–1331P). | April 20, 2009; April 27, 2009; *Wichita Eagle*. | The Honorable Michael D. McNown, Mayor, City of Valley Center, P.O. Box 188, Valley Center, KS 67147. | August 25, 2009 | 200327 |
| Michigan: Macomb | Township of Shelby (09–05–0484P). | June 21, 2009; June 28, 2009; *The Source*. | The Honorable Richard Stathakis, Supervisor, Shelby Township, 52700 Van Dyke Avenue, Shelby Township, MI 48316. | October 19, 2009 | 260126 |
| Nebraska: Lincoln | City of North Platte (09–07–1206P). | June 25, 2009; July 2, 2009; *North Platte Telegraph*. | The Honorable Marc Kaschke, Mayor, City of North Platte, 211 West 3rd Street, North Platte, NE 69101. | June 15, 2009 | 310143 |
| Ohio: Lucas | City of Toledo (09–05–0642P). | June 3, 2009; June 10, 2009; *Toledo Blade*. | The Honorable Carleton S. Finkbeiner, Mayor, City of Toledo, 1 Government Center, 640 Jackson Street, Suite 2200, Toledo, OH 43604. | May 21, 2009 | 395373 |
| Tennessee: Wilson | City of Mt. Juliet (09–04–1406P). | June 19, 2009; June 26, 2009; *Lebanon Democrat*. | The Honorable Linda Elam, Mayor, City of Mount Juliet, 2425 North Mount Juliet Road, Mount Juliet, TN 37122. | June 10, 2009 | 470290 |
| Texas: | | | | | |
| Bexar | City of San Antonio (09–06–0261P). | June 10, 2009; June 17, 2009; *San Antonio Express News*. | The Honorable Phil Hardberger, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283. | October 15, 2009 | 480045 |

| State and county | Location and case No. | Date and name of newspaper where notice was published | Chief executive officer of community | Effective date of modication | Community No. |
|---|---|---|---|---|---|
| Cherokee ..... | City of Jacksonville (09–06–0483P). | June 9, 2009; June 16, 2009; *Jacksonville Daily Progress.* | The Honorable Robert N. Haberle, Mayor, City of Jacksonville, P.O. Box 1390, Jacksonville, TX 75766. | October 14, 2009 ..... | 480123 |
| Tarrant ..... | City of Fort Worth (09–06–1123P). | April 3, 2009, April 10, 2009, *Fort Worth Star Telegram.* | The Honorable Michael J. Moncrief, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102. | March 25, 2009 ..... | 480596 |

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

**Deborah S. Ingram,**

*Acting Deputy Assistant Administrator for Mitigation, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E9–25860 Filed 10–26–09; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 080521698–9067–02]**

**RIN 0648–AW87**

## Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Secretarial Final Interim Action; Rule Extension

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

**ACTION:** Temporary rule; interim action extension and request for comments.

**SUMMARY:** NMFS continues the management measures implemented by the April 13, 2009, interim rule (as modified by the July 8, 2009 interim rule), which is scheduled to expire on October 28, 2009. Specifically, this temporary rule maintains the current interim commercial and recreational management measures intended to reduce overfishing on certain stocks managed by the Northeast (NE) Multispecies Fishery Management Plan (FMP), for the remainder of the 2009 fishing year (FY)(i.e., through April 30, 2010).

**DATES:** The effective date of the interim rule published April 13, 2009 (74 FR 17030), as amended by the interim rule published July 8, 2009 (74 FR 32466) is extended through April 30, 2010. NMFS will accept comments through November 27, 2009.

**ADDRESSES:** You may submit comments, identified by 0648–AW87, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-rulemaking portal: *http://www.regulations.gov*.
- Mail: Paper, disk, or CD-ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930–2276. Mark the outside of the envelope: ''Comments on NE Multispecies Final Interim Rule.''
- Fax: (978) 281–9135.

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

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

Copies of the small entity compliance guide are available from the Regional Administrator, NMFS, Northeast Regional Office, at the address above. Copies of the Environmental Assessment (EA) prepared for this rule may be found at the following internet address: *http://www.nero.noaa.gov/nero/regs/frdoc/09/09multiInterimea.pdf*

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Warren, Fishery Policy Analyst, (978) 281–9347, fax (978) 281–9135.

**SUPPLEMENTARY INFORMATION:**

### Background

This temporary final rule extends the interim rule published on April 13, 2009 (74 FR 17030), as modified by the interim rule published on July 8, 2009 (74 FR 32466), through April 30, 2010, in order to manage the NE multispecies fishery through the end of FY 2009 (April 30, 2010). Those interim final rules, and the preceding proposed rule of January 16, 2009 (74 FR 2959), include detailed information on the background and reasons for the need to reduce fishing effort in the NE multispecies fishery for FY 2009. The public had an opportunity to comment on both the proposed and final rules. NMFS will accept public comment after publication of this temporary rule to extend, both on the effectiveness of the emergency action to date, and its extension.

All measures in effect prior to May 1, 2009, that were not amended by the April 13, 2009, final interim rule (as amended) will remain in effect. This action extends these measures through April 30, 2010.

The interim management measures extended through this interim rule are as follows: Maintenance of the scheduled FY 2009 DAS reduction included in the FMP, which results in an approximately 18–percent reduction in Category A days-at-sea (DAS); an expanded differential DAS counting area in Southern New England (SNE), where a vessel is charged 2 days for every day fished; modified trip limits (zero possession of SNE winter flounder, windowpane flounder (north), ocean pout, and witch flounder; 2,000 lb (909.1 kg)/DAS up to 10,000 lb (4,545.5 kg)/trip for white hake, and unrestricted possession of Georges Bank (GB) winter flounder); specification of target Total Allowable Catches (TACs); revisions to incidental catch TACs and allocations to special management programs; annual specifications for the U.S./Canada Management Area; elimination of the SNE/Mid-Atlantic (MA) Winter Flounder Special Access Program (SAP); elimination of the state waters winter flounder exemption; modification of the Closed Area I (CA I) Hook Gear Haddock SAP; reduction of the haddock minimum size to 18 inches (45 cm); extension of the Eastern U.S./Canada Haddock SAP; modifications to the Regular B DAS Program; DAS Leasing Program modifications; DAS Transfer Program modifications; implementation of monkfish DAS rules to mitigate impacts of the NE multispecies interim action; revision of the FY 2009 GB cod TACs for sectors; and modifications to the recreational measures, including extension in time of a seasonal

prohibition on the possession of Gulf of Maine (GOM) cod, and continuation of the prohibition on the possession of SNE/MA winter flounder. In addition, this action continues measures to mitigate some of the negative, short-term economic impacts of the FMP by expanding the CA I Hook Gear Haddock SAP; modifying the DAS Leasing Program, the Regular B DAS Program, and the DAS Transfer Program; continuing the Eastern U.S./Canada Haddock SAP; and continuing a reduction in the haddock minimum size to 18 inches (45 cm) for both commercial and recreational vessels.

Four comments were received that were pertinent to the interim rule. Associated Fisheries of Maine supported the revised trip limits for GB winter flounder and white hake, and requested that NMFS exempt vessels fishing with haddock separator trawls or Rhule trawls from the SNE Differential DAS Area restrictions. The State of Maine supported the revised trip limits. NMFS agrees that the revised trip limits are justified. NMFS disagrees that the Rhule trawl or haddock separator trawl should be exempt from the SNE Differential DAS Area. The principal objective of the SNE Differential DAS Area is to reduce the fishing mortality on SNE winter flounder. Although the Rhule trawl significantly reduces the catch of winter flounder, it is less effective at reducing the catch of winter flounder compared to other species. Winter flounder comprised 4 percent of the experimental trawl catch in the research that was the basis of NMFS's approval of this gear for use in certain special management programs. Similarly, the haddock separator trawl research indicated significant reductions in catch of flatfish, but the percentage reduction is variable. In contrast, hook gear catches relatively little winter flounder (less than 1 percent, based on data from the Cape Cod Commercial Hook Fishermen's Association). Although it is not possible to quantitatively compare the difference in fishing mortality reduction between vessels fishing under differential (two-to-one) DAS restrictions (using regular trawl gear) and vessels fishing under one-to-one DAS restrictions (using specialized trawl gear), given the large reduction in fishing mortality necessary for SNE/MA winter flounder, exemption from the SNE Differential DAS restrictions for vessels using specialized trawl gear is not warranted.

The Atlantic States Marine Fisheries Commission (Commission) expressed support for the interim action and the extension of the action, especially those measures that provide additional protection for winter flounder. The Commission stated that the sacrifices made by the recreational and commercial fisheries are necessary to generate the future benefits of a rebuilt winter flounder fishery. NMFS agrees that continuing measures to protect winter flounder are necessary in order to rebuild the fishery for the future, and is extending the interim management measures for the duration of the fishing year.

A member of the fishing industry from New Jersey was concerned about the economic impact of the measures on vessels fishing for winter flounder from New Jersey ports. NMFS agrees that the prohibition on the retention of SNE/MA winter flounder and the SNE Differential DAS Area will have an economic impact on vessels from New Jersey ports. The economic impacts were taken into account by NMFS in the decision to implement a differential DAS area instead of a complete closure in SNE (as described in the interim rule of April 13, 2009). Restrictive measures are necessary to rebuild the SNE/MA stock of winter flounder.

## Classification

NMFS has determined that the interim management measures extended by this temporary rule are necessary and are consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law.

The interim rule that this rule extends was determined to be significant for purposes of E.O. 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

The EA prepared for the initial interim rule analyzed the impacts of the interim management measures for the duration of a year (Secretarial Interim Action to Implement Measures to Reduce Overfishing in the Northeast Multispecies Fishery Complex; Environmental Assessment; April 6, 2009). Therefore, this interim action extension meets the Categorical Exclusion requirements of NOAA Administrative Order 216–6, and no additional environmental analysis was prepared pursuant to the National Environmental Policy Act.

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

Dated: October 21, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator For Fisheries, National Marine Fisheries Service.*

[FR Doc. E9–25810 Filed 10–26–09; 8:45 am]

BILLING CODE 3510–22–S

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 0810141351–9087–02]**

**RIN 0648–XS58**

## Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel by Vessels in the Amendment 80 Limited Access Fishery in the Western Aleutian District of the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Atka mackerel by vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2009 Atka mackerel allocation total allowable catch (TAC) allocated to vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 22, 2009, through 2400 hrs, A.l.t., December 31, 2009.

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

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

The 2009 Atka mackerel TAC allocated to vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI is 9,275 metric tons (mt) as established by the final 2009 and 2010

harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2009 Atka mackerel TAC allocated to vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 9,250 mt and is setting aside the remaining 25 mt as incidental catch to support other groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel by vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Atka mackerel by vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 21, 2009.

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

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

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

Dated: October 22, 2009.

**Emily H. Menashes,**

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

[FR Doc. E9–25782 Filed 10–22–09; 4:15 pm]

**BILLING CODE 3510–22–S**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 0810141351–9087–02]**

**RIN 0648–XS57**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch by Vessels in the Amendment 80 Limited Access Fishery in the Central Aleutian District of the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific ocean perch by vessels participating in the Amendment 80 limited access fishery in the Central Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2009 Pacific ocean perch allocation specified for vessels participating in the Amendment 80 limited access fishery in the Central Aleutian District of the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 22, 2009, through 2400 hrs, A.l.t., December 31, 2009.

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

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

The 2009 Pacific ocean perch TAC allocated to vessels participating in the Amendment 80 limited access fishery in the Central Aleutian District of the BSAI is 1,811 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2009 Pacific ocean perch TAC allocated to vessels participating in the Amendment 80 limited access fishery in the Central Aleutian District of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,700 mt and is setting aside the remaining 111 mt as incidental catch to support other groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch by vessels participating in the Amendment 80 limited access fishery in the Central Aleutian District of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific ocean perch by vessels participating in the Amendment 80 limited access fishery in the Central Aleutian District of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 21, 2009.

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

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

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

Dated: October 22, 2009.

**Emily H. Menashes,**

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

[FR Doc. E9–25800 Filed 10–22–09; 4:15 pm]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 0810141351–9087–02]**

**RIN 0648–XS59**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch by Vessels in the Amendment 80 Limited Access Fishery in the Western Aleutian District of the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific ocean perch by vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2009 Pacific ocean perch allocation specified for vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 22, 2009, through 2400 hrs, A.l.t., December 31, 2009.

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

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

The 2009 Pacific ocean perch TAC allocated to vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI is 3,020 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2009 Pacific ocean perch TAC allocated to vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 2,870 mt and is setting aside the remaining 150 mt as incidental catch to support other groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch by vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific ocean perch by vessels participating in the Amendment 80 limited access fishery in the Western Aleutian District of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 21, 2009.

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

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

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

Dated: October 22, 2009

**Emily H. Menashes,**

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

[FR Doc. E9–25801 Filed 10–22–09; 4:15 pm]

**BILLING CODE 3510–22–S**

# Proposed Rules

Federal Register
Vol. 74, No. 206
Tuesday, October 27, 2009

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.

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 220

**[Release Nos. 33–9071A; 34–60798A; IC–28943A; File No. S7–25–09]**

**RIN 3235–AK45**

### Concept Release on Possible Rescission of Rule 436(g) Under the Securities Act of 1933

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Concept release; request for comments; correction.

**SUMMARY:** This document corrects the file number in the preamble to a concept release on possible rescission of rule 436(g) under the Securities Act of 1933 published in the **Federal Register** of Thursday, October 15, 2009 (74 FR 53114). The file number should read as set forth above.

**FOR FURTHER INFORMATION CONTACT:** Questions concerning this correction should be directed to Linda Cullen, Office of the Secretary, at (202) 551–5402.

**Correction**

In FR Doc. E9–24547 published on October 15, 2009, (74 FR 53114) beginning on page 53114, make the following corrections:

1. On page 53114, second column, in the **ADDRESSES** section, second bullet under Electronic Comments, 3rd line, revise ''S7–21–09'' to read ''S7–25–09''; and

2. On page 53114, in the second column, in the **ADDRESSES** section, under Paper Comments, 7th line, revise ''S7–21–09'' to read ''S7–25–09''.

Dated: October 22, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–25811 Filed 10–26–09; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 229, 239, 240, 249 and 274

**[Release Nos. 33–9070A; 34–60797A; IC–28942A; File No. S7–24–09]**

**RIN 3235–AK41**

### Credit Ratings Disclosure

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule; correction.

**SUMMARY:** This document corrects the file number in the preamble to a proposed rule regarding credit ratings disclosure published in the **Federal Register** of Thursday, October 15, 2009 (74 FR 53086). The file number should read as set forth above.

**FOR FURTHER INFORMATION CONTACT:** Questions concerning this correction should be directed to Linda Cullen, Office of the Secretary, at (202) 551–5402.

**Correction**

In FR Doc. E9–24546 published on October 15, 2009, (74 FR 53086) beginning on page 53086, make the following corrections:

1. On page 53086, first column, in the **ADDRESSES** section, second bullet under Electronic Comments, 3rd line, revise ''S7–20–09'' to read ''S7–24–09''; and

2. On page 53086, first column, in the **ADDRESSES** section, under Paper Comments, 2nd line from the bottom revise ''S7–20–09'' to read ''S7–24–09''; and

3. On page 53103, first column, second paragraph, 12th and 8th lines from the bottom, revise ''S7–20–09'' to read ''S7–24–09''.

Dated: October 22, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–25813 Filed 10–26–09; 8:45 am]

**BILLING CODE 8011–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–130200–08]**

**RIN 1545–BI09**

### Election of Reduced Research Credit Under Section 280C(c)(3); Hearing Cancellation

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

**ACTION:** Cancellation of notice of public hearing on proposed rulemaking.

**SUMMARY:** This document cancels a public hearing on proposed rulemaking that amends the regulations concerning taxpayers who make the election to claim the reduced research credit. The proposed regulations simplify how taxpayers make the election and affect taxpayers that claim the research credit.

**DATES:** The public hearing, originally scheduled for November 4, 2009, at 10 a.m., is cancelled.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Hurst of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration), at *Richard.A.Hurst@irscounsel.treas.gov.*

**SUPPLEMENTARY INFORMATION:** A notice of public hearing that appeared in the **Federal Register** on Thursday, July 16, 2009 (74 FR 34523), announced that a public hearing was scheduled for November 4, 2009, at 10 a.m., in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 280C of the Internal Revenue Code.

The public comment period for these regulations expired on October 14, 2009. Outlines of topics to be discussed at the hearing were due on October 16, 2009. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Tuesday, October 20, 2009, the taxpayer, who wished to present oral comments, has requested to withdraw. Therefore, the

public hearing scheduled for November 4, 2009, is cancelled.

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E9–25743 Filed 10–26–09; 8:45 am]

**BILLING CODE 4830–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 261

**[EPA–HQ–RCRA–2003–0004; FRL–8973–2]**

**RIN 2050–AE51**

## Hazardous Waste Management System: Identification and Listing of Hazardous Waste: Conditional Exclusion From Hazardous Waste and Solid Waste for Solvent-Contaminated Industrial Wipes

**AGENCY:** Environmental Protection Agency.

**ACTION:** Data availability, management approaches, and request for comment.

**SUMMARY:** This notice of data availability (NODA) invites comments on a revised risk analysis supporting the Environmental Protection Agency's (EPA) proposed revisions to the Resource Conservation Recovery Act (RCRA) hazardous waste regulations governing the management of solvent-contaminated wipes. The revised analysis addresses public comments received on the risk screening analysis conducted on EPA's 2003 **Federal Register** proposal to exclude solvent-contaminated wipes from the RCRA definitions of solid and hazardous waste. To address these comments, EPA updated the data, models, and approach used in the risk analysis and then had the product peer reviewed by outside experts. The revised risk analysis, as well as the peer review comments and our response to those comments are available in the docket for this NODA. The NODA also invites comment on specific issues in light of the results of the revised risk analysis.

**DATES:** Comments must be received within December 28, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2003–0004 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov*, Attention Docket No. EPA–HQ–RCRA–2003–0004.
- *Fax:* 202–566–9744, Attention Docket No. EPA–HQ–RCRA–2003–0004.
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Resource Conservation and Recovery Act (RCRA) Docket, 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket No. EPA–HQ–RCRA–2003–0004. Please include 2 copies.
- *Hand Delivery:* Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, Attention Docket No. EPA–HQ–RCRA–2003–0004. Such deliveries are only accepted during the docket's normal hours, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–RCRA–2003–0004. 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 send information you consider CBI or that is otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment direct 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 send 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 send. If EPA cannot read your comment because of technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For more information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Resource Conservation and Recovery Act (RCRA) 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 for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

**FOR FURTHER INFORMATION CONTACT:** Teena Wooten, Office of Resource Conservation and Recovery (ORCR), (703) 308–8751, *wooten.teena@epa.gov.* Direct mail inquiries to the U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, (Mailstop 5304P), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

This action may affect up to 164,000 entities in at least 15 industries involved in the use and handling of solvent-contaminated wipes. These industries include, but are not limited to:

| Industry |
|---|
| 1. Printing manufacturing. |
| 2. Chemical and allied products manufacturing. |
| 3. Plastics and rubber products manufacturing. |
| 4. Fabricated metal products manufacturing. |
| 5. Industrial machinery and equipment manufacturing. |
| 6. Electronics and computers manufacturing. |
| 7. Transportation equipment manufacturing. |
| 8. Furniture and fixture manufacturing. |
| 9. Auto dealers (retail trade). |
| 10. Publishing (printed matter). |
| 11. Business services. |
| 12. Auto repair and maintenance. |
| 13. Military bases. |
| 14. Solid waste services. |
| 15. Industrial launderers. |

This list is not intended to be an exhaustive list, but rather provides a guide for readers regarding entities likely to be covered by this action. This list includes the types of entities that EPA is now aware of that could potentially be covered by this action. Other types of entities not listed above could also be addressed by this action. If you have any questions about the

applicability of this action to a particular entity or industry, consult the individual listed above in the **FOR FURTHER INFORMATION CONTACT** Section.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not send CBI information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. As well as one complete version of the comment that includes information claimed as CBI, send a copy of the comment that does not contain the information claimed as CBI for inclusion in the public docket. Information so marked will not be disclosed, except under procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When sending comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in enough detail to allow reproduction.
- Provide specific examples to explain your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to send your comments by the comment period deadline identified.

The contents of this notice are listed in the following outline:

I. Background
A. Introduction
B. November 2003 Proposed Rule Standards and Approach
C. Comments on the 2003 Proposal
II. Methodology and Results of the Revised Risk Analysis
A. Introduction
B. Were the Documents Peer Reviewed Before Issuing this Notice?
C. How were the Landfill Loadings for Solvent-Contaminated Wipes Determined?
D. How were the Risk-Based Mass Loadings Calculated?
E. How were the Risk-Based Mass Loadings Compared to the Solvent-Quantity Loadings?
F. What are the Results for the Comparison of the Loading Estimates?
G. Request for Comment
III. Discussion and Request for Comment on Management Approaches and Risk Analysis Findings
IV. Conclusion

## I. Background

*A. Introduction*

A wide variety of industries use wipes (*i.e.,* rags, shop towels, disposable wipes and paper towels, collectively called ''wipes'') for cleaning and degreasing. The wipes are handled in various ways. For example, wipes may be used once or several times before they are thrown away, while other wipes are used, laundered, and reused multiple times. During cleaning and degreasing operations, these wipes may become contaminated with solvents, as well as with other materials (*e.g.,* paints, varnishes, waxes, metal shavings, inks, dirt). When discarded, spent wipes are considered hazardous waste under the Federal hazardous waste regulations if the wipes exhibit a hazardous waste characteristic under 40 CFR part 261, subpart C or contain a solvent listed in 40 CFR 261.31 (that is, the solvents included in RCRA waste codes F001 through F005).

Members of the regulated community petitioned EPA to remove solvent-contaminated wipes from the hazardous waste regulations. The petitioners argued that when small amounts of solvent are used on each wipe, minimal risk occurs from the disposal of such wipes in municipal solid waste landfills (MSWLF). Thus, they viewed the required disposal of the solvent-contaminated wipes in RCRA Subtitle C hazardous waste facilities as overregulation. Industrial laundries presented similar arguments and requested that the solvent-contaminated wipes they wash before returning them to their customers for reuse be excluded from the definition of solid waste. After a review of the petitions, subsequent industry requests and information, and internal EPA analysis, the Agency decided to propose exclusions from the RCRA definition of solid waste for solvent-contaminated wipes sent to a laundry or dry cleaner and from the definition of hazardous waste for solvent-contaminated wipes sent to a landfill or combustion facility, provided certain conditions were met. We published the proposed changes in the November 20, 2003, **Federal Register** (68 FR 65586). The result of this proposal, if finalized, would reduce the regulatory burden on users and handlers of solvent-contaminated wipes. In support of the proposed regulatory change, we completed a risk screening analysis to evaluate the potential risk at MSWLFs from the disposal of solvent-contaminated wipes and industrial laundry sludge.

*B. November 2003 Proposed Rule Standards and Approach*

To evaluate the appropriate regulatory status for solvent-contaminated wipes, we considered the risks to the environment and public health from the management of solvent-contaminated wipes and wastewater treatment sludge from laundries (laundry sludge) in MSWLFs. This was done by conducting a screening analysis to determine the constituent-specific risks from landfilling wipes and laundry sludge contaminated with the F001–F005 listed (40 CFR 261.31) spent solvents. Then we estimated the risks from exposure to the 30 F001–F005 listed solvents potentially used on wipes, assuming disposal in an unlined MSWLF. Specifically, we looked at potential risks from inhalation of the spent solvents volatilizing from the landfill, from ingestion of groundwater contaminated by the spent solvents leaching from the landfill, and from inhalation of the spent solvent vapors released from contaminated groundwater during showering and other such uses. Section V of the Technical Background Document for the proposed rule [Docket EPA–HQ–RCRA–2003–0004] provides details on the risk screening analysis conducted for the 2003 proposed rule.

*C. Comments on the 2003 Proposal*

During the comment period on the proposed rule, we received substantive comments on the risk screening analysis and solvent loading calculations from 23 commenters. In addition to public review and comment, we received comments from outside peer reviewers. Both the public and the peer reviewers questioned the validity of the risk screening analysis and the modeling assumptions. These comments are available in EPA's Docket No. EPA–HQ–RCRA–2003–0004.

## II. Methodology and Results of the Revised Risk Analysis

*A. Introduction*

In response to the comments received from the peer reviewers and the public on the risk screening analysis used to support the proposed rule, we decided to revisit our risk analysis. Based on this

review, we determined that a more robust risk analysis was required to adequately determine the potential risk from disposal of solvent-contaminated wipes and laundry sludge in MSWLFs, also referred to in this NODA as landfills or non-hazardous waste landfills. We have thus completed a revised risk analysis which is more robust and more sophisticated than the original risk screening analysis. The revised risk analysis includes updated data and information, a new model to evaluate the behavior of solvents in a landfill, revised fate and transport modeling, including additional probabilistic modeling, uncertainty and sensitivity analyses, and an improved approach to compare the solvent quantity estimates to the risk-based solvent levels. Because so much of the revised risk analysis is new, we believe it appropriate to make it available for public comment before making decisions on the final rule.

The revised risk analysis estimates the amount of each F-listed solvent that is present in solvent-contaminated wipes and laundry sludge disposed of in MSWLFs. We compared these amounts to the quantities of spent solvents that may be disposed of in MSWLFs without presenting unacceptable risks to human health and the environment (risk-based mass loadings). The revised risk analysis consists of three separate documents, which are described generally in this NODA. The documents are:

—''Landfill Loadings Calculations for Disposed Solvent-Contaminated Wipes and Laundry Sludge Managed in Municipal Landfills''

—''Risk-Based Mass Loading Limits for Solvents in Disposed Wipes and Laundry Sludges Managed in Municipal Landfills''

—''F001–F005 Solvent-Contaminated Wipes and Laundry Sludge: Comparison of Landfill Loading Calculations and Risk-Based Mass Loading Limits''

For more details about the revised risk analysis, please *see* the above documents in the Docket (EPA–HQ–RCRA–2003–0004).

The discussion below summarizes our revised risk analysis for disposal of the solvent-contaminated wipes and laundry sludge in landfills.

### *B. Were the Documents Peer Reviewed before Issuing this Notice?*

The revised risk analysis will be used to support EPA's rulemaking to the RCRA hazardous waste regulations governing the management of solvent-contaminated wipes. Under our peer review policy, risk analyses used to support rulemaking decisions are influential scientific information. Therefore, we conducted an external peer review in accordance with both EPA's peer review policy and the Office of Management and Budget's (OMB's) Final Information Quality Bulletin for Peer Review. We asked the peer reviewers to conduct a comprehensive review of the risk analysis. The peer reviewers were asked to respond to a set of questions, which are included in the public docket for this NODA addressing the technical basis of the approaches we used and to prepare a report highlighting their comments and recommendations. The peer reviewers suggested clarifications in several sections of the ''Landfill Loadings Calculations for Disposed Solvent-Contaminated Wipes and Laundry Sludge Managed in Municipal Landfills'' document. One reviewer questioned the method chosen to determine the uncertainty/variability distribution, while two reviewers asked for more information on determining the number of generators using wipes. The reviewers also suggested that EPA review its discussion on sensitivity analysis. For the ''Risk-Based Mass Loading Limits for Solvents in Disposed Wipes and Laundry Sludges Managed in Municipal Landfills'' document, the reviewers recommended more data and discussion on the model methodology and results. EPA revised these documents incorporating the peer reviewers' comments, where necessary and appropriate. The docket contains the individual peer reviewer reports, EPA's response to the peer reviewers' comments, and supporting documents for the peer reviews.[1] For more information about the peer review process, *see* EPA's Peer Review Handbook at *http://www.epa.gov/iris/Peer_Review_Handbook_2006_3rd_edition.pdf.*

### *C. How were the Landfill Loadings for Solvent-Contaminated Wipes Determined?*

We began the evaluation by looking at the 30 solvents listed in 40 CFR 261.31 (F001–F005). Through literature review and site visits, we eliminated 10 of these 30 solvents[2] from the analysis. Of the 10 eliminated solvents, 5 are ozone-depleting or present other serious hazards and are therefore banned or restricted from use. The other 5 solvents eliminated from the analysis may have been used on wipes in the past; however, our research found that these solvents are currently not used or are used only in limited quantities in conjunction with wipes. The Agency solicits comment on this finding.

After identifying the remaining 20 solvents[3] to evaluate, we used both deterministic (point-value) and Monte Carlo (probabilistic) methods in the analysis. We estimated the number of generators and the number of wipes used by those generators. Few generators have the same solvent use practices or use the same number of wipes. To account for these differences, our revised risk analysis included an assessment of the uncertainty using empirical data-based probability distributions in a Monte Carlo analysis. We conducted a separate sensitivity analysis to assess the influence that each input parameter has on the result. These results identify the most and least influential assumptions. We estimated the amount of solvent that could be on a wipe or in laundry sludge before disposal and then estimated the number of generators potentially disposing of solvent-contaminated wipes or laundry sludge into a single MSWLF. Through our calculations, we derived estimated landfill loadings for the solvents. The full report, ''Landfill Loadings Calculations For Disposed Solvent-Contaminated Wipes and Laundry Sludge Managed in Municipal Landfills'' describes the assumptions made, methodologies used, and the results of the analysis. The Docket (EPA–HQ–RCRA–2003–0004) for this NODA contains this document.

### *D. How were the Risk-Based Mass Loadings Calculated?*

We also developed a methodology to estimate the amount of hazardous spent solvents that could be disposed of in MSWLFs (unlined and composite lined), and be protective of human health and the environment at the point of exposure. These ''allowable amounts'' are risk-based mass loading rates expressed in kg of each spent solvent

[1] The ''F001–F005 Solvent-Contaminated Wipes and Laundry Sludge: Comparison of Landfill Loading Calculations and Risk-Based Mass Loading Limits'' document was developed after completion of the peer reviews.

[2] Carbon tetrachloride, 1,1,1-Trichloroethane, Trichlorofluoromethane, Dichlorodifluoromethane, 1,1,2-Trichlorotrifluorethane (ozone depleting substances), Carbon disulfide, ethyl ether, Nitrobenzene, 2-Nirtopropane, Pyridine (not know to be used as solvents in wipes applications). For the discussion on the solvents, see the ''Landfill Loadings Calculations for Disposed Solvent-Contaminated Wipes and Laundry Sludge Managed in Municipal Landfills'' Section 1.2.1 and 1.2.2.

[3] Acetone, benzene, butanol, chlorobenzene, cresols (total), cyclohexanone, dichlorobenzene, 1, 2-ethoxyethanol, 2-ethyl acetate, ethyl benzene, isobutanol, methanol, methyl ethyl ketone, methyl isobutyl ketone, methylene chloride, tetrachloroethylene, toluene, trichloroethane, 1,1,2-trichloroethylene, xylene (mixed isomers).

that can be added to a landfill in a given year. These risk-based mass loading rates were derived from modeling scenarios defined in terms of the solvent, landfill type (*e.g.,* lined or unlined), exposure pathway (*e.g.,* ambient air inhalation), contact media (*e.g.,* groundwater), and receptor (*e.g.,* child or adult). Mass loading rates were estimated for each solvent such that the exposure at the 50th and 90th percentiles of the risk distribution would not exceed the identified risk target criteria, if these materials were disposed of in a MSWLF. The 50th and 90th percentiles are typically used by the Agency to characterize risk. The 90th percentile represents a ''high end'' estimate of individual risk, while the 50th percentile results reflect the central tendency estimate of the risk distribution.[4] For this analysis, the risk criteria were selected so that either 50 or 90 percent of the hypothetical individuals living near a landfill will not be exposed to solvent releases resulting in an excess lifetime cancer risk above 1 chance in 10,000 ($10^{-4}$) through 1 chance in 1,000,000 ($10^{-6}$).[5] For noncancer health effects, we used a hazard quotient (HQ) of one as our risk criterion (the noncancer HQ is defined as the ratio of predicted intake levels to safe intake levels).

We identified the following exposure pathways based on the solubility and volatility of the 20 spent solvents included in the analysis, as well as the operating practices of nonhazardous waste landfills:

(1) Inhalation of ambient air containing spent solvents emitted from the landfill at residential dwellings;

(2) Ingestion of spent solvents that leach from the landfill and migrate through groundwater to residential drinking water wells;

(3) Inhalation of spent solvents during showering and bathing with solvent-contaminated groundwater; and

(4) Dermal contact of spent solvents during showering and bathing with solvent-contaminated groundwater.

A probabilistic approach was used to develop national mass loading rates because landfills that receive solvent-contaminated wipes and laundry sludge could be of varying geometry and located in many different parts of the country. The approach primarily addresses the variability in waste management practices (that is, unlined and composite lined landfills), environmental settings, and exposure-related parameters. We also developed a landfill source model to simulate the solvent-specific air emissions and leachate releases from landfills. The quantity of solvent releases to the air and groundwater were then used as inputs to the air and groundwater fate and transport models.

For each solvent, we calculated risk estimates assuming a unitized mass loading rate (1 kg per year) for each liner type, exposure pathway, and receptor, as well as for the combined exposures associated with groundwater uses. The risk results provide insight into the relative nature of exposures and potential risks that could be associated with the solvent-contaminated wipes disposed of in MSWLFs.

For unlined landfills, the groundwater pathways were always associated with the highest predicted risks at the 50th and 90th percentiles of the distributions. For composite lined landfills, groundwater exposures were associated with the highest risks at the 90th percentile, except for methylene chloride and methyl ethyl ketone, which showed higher risks for the ambient air inhalation pathway. At the 50th percentile, the highest predicted risks were associated with the ambient air inhalation pathway for 16 of the 20 solvents; however, for unlined landfill disposal, the predicted risks were associated more with drinking water.

From this information, we developed solvent-specific risk-based mass loading rates (in kg/yr) that could be disposed of in a MSWLF and meet specific risk criteria and be protective of human health and the environment. The risk-based mass loading rates do not provide direct insight into the potential impacts associated with current management practices. The full report, ''Risk-Based Mass Loading Limits for Solvents in Disposed Wipes and Laundry Sludges Managed in Municipal Landfills'' describes the assumptions made, methodologies used, and the results of the analysis. The Docket for this NODA (EPA–HQ–RCRA–2003–0004) contains this document.

### *E. How were the Risk-Based Mass Loadings Compared to the Solvent-Quantity Loadings?*

To perform a comparison, EPA evaluated a 90th percentile risk criterion for the risk-based mass loading limit to be protective of 90 percent of hypothetically exposed individuals across all of the landfill sites in the United States (Guidance for Risk Characterization, U.S. Environmental Protection Agency, 1995; accessible at *http://www.epa.gov/OSA/spc/pdfs/rcguide.pdf*, which states that ''For the Agency's purposes, high end risk descriptors are plausible estimates of the individual risk for those persons at the upper end of the risk distribution,'' or conceptually, individuals with ''exposure above about the 90th percentile of the population distribution''). As recommended in the Guidance, EPA also evaluated the 50th percentile results as the central tendency estimate of that risk distribution. Thus, we compared the 90th percentile estimate of landfill loading rates (ELLRs) to the 90th percentile of the risk-based mass loading levels (RB–MLLs) to determine whether the ELLRs in landfills that can be attributed to solvent-contaminated wipes and laundry sludge exceeds the RB–MLLs that correspond to selected health-based limits. A similar comparison was conducted at the 50th percentile.

### *F. What are the Results for the Comparison of the Loading Estimates?*

The results for both the ELLR and the RB–MLL are generated from a probabilistic analysis. The results from these two separate calculations are given by a distribution of values. The theoretical risk distribution provides the basis for calculating risk-based mass loading rates for any percentile of that distribution. Based on the risk criteria that EPA evaluated for the wipes analysis, the RB–MLL was identified at the 50th and 90th percentiles of the distribution. These levels represent the allowable mass loading rate (in kg per year) for management of solvent-containing wipes and laundry sludges in a MSWLFs anywhere in the country in any given year.

The comparisons of the ELLRs and RB–MLLs are expressed as ratios, *i.e.,* the 90th percentile ELLRs (kg solvent per year) are divided by the 90th percentile RB–MLLs (kg solvent per year) for a specific solvent to yield ratios. The ELLR is an estimate of the mass loading into the landfill and the RB–MLL is an estimate of the mass loading that would correspond to an exposure equivalent to the chosen risk criterion, or risk ''target.'' Therefore, if the ratio exceeds one, this indicates the degree to which the ELLR exceeds the evaluation criteria used to establish the RB–MLLs (*i.e.,* a cancer risk of $1 \times 10^{-5}$ and an HQ of 1 for noncarcinogenic risk).

The comparison of the 90th percentile values of the ELLRs and the RB–MLLs

[4] *Guidance for Risk Characterization,* U.S. Environmental Protection Agency, 1995.

[5] These risk criteria are consistent with those discussed in EPA's hazardous waste listing determination policy (*see* December 22, 1994; 59 FR 66072). *Also see* 40 CFR 300.430(e)(2)(i)(A)(2), which establishes a cancer risk range of $10^{-4}$ to $10^{-6}$ in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) for responding to releases of hazardous substances under Superfund.

indicates that 8 of the 20 spent solvents could pose potential risks above EPA's evaluated criteria at some risk levels for unlined landfills. The 90th percentile risks for benzene (using the high end cancer risk value only), 1,1,2-trichloroethane, methylene chloride, tetrachloroethylene, and trichloroethylene exceeded the $10^{-5}$ cancer risk criteria. The 90th percentile risks for chlorobenzene, toluene, and xylenes exceeded the criteria for non-cancer health effects (HQ = 1). As expected, the predicted risks for the unlined landfill analysis were always greater than those for the composite-lined landfill analysis. Using the comparison of the 90th percentile results, the potential risks from all solvents examined in the composite-liner scenario, except for tetrachloroethylene, were well below (generally <0.1) the health-based criteria used in this analysis. The value for tetrachloroethylene was 1.1 using the higher end cancer risk value and 0.9 using the lower end cancer risk value. For a more detailed explanation of how the ELLR and RB–MLL were compared, *see* the ''F001–F005 Solvent-Contaminated Wipes and Laundry Sludge: Comparison of Landfill Loading Calculations and Risk Based Mass Loading Limits'' document in the docket for this NODA.

A comparison of the ELLR and RB–MLL central tendency values (50th percentiles), showed that tetrachloroethylene is the only solvent in the unlined landfill scenario that produced a ratio of ELLR to RB–MLL greater than one (using a cancer risk of $1 \times 10^{-5}$ and an HQ of 1) and this value was 1.4 using the higher end cancer risk value; using the lower end cancer risk value, the ratio was 1.2. For the composite liner scenario, all ratios of the 50th percentile ELLRs and RB–MLLs are well below one using these risk criteria.

The ratios from a comparison of the ELLRs and the RB–MLLs for the constituents with carcinogenic risk would change if the RB–MLLs were calculated using a risk criterion different from the $1 \times 10^{-5}$ criterion. If a target risk level of $1 \times 10^{-4}$ were used for calculating the RB–MLLs, the carcinogenic risk for the carcinogens (1,1,2-trichloroethane, benzene, methylene chloride, tetrachloroethylene, and trichloroethylene) would be lower by a factor of ten. Alternatively, if a target risk level of $1 \times 10^{-6}$ were used, the cancer risks for these constituents would be higher by a factor of ten. A comparison of the ELLR and RB–MLL values using the $10^{-4}$ risk criterion for the no-liner scenario would have the effect of lowering the ratios; however, the ratios of 7 of the 8 solvents of potential concern would remain above one at the 90th percentile (the ratio for benzene would be less than one). Using the $10^{-4}$ criterion at the 50th percentile, the ratios for all the solvents would be below one. Using the $10^{-6}$ risk criterion would have the effect of raising the ratios in the unlined landfill scenario for carcinogens, such that the ratios for all these 8 solvents for the 90th percentile results would exceed one by a wider margin. Using the $10^{-6}$ risk criterion, the ratios from the 50th percentile results would increase for the carcinogenic solvents, such that the ratios for tetrachloroethylene and trichloroethylene would exceed one at the 50th percentiles.

For the composite-liner scenario, the ratios for all solvents would be below one (including tetrachloroethylene) at both the 90th and 50th percentiles using the $10^{-4}$ risk criterion. Using the $10^{-6}$ criterion, the ratios for tetrachloroethylene and trichloroethylene at the 90th percentile are above one.

These results differ from our original risk screening analysis for the proposed rule in the following ways:

- The number of solvents that show a potential risk for disposal in an unlined landfill in our risk screening analysis increased by 2 in the revised analysis and the solvents indicating a potential risk also changed.[6]
- In the original risk screening analysis, we did not consider risks from lined landfills. The revised risk analysis does consider risks from composite lined non-hazardous waste landfills.
- In the original risk screening analysis, we did not identify any solvents of concern from laundry sludge. Our revised risk analysis indicates that tetrachloroethylene may be a concern in both solvent-contaminated wipes and laundry sludge disposed of in unlined and composite lined landfills.

*G. Request for Comment*

We are seeking comment on all aspects of the revised risk analysis (landfill loading calculations, risk based mass loading levels, comparison document). In particular, we are seeking comment on:

—The assumptions used;

—Whether the uncertainties are properly acknowledged and mitigated, as appropriate;

—The data used;

—The methodology used; and

—How the agency should consider using the results of the revised risk analysis in its decision-making.

## III. Discussion and Request for Comment on Management Approaches and Risk Analysis Findings

The Agency's November 2003 proposal allowed solvent-contaminated wipes and laundry sludge that met certain conditions to be sent either to a MSWLF or to another nonhazardous waste landfill that meets the standards under 40 CFR part 257, subpart B. We did not discuss the specific characteristics of MSWLFs receiving solvent-contaminated wipes or laundry sludge, specifically whether the landfill would be unlined or lined. Because our revised risk analysis indicates that a number of solvents show a potential for risk in unlined landfills (using the 90th percentile results and a risk criterion of $1 \times 10^{-5}$ for cancer risk), we are considering two additional approaches for managing solvent-contaminated wipes and laundry sludge in landfills.

The first approach would allow the disposal of solvents not showing a risk in any municipal landfill or nonhazardous waste landfill whether lined or unlined. The solvents that indicated a potential risk if disposed of in an unlined landfill[7] could only be disposed in a lined municipal landfill or lined non-hazardous waste landfill. This could be accomplished by requiring disposal in a Subtitle D municipal or industrial landfill unit subject to, or otherwise meeting, the landfill requirements in 40 CFR 258.40(a)(2) and (b).[8][9] The second approach would be to

[6] Solvents in the proposal indicating a potential risk in unlined landfill scenario: Methyl ethyl ketone, methyl isobutyl ketone, nitrobenzene, pyridine, methylene chloride, 2-nitroproane. Solvents from revised risk analysis indicating a potential risk in unlined landfill scenario: benzene, 1,1,2-trichloroethane, chlorobenzene, methylene chloride, tetrachloroethylene, toluene, trichloroethylene, and xylene.

[7] Benzene, 1,1,2-trichloroethane, chlorobenzene, methylene chloride, toluene, trichloroethylene, and xylene.

[8] 40 CFR 258.40(a)(2) states: ''With a composite liner, as defined in paragraph (b) of this section and a leachate collection system that is designed and constructed to maintain less than a 30-cm depth of leachate over the liner. 40 CFR 258.40(b) states ''For purposes of this section, composite liner means a system consisting of two components; the upper component must consist of a minimum 30-mil flexible membrane liner (FML), and the lower component must consist of at least a two-foot layer of compacted soil with a hydraulic conductivity of no more than $1 \times 10^{-7}$cm/sec. FML components consisting of high density polyethylene (HDPE) shall be at least 60-mil thick. The FML component must be installed in direct and uniform contact with the compacted soil component.''

[9] Solvent-contaminated wipes, while not required, could also be disposed of in a hazardous waste landfill meeting the landfill requirements in 40 CFR 264.301 or 265.301.

establish conditions that allow all solvent-contaminated wipes, no matter which solvent they contain, except perhaps tetrachloroethylene, to be sent to a Subtitle D municipal or industrial landfill unit subject to, or otherwise meeting, the landfill requirements in § 258.40(a)(2) and (b). This approach could be simpler since the generator would not need to separate his wipes and send them to separate disposal locations. We are requesting comment on these two approaches.

The risk analysis using 90th percentile results also indicates that tetrachloroethylene has a risk potential in both unlined landfills and composite lined landfills for both solvent-contaminated wipes and laundry sludge (using a cancer risk criterion of $1 \times 10^{-5}$). Using the higher end cancer risk value in our analysis, the ratio of the ELLR to the RB–MLL for tetrachloroethylene was 1.1, while using the lower end cancer risk value the ratio was 0.9. If we rounded the numbers, the ratios would both be 1.0. Since we generally used a conservative approach in the risk analysis, we are asking for comment on whether our results represent a risk of concern.

Even though the risk may be borderline, we are considering alternative management conditions for tetrachloroethylene to address this potential risk. One approach is to prohibit disposal of tetrachloroethylene, either on solvent-contaminated wipes or in laundry sludge that exhibits the tetrachloroethylene toxicity characteristic (TC) in nonhazardous waste landfills. Another approach could be eliminating wipes contaminated with tetrachloroethylene from the scope of the final exclusions for solvent-contaminated wipes, or eliminating wipes contaminated with tetrachloroethylene that exhibit the TC in the scope of the final exclusions for solvent-contaminated wipes. We are requesting comment on these approaches or other possible alternatives.

## IV. Conclusion

We will consider comments received on the revised risk analysis and then modify the analysis as appropriate. The final risk analysis, comments submitted in response to Section III of this notice, and comments submitted in response to the November 2003 proposed rule will be considered as we develop a final rule for the management of solvent-contaminated wipes.

Readers should note that other than the specific issues identified in this NODA, no other issues discussed in or related to the November 20, 2003, proposed rule are open for further comment and the Agency will not respond to any comments received on any issues not identified in this NODA.

Dated: October 15, 2009.

**Mathy Stanislaus,**

*Assistant Administrator, Office of Solid Waste and Emergency Response.*

[FR Doc. E9–25812 Filed 10–26–09; 8:45 am]

BILLING CODE 6560–50–P

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## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 67

**[Docket ID FEMA–2008–0020; Internal Agency Docket No. FEMA–B–1075]**

## Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

**DATES:** Comments are to be submitted on or before January 25, 2010.

**ADDRESSES:** The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1075, to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2820, or (e-mail) *kevin.long@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

*National Environmental Policy Act.* This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act.* As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

*Executive Order 12866, Regulatory Planning and Review.* This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

*Executive Order 13132, Federalism.* This proposed rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This proposed rule meets the

applicable standards of Executive Order 12988.

**List of Subjects in 44 CFR Part 67**

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 67.4 [Amended]**

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| **Peoria County, Illinois, and Incorporated Areas** | | | | |
| Illinois River | Peoria/Fulton County Boundary | +455 | +454 | Unincorporated Areas of Peoria County, City of Pekin, City of Peoria, Village of Bartonville, Village of Kingston Mines, Village of Mapleton. |
| | Approximately 1.27 Miles downstream of the Peoria and Pekin Union Railroad. | +459 | +458 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Pekin**
Maps are available for inspection at City Hall, 111 South Capital Street, Pekin, IL 61554.
**City of Peoria**
Maps are available for inspection at City Hall, 419 Fulton Street, Peoria, IL 61602.
**Unincorporated Areas of Peoria County**
Maps are available for inspection at the Planning and Zoning Department, 324 Main Street, Room 301, Peoria, IL 61602.
**Village of Bartonville**
Maps are available for inspection at the Village Hall, 5912 South Adams Street, Bartonville, IL 61607.
**Village of Kingston Mines**
Maps are available for inspection at the Planning and Zoning Department, 324 Main Street, Room 301, Peoria, IL 61602.
**Village of Mapleton**
Maps are available for inspection at the Planning and Zoning Department, 324 Main Street, Room 301, Peoria, IL 61602.

| | | | | |
|---|---|---|---|---|
| **Clayton County, Iowa, and Incorporated Areas** | | | | |
| Mississippi River | Clayton/Dubuque County boundary | None | +616 | Unincorporated Areas of Clayton County, City of Clayton, City of Guttenberg, City of Marquette, City of McGregor, City of North Buena Vista. |
| | Clayton/Allamakee County boundary, approximately 2.5 miles upstream of the Marquette-Joliet U.S. Route 18 Bridge. | None | +629 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Clayton**
Maps are available for inspection at 302 Main Street, Clayton, IA 52049.
**City of Guttenberg**
Maps are available for inspection at 502 South 1st Street, Guttenberg, IA 52052.
**City of Marquette**
Maps are available for inspection at 88 North Street, Marquette, IA 52158.
**City of McGregor**
Maps are available for inspection at 416 Main Street, McGregor, IA 52157.
**City of North Buena Vista**
Maps are available for inspection at 502 Walnut Street, North Buena Vista, IA 52066.

**Unincorporated Areas of Clayton County**

Maps are available for inspection at 100 Sandpit Road, Elkader, IA 52043.

**Jackson County, Iowa, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Deutel Hollow Branch 2 | At the confluence of Deutel Hollow Branch 2 and Mill Creek. | None | +613 | City of Bellevue. |
| | Approximately 170 feet upstream of Park Street | None | +623 | |
| Deutel Hollow Main Branch | At the confluence of Deutel Hollow Main Branch and Mill Creek. | None | +614 | City of Bellevue. |
| | Immediately downstream of Maple Street | None | +680 | |
| Mill Creek | At the confluence of Mill Creek and Mississippi River | None | +602 | Unincorporated Areas of Jackson County. |
| | Approximately 0.28 mile upstream of Riverview Street | None | +604 | |
| | Approximately 0.74 mile downstream of State Highway 62. | None | +614 | |
| | Approximately 0.25 mile upstream of State Highway 62. | None | +629 | |
| Mississippi River | Clinton/Jackson County boundary | None | +594 | Unincorporated Areas of Jackson County. |
| | Approximately 11 miles upstream of Lock & Dam 12 | None | +603 | |
| Prairie Creek | Approximately 150 feet downstream of South Main Street. | None | +677 | City of Maquoketa, Unincorporated Areas of Jackson County. |
| | Just downstream of U.S. Route 61 | None | +681 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Bellevue**
Maps are available for inspection at 106 North 3rd Street, Bellevue, IA 52031.
**City of Maquoketa**
Maps are available for inspection at 201 East Pleasant Street, Maquoketa, IA 52060.

**Unincorporated Areas of Jackson County**

Maps are available for inspection at 201 West Platt Street, Maquoketa, IA 52060.

**Jones County, Iowa, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Maquoketa River | Approximately 425 feet downstream of U.S. Highway 151. | None | +803 | Unincorporated Areas of Jones County. |
| | Approximately 0.73 mile upstream of U.S. Highway 151. | None | +805 | |
| Unnamed Stream | Approximately 600 feet downstream of U.S. Highway 151. | None | +818 | Unincorporated Areas of Jones County. |

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| | Approximately 250 feet downstream of U.S. Highway 151. | None | +819 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
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**ADDRESSES**

**Unincorporated Areas of Jones County**

Maps are available for inspection at the County Courthouse, 500 West Main Street, Anamosa, IA 52205.

**Barton County, Missouri, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| North Fork Spring River ..... | Approximately 6,200 feet downstream of Village of Lamar Heights corporate limits. | None | +935 | Unincorporated Areas of Barton County, Village of Lamar Heights. |
| | Approximately 600 feet upstream of City of Lamar corporate limits. | None | +942 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**Unincorporated Areas of Barton County**

Maps are available for inspection at 1004 Gulf Street, Room 103, Lamar, MO 64759.

**Village of Lamar Heights**

Maps are available for inspection at 1004 Gulf Street, Room 103, Lamar, MO 64759.

**Henry County, Missouri, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Harry S. Truman Reservoir ... | Shoreline of Harry S. Truman Reservoir ..... | None | +741 | City of Calhoun, City of Brownington, City of Deepwater, City of Hartwell, City of Ladue, City of Urich, Unincorporated Areas of Henry County. |
| Montrose Reservoir ..... | Shoreline of Montrose Reservoir ..... | None | +755 | Unincorporated Areas of Henry County. |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Brownington**

Maps are available for inspection at 100 West Franklin Street, Clinton, MO 64735.

**City of Calhoun**

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |

Maps are available for inspection at 201 East Main Street, Calhoun, MO 65323.

**City of Deepwater**

Maps are available for inspection at 259 Southwest Highway 52, Deepwater, MO 64740.

**City of Hartwell**

Maps are available for inspection at 100 West Franklin Street, Clinton, MO 64735.

**City of Ladue**

Maps are available for inspection at 100 West Franklin Street, Clinton, MO 64735.

**City of Urich**

Maps are available for inspection at 308 Main Street, Urich, MO 64788.

**Unincorporated Areas of Henry County**

Maps are available for inspection at 100 West Franklin Street, Clinton, MO 64735.

**Lafayette County, Missouri, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Missouri River | Approximately U.S. Highway 24 | None | +677 | City of Waverly. |
| | Approximately 1,100 feet upstream of U.S. Highway 24. | None | +678 | |
| Missouri River | Approximately 53,000 feet upstream of U.S. Highway 24. | *686 | +684 | Unincorporated Areas of Lafayette County, City of Lexington, City of Napoleon, City of Wellington. |
| | Approximately 2,825 feet downstream of the county boundaries of Jackson and Lafayette Counties. | *711 | +709 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

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**ADDRESSES**

**City of Lexington**

Maps are available for inspection at 919 Franklin Street, Lexington, MO 64067.

**City of Napoleon**

Maps are available for inspection at 191 West 2nd Street, Napoleon, MO 64074.

**City of Waverly**

Maps are available for inspection at 111 East Kelling Avenue, Waverly, MO 64096.

**City of Wellington**

Maps are available for inspection at 101 East 4th Street, Wellington, MO 64097.

**Unincorporated Areas of Lafayette County**

Maps are available for inspection at 1106 Main Street, Lexington, MO 64067.

**Newton County, Missouri, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Shoal Creek | Approximately 400 feet upstream of the Town of Grand Falls Plaza corporate limits. | *891 | +887 | Town of Grand Falls Plaza. |
| Shoal Creek | Approximately 75 feet downstream of Shoal Creek Estates corporate limits. | None | +898 | Town of Shoal Creek Drive. |
| | Approximately 175 feet upstream of Shoal Creek Drive corporate limits. | None | +903 | |
| Shoal Creek | Approximately 75 feet downstream of Shoal Creek Estates corporate limits. | None | +915 | City of Shoal Creek Estates. |
| Shoal Creek | Approximately 150 feet downstream of Village of Cliff Village corporate limits. | None | +906 | Village of Cliff Village. |
| South Indian Creek | Approximately 300 feet downstream of Ozark Street | None | +1119 | City of Stella. |
| | Approximately 150 feet upstream of Ozark Street | None | +1122 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

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**ADDRESSES**

**City of Shoal Creek Estates**
Maps are available for inspection at 101 South Wood Street, Neosho, MO 64850.
**City of Stella**
Maps are available for inspection at 744 Ozark Street, Stella, MO 64867.
**Town of Grand Falls Plaza**
Maps are available for inspection at 101 South Wood Street, Neosho, MO 64850.
**Town of Shoal Creek Drive**
Maps are available for inspection at 101 South Wood Street, Neosho, MO 64850.
**Village of Cliff Village**
Maps are available for inspection at 101 South Wood Street, Neosho, MO 64850.

**Grand Forks County, North Dakota, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Red River of the North | Approximately 2,137 feet downstream of 13th Avenue NE Extended. | +835 | +837 | City of Grand Forks, Unincorporated Areas of Grand Forks County. |
| | Just downstream of the Southern Grand Forks County limit. | None | +854 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

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**ADDRESSES**

**City of Grand Forks**
Maps are available for inspection at 225 North 4th Street, Grand Forks, ND 58506.

**Unincorporated Areas of Grand Forks County**

Maps are available for inspection at 151 South 4th Street, Grand Forks, ND 58506.

**Butler County, Ohio, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Dicks Creek | Approximately 500 feet upstream of Main Street | None | +631 | City of Middletown, City of Monroe, Unincorporated Areas of Butler County. |
| | Approximately 1,270 feet upstream of Cincinnati-Dayton Road. | None | +660 | |
| Elk Creek | Approximately 0.7 mile downstream of Howe Road | None | +648 | City of Trenton. |
| | Approximately 0.5 mile downstream of Howe Road | None | +654 | |
| Four Mile Creek | Approximately 1,250 feet upstream of Bonham Road | None | +796 | City of Oxford. |
| Four Mile Creek | Approximately 0.7 mile upstream of Seven Mile Avenue. | None | +600 | Village of New Miami. |
| | Approximately 0.8 mile upstream of Seven Mile Avenue. | None | +601 | |
| GM Ditch | At the confluence of GM Ditch with Pleasant Run | +595 | +596 | City of Fairfield. |
| | Approximately 1,200 feet upstream of Symmes Road | None | +605 | |
| Great Miami River | Approximately 0.5 mile downstream of State Route 73 | None | +637 | City of Middletown. |
| | Approximately 1.5 mile upstream of State Route 4 | None | +661 | |
| Great Miami River | Approximately 1.4 mile upstream of the confluence of Great Miami River with Gregory Creek. | None | +626 | City of Trenton. |
| Jackson Ditch | Approximately 1,000 feet downstream of Wehr Road | None | +627 | Unincorporated Areas of Butler County. |
| | Approximately 1,840 feet upstream of Trenton Road | None | +649 | |
| Jackson Ditch East Fork | At the confluence of Jackson Ditch East Branch of East Fork with Jackson Ditch East Fork. | None | +701 | Unincorporated Areas of Butler County. |

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| | Approximately 110 feet upstream of Howe Road ..... | None | +750 | |
| Jackson Ditch East Fork ..... | At the confluence of Jackson Ditch East Fork with Jackson Ditch. | None | +651 | Unincorporated Areas of Butler County, City of Trenton. |
| | Approximately 80 feet upstream of Howe Road ..... | None | +756 | |
| Jackson Ditch West Fork ..... | At the confluence of Jackson Ditch West Fork with Jackson Ditch. | None | +651 | Unincorporated Areas of Butler County. |
| | Approximately 130 feet upstream of Howe Road ..... | None | +807 | |
| Mill Creek ..... | Just downstream of Seward Road ..... | None | +606 | City of Hamilton. |
| | Approximately 190 feet upstream of Seward Road ..... | None | +609 | |
| Millers Creek ..... | Approximately 500 feet downstream of the railroad .... | None | +652 | City of Middletown. |
| | Approximately 400 feet downstream of Cincinnati-Dayton Road. | None | +654 | |
| Pleasant Run ..... | Just upstream of Groh Lane ..... | +570 | +566 | City of Fairfield. |
| | Just downstream of East River Road ..... | +581 | +584 | |
| | Just upstream of Nilles Road ..... | +597 | +598 | |
| | Just upstream of John Gray Road ..... | +663 | +665 | |
| Pleasant Run Branch No. 4 .. | At the confluence of Pleasant Run Branch No. 4 with Pleasant Run. | +607 | +610 | City of Fairfield. |
| | Just upstream of Resor Road ..... | None | +634 | |
| Shakers Creek ..... | At the confluence of Shakers Creek with Dicks Creek | None | +650 | City of Middletown. |
| | Just downstream of Cincinnati-Dayton Road ..... | None | +654 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Fairfield**
Maps are available for inspection at 5350 Pleasant Avenue, Fairfield, OH 45014.
**City of Hamilton**
Maps are available for inspection at 20 High Street, Hamilton, OH 45011.
**City of Middletown**
Maps are available for inspection at One Donham Plaza, Middletown, OH 45042.
**City of Monroe**
Maps are available for inspection at 233 South Main Street, Monroe, OH 45050.
**City of Oxford**
Maps are available for inspection at 101 East High Street, Oxford, OH 45056.
**City of Trenton**
Maps are available for inspection at 11 East State Street, Trenton, OH 45067.
**Unincorporated Areas of Butler County**
Maps are available for inspection at 130 High Street, 3rd Floor, Hamilton, OH 45011.
**Village of New Miami**
Maps are available for inspection at 268 Whitaker Avenue, Hamilton, OH 45011.

**Warren County, Ohio, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Hoff Run ..... | Just upstream of the confluence of Hoff Run with Great Miami River. | None | +613 | City of Mason. |
| | Approximately 1,535 feet upstream of Eagle View Drive. | None | +829 | |
| Little Miami River ..... | Approximately 1.6 mile upstream of South Main Street. | None | +634 | Village of South Lebanon. |
| Muddy Creek ..... | Approximately 0.4 mile downstream of Mason-Morrow-Millgrove Road. | None | +656 | City of Mason. |
| | Just downstream of Tylersville Road ..... | +801 | +803 | |
| Muddy Creek Branch No. 1 .. | Approximately 575 feet downstream of U.S. Route 42 | +741 | +742 | City of Mason. |
| | Approximately 650 feet upstream of Mason Road ..... | +821 | +819 | |
| Pine Run ..... | Approximately 400 feet downstream of Kings Mill Road. | +754 | +752 | City of Mason. |
| | Approximately 0.5 mile upstream of Tylersville Road .. | None | +857 | |

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| Satterthwaites Run | Approximately 1,400 feet upstream of U.S. Route 42 | None | +767 | Unincorporated Areas of Warren County. |
| | Approximately 1,465 feet upstream of U.S. Route 42 | None | +768 | |
| Turtle Creek | Approximately 530 feet upstream of Mason-Morrow-Millgrove Road. | None | +634 | Village of South Lebanon. |
| | Approximately 1,190 feet downstream of Interstate 71 | None | +635 | |
| Twin Creek No. 2 | Just upstream of Pennyroyal Road | None | +874 | Unincorporated Areas of Warren County. |
| | Approximately 1,250 feet upstream of Pennyroyal Road. | None | +882 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Mason**
Maps are available for inspection at 202 West Main Street, Mason, OH 45040.

**Unincorporated Areas of Warren County**
Maps are available for inspection at 406 Justice Drive, Room 167, Lebanon, OH 45036.

**Village of South Lebanon**
Maps are available for inspection at 99 North High Street, Lebanon, OH 45065.

**Columbia County, Oregon, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Nehalem River | Approximately 0.29 mile upstream of State Highway 47 bridge. | +610 | +613 | City of Vernonia, Unincorporated Areas of Columbia County. |
| | Approximately 0.46 mile downstream of Sword Place | +621 | +623 | |
| Rock Creek | Approximately at confluence with Nehalem River | +618 | +620 | City of Vernonia, Unincorporated Areas of Columbia County. |
| | Approximately 0.72 mile upstream of Bridge Street | +621 | +622 | |
| Rock Creek Overbank | Approximately at confluence of Rock Creek | +615 | +617 | City of Vernonia. |
| | Approximately 400 feet upstream of Washington Avenue. | +619 | +621 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Vernonia**
Maps are available for inspection at 1001 Bridge Street, Vernonia, OR 97064.

**Unincorporated Areas of Columbia County**
Maps are available for inspection at 230 Strand Street, St. Helens, OR 97051.

**Washington County, Rhode Island (All Jurisdictions)**

| | | | | |
|---|---|---|---|---|
| Mattatuxet River | At the confluence with Pettaquamscutt River | +11 | +10 | Town of North Kingstown. |
| | At downstream side of Gilbert Stuart Dam | +11 | +10 | |

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| Narragansett Bay (Mill Creek). | From a point approximately 500 feet northwest of the intersection of Asqah Drive and Camp Avenue, extending northeast to Quonset Road and following the unnamed tributary to Mill Creek, to a point approximately 600 feet east of the intersection of Camp Avenue and Gateway Road. | None | +12 | Town of North Kingstown. |
| Pawcatuck River | Approximately 70 feet upstream of Ashaway Road (State Route 3). | None | +33 | Town of Hopkinton, Town of Richmond. |
| | Approximately 1,518 feet upstream of Biscuit City Road. | None | +89 | |
| Pettaquamscutt River | At Town of North Kingstown/South Kingstown/Narragansett corporate limits (approximately 5,060 feet upstream of Bridgetown Road). | +11 | +10 | Town of North Kingstown. |
| | At the confluence with Mattatuxet River | +11 | +10 | |
| Tomaquag Brook | At the confluence with Pawcatuck River | None | +35 | Town of Hopkinton. |
| | Approximately 1,210 feet downstream of Chase Hill Road. | +33 | +35 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**Town of Hopkinton**
Maps are available for inspection at the Town Hall, 1 Town House Road, Hopkinton, RI 02833.
**Town of North Kingstown**
Maps are available for inspection at the Department of Public Works and Engineering, 2050 Davisville Road, North Kingstown, RI 02852.
**Town of Richmond**
Maps are available for inspection at the Town Hall, 5 Richmond Townhouse Road, Wyoming, RI 02898.

**Crawford County, Wisconsin, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Baker Creek | Approximately 590 feet downstream of confluence with the Unnamed Tributary to Baker Creek. | +759 | +758 | Village of Soldiers Grove. |
| | Approximately 230 feet downstream of U.S. Highway 61. | +777 | +778 | |
| Kickapoo River | Just over 1 mile upstream of State Highway 179 | None | +672 | Village of Steuben, Unincorporated Areas of Crawford County. |
| | 3,190 feet upstream of Bridge Street | None | +676 | |
| | 1,540 feet upstream of County Highway S | None | +695 | |
| | Approximately 1.75 mile upstream of State Highway 171. | None | +705 | |
| | Approximately 0.8 mile upstream from Trout Creek Road. | None | +734 | |
| Mississippi River | At River Mile Marker 636 | +630 | +629 | Village of De Soto, City of Prairie Du Chien, Unincorporated Areas of Crawford County, Village of Ferryville, Village of Lynxville. |
| | Approximately 4.25 miles upstream from State Highway 82. | +634 | +633 | |
| Unnamed Tributary to Baker Creek. | 3,075 feet upstream of U.S. Highway 61 | None | +902 | Unincorporated Areas of Crawford County. |
| Wisconsin River | 205 feet downstream of River Mile Marker 15 | +642 | +640 | Village of Wauzeka. |
| | 1,245 feet upstream of River Mile Marker 17 | +644 | +643 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

| Flooding source(s) | Location of referenced elevation** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |

∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.
Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Prairie Du Chien**
Maps are available for inspection at 214 East Blackhawk Avenue, Prairie Du Chien, WI 53821.

**Unincorporated Areas of Crawford County**
Maps are available for inspection at 225 North Beaumont Road, Prairie Du Chien, WI 53821.
**Village of De Soto**
Maps are available for inspection at 115 South Houghton Street, De Soto, WI 54624.
**Village of Ferryville**
Maps are available for inspection at 170 Pine Street, Ferryville, WI 54628.
**Village of Lynxville**
Maps are available for inspection at 475 Bench Street, Lynxville, WI 54626.
**Village of Soldiers Grove**
Maps are available for inspection at 102 Passive Sun Drive, Soldiers Grove, WI 54655.
**Village of Steuben**
Maps are available for inspection at 123 Midway Street, Steuben, WI 54657.
**Village of Wauzeka**
Maps are available for inspection at 213B East Front Street, Wauzeka, WI 53826.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

**Deborah S. Ingram,**

*Acting Deputy Assistant Administrator for Mitigation, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E9–25861 Filed 10–26–09; 8:45 am]
BILLING CODE 9110–12–P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[Docket No. FWS-R6-ES-2009-0064]**
**[MO 922105 0083-B2]**

## Endangered and Threatened Wildlife and Plants; 90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the distinct population segment (DPS) of American dipper (*Cinclus mexicanus unicolor*) in the Black Hills of South Dakota as threatened or endangered and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). For the purposes of this finding, we evaluated whether the petition presents substantial information to indicate whether the petitioned entity (the American dipper in the Black Hills of South Dakota) is a listable entity. Based on our review of the best available scientific and commercial information, we conclude that the American dipper in the Black Hills of South Dakota is not a listable entity under the Act. Because the petition did not present substantial information that the American dipper in the Black Hills of South Dakota is a DPS, we did not evaluate whether the information contained in the petition regarding threats was substantial. Therefore, we will not initiate a status review to determine if listing this subspecies is warranted in response to this petition. However, the public may submit to us new information concerning the subspecies, its status, or threats to it at any time.

**DATES:** You may submit new information concerning this subspecies for our consideration at any time.

**ADDRESSES:** This finding is available on the Internet at *http://www.regulations.gov*. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the South Dakota Ecological Services Office, U.S. Fish and Wildlife Service, 420 South Garfield Avenue, Suite 400, Pierre, SD 57501. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

**FOR FURTHER INFORMATION CONTACT:** Pete Gober, Field Supervisor, South Dakota Ecological Services Office (see **ADDRESSES** section) (telephone 605–224–8693). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) 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 scientific or commercial 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 scientific or commercial information was presented, we are required to promptly review the status of the species (status review).

We base this 90–day finding on information provided by the petitioners and our evaluation of that information in relation to information available in our files at the time of the petition review. This finding summarizes the information included in the petition and information available to us at the time of the petition review. Under section 4(b)(3)(A) of the Act and our regulations at 50 CFR 424.14(b), our review of a 90–day finding is limited to a determination of whether the information in the petition meets the ''substantial [scientific or commercial] information'' threshold.

**Previous Federal Actions**

On March 28, 2003, the Biodiversity Conservation Alliance, Center for Native Ecosystems, and Jeremy Nichols petitioned the Service to list the Black Hills American dipper distinct population segment (DPS) as an endangered or threatened species. We received a Notice of Intent to sue from the petitioners on July 21, 2003, who subsequently filed a complaint with the U.S. District Court for the District of Columbia on August 20, 2004. On January 24, 2005, we reached a settlement agreement to publish a 90–day finding in the **Federal Register** by January 20, 2006. On January 26, 2006, we determined in a 90–day finding that the Black Hills American dipper did not meet the elements for being a DPS and, therefore, was not a listable entity under the Act (71 FR 4341).

**Petition**

On October 2, 2008, we received a petition dated September 29, 2008, requesting that we list the DPS of American dipper in the Black Hills of South Dakota as threatened or endangered under the Act and designate critical habitat for that DPS. In addition, the petition requested emergency listing of the DPS. The petition, submitted by the Biodiversity Conservation Alliance, Center for Native Ecosystems, Native Ecosystems Council, and Prairie Hills Audubon Society, was clearly identified as a petition for a listing rule, and it contained the names, signatures, and addresses of the requesting parties. Included in the petition was supporting information regarding the subspecies' taxonomy and ecology, historical and current distribution, present status, and potential causes of decline. We acknowledged the receipt of the petition and addressed the request for emergency listing in a letter to Mr. Duane Short, dated December 5, 2008. The letter stated that we determined that the Black Hills population would need to meet our policy criteria as a DPS or a significant portion of the range of the subspecies before we can determine if emergency listing is necessary.

**Species Information**

The American dipper is a small, gray passerine bird that inhabits western Canada, Mexico, and the western United States, including the Black Hills (Pettingill and Whitney 1965, p. 74; Anderson 2002, p. 2) of South Dakota. The American dipper utilizes permanent, clean, cold, and swift mountain streams (Price and Bock 1983, p. 2; Tyler and Ormerod 1994, p. 3; Kingery 1996, p. 4; Feck 2002, p. 2) with abundant and healthy populations of benthic macroinvertebrates, the dipper's prey (Ealey 1977, p. 104; Price and Bock 1983, p. 2; Tyler and Ormerod 1994, p. 38; Kingery 1996, p. 6). Dippers are usually found in streams with rock, sand, and rubble substrates, which also are associated with the highest abundance of aquatic invertebrates. American dippers establish linear territories along a river in early spring (Kingery 1996, p. 11). They remain in or near their territories most of the year, depending upon the availability of open water. Dipper nest sites can be found on streamside rock cliffs, waterfalls, large rocks in midstream, or under bridges (Kingery 1996, p. 14).

**Distribution and Abundance**

The Black Hills are the eastern edge of the American dipper's range. The dipper is a permanent year-round resident of the Black Hills and has historically been known to inhabit nearly all permanent, fast-flowing streams in the area (Pettingill and Whitney 1965, p. 74). There are few records of American dippers making long-distance flights, and these records do not substantiate that these movements contribute to the establishment of new populations (Kingery 1996, p. 4; Muelhausen 1970, p. 136). No instances of long-distance dispersal of dippers between the Black Hills and the next nearest populations of American dipper to the west in the Big Horn Mountains of north-central Wyoming and the Laramie Range of east-central Wyoming have been documented. In addition to the apparent lack of long distance movements, the dipper population in the Black Hills is isolated from other populations by geographical barriers to dispersal in the form of extensive grasslands, poor-quality stream habitat, and the lack of water connections to dipper populations existing west of the Black Hills (Backlund 2001, p. 1).

Verified historical American dipper reports have been recorded on six streams or their tributaries in the Black Hills: French Creek, Rapid Creek, Box Elder Creek, Elk Creek, Whitewood Creek, and Spearfish Creek (Backlund 2001, pp. 2-4). Other streams are unable to support self-sustaining populations of dipper due to habitat degradation, erratic water flows, loss of water flow, poor water quality, and other impacts (Backlund 2001, p. 4). Currently, nesting dippers can be found on only two streams in the Black Hills—Spearfish Creek and Whitewood Creek (Lovett 2008, p. 2).

Dipper nest surveys in the Black Hills were started in 1993 by South Dakota Game, Fish and Parks, and became more extensive from 2003 to 2008. The lowest number of dippers reported on Spearfish Creek was 10 in 1997, with only two nests found (Backlund 2001, p. 4). In 2008, the number of dippers reported on Spearfish Creek was approximately 54 adults, with 38 nest attempts (Lovett 2008, p. 12). This is the second highest number of adults compared to 56 adults in both 2005 and 2006; there were 42 nest attempts in 2005 and 36 nest attempts in 2006. In 2008, Whitewood Creek had six adults observed and four known nest attempts (Lovett 2008, p. 12). Select areas of French Creek, Rapid Creek, and Boxelder Creek were checked for dippers but neither dippers nor active nests were found (Lovett 2008, p. 37).

**Distinct Vertebrate Population Segment**

The petitioners have asked us to consider listing a DPS of the American dipper in the Black Hills of South Dakota. Under the Act, we can consider for listing any species, subspecies, or DPS of any species of vertebrate fish or wildlife that interbreeds when mature. To implement the measures prescribed by the Act and its congressional guidance, we developed a joint policy with the National Oceanic and Atmospheric Administration entitled Policy Regarding the Recognition of Distinct Vertebrate Population Segments

under the Act (61 FR 4722; February 7, 1996) (DPS Policy). Under the DPS policy, we must consider three elements in making our decision whether an entity qualifies as a DPS that warrants listing as endangered or threatened under the Act. The three elements are: (1) The population segment's discreteness in relation to the remainder of the species to which it belongs; (2) the population segment's significance to the species to which it belongs; and (3) the population segment's conservation status in relation to the Act's standards for listing—that is, when treated as if it were a species, is the population segment endangered or threatened? For the purposes of this finding, we evaluated whether the petition presented substantial information to indicate whether the petitioned entity (the American dipper in the Black Hills of South Dakota) is a listable entity.

Discreteness

The DPS policy states that a population segment of a vertebrate species may be considered discrete if it satisfies either one of the following two conditions: (1) It must be markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors, or (2) it must be delimited by international governmental boundaries within which significant differences in control of exploitation, management of habitat conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Substantial information is presented in the petition to indicate that the Black Hills population may be markedly separated from other populations of the American dipper as a consequence of physical factors. The Black Hills is an isolated mountain range located within the plains of western South Dakota and northeastern Wyoming (Raventon 1994, p. 15). The Great Plains, which entirely surround the Black Hills, create a major physical barrier separating the Black Hills American dipper populations from other Rocky Mountain populations to the west (Hall *et al.* 2002, p. 3). The Big Horn Mountains, approximately 241 to 322 kilometers (km) (150 to 200 miles (mi)) to the west, is the closest mountain range to the Black Hills (Froiland 1990, p. 11). The expanse of grassland separating the Black Hills from other mountain ranges is incapable of supporting American dippers and represents a significant barrier to dispersal (Backlund 2001, p. 1; Voelker 2002, p. 582). The streams and rivers of the Great Plains are described as typically silt-laden, turbid, alkaline, and subject to erratic flows which precludes their use by dippers (Smith and Hubert 1989, p. 27).

Information in the petition, as supported by information readily available in our files, suggests that there is a substantial physical isolation of the Black Hills population of the American dipper. Therefore, the petition presents substantial information indicating that the Black Hills population of the American dipper meets the condition for discreteness under our DPS policy that the population is markedly separated from other populations of the same taxon. The Black Hills population of the American dipper is located entirely within the United States, therefore the international governmental boundaries provision for discreteness does not apply.

Significance

Under our DPS policy, if we determine that a population segment is discrete, we further consider that population's biological and ecological significance to the taxon to which it belongs, within the context that the DPS policy be used ''sparingly'' while encouraging the conservation of genetic diversity (61 FR 4722; February 7, 1996). This consideration may include, but is not limited to: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; and (4) evidence that the discrete population segment differs markedly from other populations of the subspecies in its genetic characteristics. These four considerations are addressed here:

(1) Persistence of the population segment in an ecological setting that is unusual or unique for the taxon.

The American dipper occupies permanent, clean, cold, and swift mountain streams throughout the western half of North America, including the Black Hills (Kingery 1996, p. 2). The petition contends that the streams in the Black Hills inhabited by dippers may be a unique ecological setting because the Black Hills themselves are a unique ecosystem. We recognize that the Black Hills have many unique ecological features, but information readily available in our files (Kingery 1996) indicates that the Black Hills are not unusual. These mountain ecosystems share commonalities, such as clean, cold, swift mountain streams with suitable substrate that provide the habitats for invertebrate species used by dippers. In that respect, the Black Hills are similar to other western mountain ecosystems that also support American dippers.

In addition, the petition claims that Black Hills streams have features that make them ecologically unique. Streams throughout the Rocky Mountains vary in many features, including elevation, gradient, substrate, parent geological material, and riparian vegetation, such that virtually every stream could be considered ''unique.'' Information readily available in our files (Kingery 1996) indicates that the key features of Black Hills streams used by dippers—cold temperatures, good water quality, suitable substrate, and swift flow—are the same key features of dipper-utilized streams elsewhere throughout the Rocky Mountains. Accordingly, we do not believe the petition presents substantial information that the clean, cold, swift streams of the Black Hills occupied by dippers are an ecological setting that is unusual or unique for this subspecies.

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of taxon.

The petition claims that the Black Hills dipper population is at the eastern edge of its global distribution and its loss would result in a significant gap in the range of the dipper. Information readily available in our files (Kingery 1996, NatureServe.org 2007) states that the American dipper's breeding range extends from western Alaska eastward across north-central Alaska; southward along the Pacific Coast, and throughout the Rocky Mountains into New Mexico. The subspecies is absent from the Great Basin area except for scattered populations. The subspecies' range includes mountain streams in an area that is approximately 5,000 km (3,107 mi) from north to south and approximately 1,800 km (1,118 mi) from west to east at its widest point. Within that range, there are thousands of suitable streams and tens of thousands of kilometers of occupied streams. The Black Hills dipper population, which occupies two streams that represent less than 80 km (50 mi) of occupied stream habitat, is a small population relative to the entire range. Populations of dippers exist throughout suitable streams in the Rocky Mountains. The Black Hills dipper population is small, and there is no information in the petition or readily available in our files to suggest that it makes a significant contribution to the taxa. The dipper-occupied streams in the Black Hills are on the eastern edge of the dipper's overall range in the

United States; however, mountain streams in the southern parts of the subspecies' range (the i.e. front ranges of Colorado and, Mexico) are as far or farther east than the Black Hills.

We find that the petition does not present substantial information that loss of the population segment would result in a significant gap in the range of the taxon because it did not provide substantial information that the population in the Black Hills is significant to the taxa as a whole.

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range.

The petition does not address this consideration. As stated above under ''Distribution and Abundance,'' the American dipper survives naturally throughout much of western North America. As such, this consideration is not applicable to the Black Hills population of the American dipper.

(4) Evidence that the discrete population segment differs markedly from other populations of the subspecies in its genetic characteristics.

The petition does not address this consideration. We are aware that a genetic analysis was conducted to determine whether the Black Hills population of the American dipper is genetically distinct from other American dipper populations in North America (Anderson *et al.* 2007). The research analyzed samples from six populations (Black Hills, South Dakota; Big Horn Mountains, Wyoming; and four locations in west-central Montana and east-central Idaho). Information from this research suggests that genetic differences could exist among the dipper populations studied. However, the study did not address the significance of the Black Hills population of American dipper to the taxon as a whole. The results of the study do not lead us to believe there are significant genetic differences to meet the criteria in our DPS policy for significance based on genetics.

The information as provided in the petition does not meet the four considerations for significance. Only the first two considerations are actually addressed in the petition and do not present substantial information in favor of significance. Little information is available in our files to support the third and fourth considerations, and no information was presented in the petition with respect to those criteria.

Conservation Status

We did not need to evaluate whether the information contained in the petition regarding the conservation status in relation to the Act's standards for listing was substantial, because the petition does not present substantial information that the American dipper in the Black Hills of South Dakota is a DPS and, therefore, a listable entity under the Act.

## Finding

We have reviewed the information presented in the petition and have evaluated that information in relation to information readily available in our files. On the basis of our review, we find that the petition does not present substantial scientific or commercial information to indicate that listing the American dipper in the Black Hills of South Dakota may be warranted. This finding is based on the lack of substantial scientific evidence to indicate that the American dipper in the Black Hills of South Dakota may meet the elements of being a valid DPS and, therefore, a listable entity under the Act. Although the population appears to meet the criteria for being discrete, neither the information in the petition nor the information readily available in our files suggests that the Black Hills dipper population may be significant in relation to the remainder of the taxon. Therefore, we conclude that the American dipper in the Black Hills of South Dakota does not satisfy the elements of being a DPS under our 1996 policy and, therefore, is not a listable entity under section 3(16) of the Act. Because the petition does not present substantial information that the American dipper in the Black Hills of South Dakota is a DPS, we did not evaluate whether the information contained in the petition regarding the conservation status was substantial.

Although we will not commence a status review in response to this petition, we will continue to monitor the American dipper's population status and trends, potential threats, and ongoing management actions that might be important with regard to the conservation of the species in the Black Hills of South Dakota. We encourage interested parties to continue to gather data that will assist with these conservation efforts. New information should be submitted to the Field Supervisor, South Dakota Ecological Services Office (see **ADDRESSES**).

The petitioners also request that critical habitat be designated for the American dipper in the Black Hills of South Dakota. Because the petition does not present substantial information that the American dipper in the Black Hills of South Dakota may be a DPS, we are not required to address the designation of critical habitat, and therefore, will not be doing so.

If you wish to provide information regarding the American dipper in the Black Hills, you may submit your information or materials to the Field Supervisor of the South Dakota Ecological Services Office (see **ADDRESSES**) at any time.

## References Cited

A complete list of all references is available upon request from the Field Supervisor (see **ADDRESSES**).

## Author

The primary authors of this document are staff members at the South Dakota Ecological Services Office (see **ADDRESSES**).

## Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C.1531 *et seq.*).

Dated: October 9, 2009

**Daniel M. Ashe**

*Acting Director, U.S. Fish and Wildlife Service*

[FR Doc. E9–25524 Filed 10–26–09; 8:45 am]

**BILLING CODE 4310–55–S**

# Notices

Federal Register

Vol. 74, No. 206

Tuesday, October 27, 2009

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

October 22, 2009.

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.

### Food and Nutrition Service

*Title:* Financial Status Report, FNS–778 and FNS–778A.

*OMB Control Number:* 0584–NEW.

*Summary of Collection:* Section 16(a) of the Food and Nutrition Act of 2008 (the Act) (7 U.S.C. 2011 *et seq.*) authorizes the Secretary to pay each State agency an amount equal to 50 percent of most allowable administrative costs involved in each State agency's operation of the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. Since 1980, SNAP has used a program-specific FS–269 variant approval by the Office of Management and Budget that captures total SNAP administrative cost and subdivides it into 26 functional categories. The Food and Nutrition Service (FNS) is proposing to have form FNS–778 and 778A replace SF–269 for SNAP and be an exception to the new Federal Financial Report.

*Need and Use of the Information:* State agencies will need to submit forms FNS–778 to receive State administrative funding and FNS–778A to receive benefits and comply with applicable legislation. The FNS–778 will be completed by State agencies on a quarterly basis with a final report 90 days after the end of the Federal fiscal year. The form reports the administrative costs to operate SNAP at the State level and supports the claims for Federal funding. FNS–778A will be completed by State agencies on a quarterly basis with a final report 90 days after the end of the Federal fiscal year. The form requests the program cash-out benefits where FNS has approved the issuance of checks or electronic cash payments in lieu of electronic benefit transfer (EBT) benefits. If a respondent does not respond, the respondent is subject to withholding of administrative funds or termination from program participation. Without the information FNS could not track administrative and benefit costs data for program evaluation.

*Description of Respondents:* State, Local, or Tribal Government.

*Number of Respondents:* 53.

*Frequency of Responses: Reporting:* Quarterly.

*Total Burden Hours:* 4,646.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E9–25824 Filed 10–26–09; 8:45 am]

BILLING CODE 3410–30–P

## DEPARTMENT OF AGRICULTURE

### Rural Housing Service

### Notice of Request for Extension of a Currently Approved Information Collection

**AGENCY:** Rural Housing Service, USDA.

**ACTION:** Proposed collection; comments requested.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's (RHS) intention to request an extension for a currently approved information collection in support of 7 CFR part 1942, subpart A, ''Community Facility Loans.''

**DATES:** Comments on this notice must be received by December 28, 2009 to be assured consideration.

**FOR FURTHER INFORMATION CONTACT:** Derek L. Jones, Community Programs Loan Specialist, Rural Housing Service, U.S. Department of Agriculture, STOP 0787, 1400 Independence Ave., SW., Washington, DC 20250–0787, telephone (202) 720–1504, e-mail: *derek.jones@wdc.usda.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* 7 CFR, part 1942, subpart A, ''Community Facility Loans''.

*OMB Number:* 0575–0015.

*Expiration Date of Approval:* February 28, 2010.

*Type of Request:* Extension of a currently approved information collection.

*Abstract:* The Community Facilities Loan program is authorized by Section 306 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926) to make loans to public entities, nonprofit corporations, and Indian tribes for the development of community facilities for public use in rural areas.

Community facilities programs have been in existence for many years. These programs have financed a wide range of projects varying in size and complexity from large general hospitals to small day care centers. The facilities financed are

designed to promote the development of rural communities by providing the infrastructure necessary to attract residents and rural jobs.

Information will be collected by the field offices from applicants, borrowers, and consultants. This information will be used to determine applicant/borrower eligibility, project feasibility, and to ensure borrowers operate on a sound basis and use funds for authorized purposes. Failure to collect proper information could result in improper determination of eligibility, improper use of funds, and/or unsound loans.

*Estimate of Burden:* Public reporting for this collection of information is estimated to average 2 hours per response.

*Respondents:* Public bodies, not-for-profit, or Indian Tribes.

*Estimated Number of Respondents:* 19,570.

*Estimated Number of Responses per Respondent:* 2.02.

*Estimated Number of Responses:* 18,519.

*Estimated Total Annual Burden on Respondents:* 39,607 hours.

Copies of this information collection can be obtained from Linda Watts Thomas, Regulations and Paperwork Management Branch, at (202) 692–0226.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the RHS, including whether the information will have practical utility; (b) the accuracy of the RHS'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 Linda Watts Thomas, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request of OMB approval. All comments will also become a matter of public record.

Dated: October 13, 2009.

**Tammye Treviño,**

*Administrator, Rural Housing Service.*

[FR Doc. E9–25685 Filed 10–26–09; 8:45 am]

BILLING CODE 3410–XV–P

## DEPARTMENT OF AGRICULTURE

### Rural Housing Service

### Notice of Request for Extension of a Currently Approved Information Collection

**AGENCY:** Rural Housing Service, USDA.

**ACTION:** Proposed collection; comments requested.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's (RHS) intention to request an extension for a currently approved information collection in support of 7 CFR part 1951, subpart F, ''Analyzing Credit Needs and Graduation of Borrowers.''

**DATES:** Comments on this notice must be received on or before December 28, 2009 to be assured consideration.

**FOR FURTHER INFORMATION CONTACT:** Derek L. Jones, Community Programs Loan Specialist, Rural Housing Service, U.S. Department of Agriculture, STOP 0787, 1400 Independence Ave., SW., Washington, DC 20250–0787, telephone (202) 720–1504, e-mail: *derek.jones@wdc.usda.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* 7 CFR, part 1951, subpart F, ''Analyzing Credit Needs and Graduation of Borrowers''.

*OMB Number:* 0575–0093.

*Expiration Date of Approval:* January 31, 2010.

*Type of Request:* Extension of a currently approved information collection.

*Abstract:* Section 333 of the Consolidated Farm and Rural Development Act (Con Act) (7 U.S.C. 1983) requires the Agencies to ''graduate'' their direct loan borrowers to other credit when they are able to do so. Graduation is required because the Government loans are not to be extended beyond a borrower's need for subsidized rates or Government credit. Borrowers must refinance their direct Government loan when other credit becomes available at reasonable rates and terms. If other credit is not available, the Agencies will continue to review the account for possible graduation at periodic intervals. The information collected to carry out these statutory mandates is financial data such as amount of income, operating expenses, asset values and liabilities. This information collection is then submitted by the Agencies to private creditors.

*Estimate of Burden:* Public reporting for this collection of information is estimated to average 2 hours per response.

*Respondents:* Individuals or households, business or other for-profit and farms.

*Estimated Number of Respondents:* 131.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Number of Responses:* 131.

*Estimated Total Annual Burden on Respondents:* 185 hours.

Copies of this information collection can be obtained from Linda Watts Thomas, Regulations and Paperwork Management Branch, at (202) 692–0226.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the RHS, including whether the information will have practical utility; (b) the accuracy of the RHS'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 Linda Watts Thomas, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request of OMB approval. All comments will also become a matter of public record.

Dated: October 13, 2009.

**Tammye Treviño,**

*Administrator, Rural Housing Service.*

[FR Doc. E9–25680 Filed 10–26–09; 8:45 am]

BILLING CODE 3410–XV–P

## COMMISSION ON CIVIL RIGHTS

### Agenda and Notice of Public Meeting of the New Jersey Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and

regulations of the U.S. Commission on Civil Rights and the Federal Advisory Committee Act, that a planning meeting and a briefing meeting of the New Jersey Advisory Committee will convene on Friday, November 20, 2009, at the Legislative Annex of the State House, 125 West State Street, Room 3, Trenton, New Jersey 08625. The purpose of the planning meeting is to discuss and vote on the education report. The purpose of the briefing meeting is to obtain an update on the mortgage crisis in the state. The planning meeting will convene at 10 a.m. and the briefing meeting will convene at 11 a.m.

Members of the public are entitled to submit written comments; the comments must be received in the regional office by Monday, December 21, 2009. The address is Eastern Regional Office, 624 Ninth St., NW., Washington, DC 20425. Persons wishing to e-mail their comments, or who desire additional information should contact Alfreda Greene, Secretary, at 202–376–7533 or by e-mail to *ero@usccr.gov.*

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee may go to the Commission's website, *http://www.usccr.gov,* or contact the Eastern Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the rules and regulations of the Commission and Federal Advisory Committee Act.

Dated in Washington, DC, October 22, 2009.

**Peter Minarik,**

*Acting Chief, Regional Programs Coordination Unit.*

[FR Doc. E9–25845 Filed 10–26–09; 8:45 am]

**BILLING CODE 6335–01–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:* Northeast Region Logbook Family of Forms.

*OMB Control Number:* 0648–0212.

*Form Number(s):* NOAA Forms 88–30 and 88–140.

*Type of Request:* Regular submission.

*Number of Respondents:* 4,346.

*Average Hours per Response:* Logbooks, 5 minutes (12 minutes for shellfish logbooks); catch reports through Interactive Voice Response (IVR), 4 minutes; catch reports through vessel monitoring systems, 15 minutes.

*Burden Hours:* 12,119.

*Needs and Uses:* Under the authority of the Magnuson-Stevens Fishery Conservation and Management Act and the Fishery Management Council and Plan developed under this authority, fishing vessels permitted to participate in Federally-permitted fisheries in the Northeast Region are required to submit logbooks containing catch and effort information about their fishing trips. The participants in the herring, tilefish and red crab fisheries are also required to make reports on the catch through an IVR system. In addition, permitted vessels that catch halibut are asked to voluntarily provide additional information on the estimated size of the fish and the time of day caught. The information submitted is needed for the management of the fisheries.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* On occasion.

*Respondent's Obligation:* Mandatory.

*OMB Desk Officer:* David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 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: October 22, 2009.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E9–25767 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–583–843]**

### Polyethylene Retail Carrier Bags From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (the Department) preliminarily determines that polyethylene retail carrier bags (PRCBs) from Taiwan are being, or are likely to be, sold in the United States at less than fair value (LTFV) as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are listed in the ''Suspension of Liquidation'' section of this notice. Interested parties are invited to comment on this preliminary determination.

Pursuant to requests from the petitioners and the respondent, we are postponing by 60 days the final determination and extending provisional measures from a four-month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after publication of the preliminary determination.

**DATES:** *Effective Date:* October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Dmitry Vladimirov or Minoo Hatten, 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) 482–0665 and (202) 482–1690, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On March 31, 2009, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the petitioners) filed an antidumping petition concerning imports of PRCBs from Taiwan. See the Petition for the Imposition of Antidumping and Countervailing Duties on Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and the Socialist Republic of Vietnam, dated March 31, 2009 (the petition).

On April 20, 2009, the Department initiated the antidumping duty investigation on PRCBs from Taiwan. See *Polyethylene Retail Carrier Bags From Indonesia, Taiwan, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations,* 74

FR 19049 (April 27, 2009) (*Initiation Notice*).

The Department set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of the date of publication of the *Initiation Notice.* See *Initiation Notice,* 74 FR at 19049. See also *Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997). We received no comments from interested parties concerning product coverage. The Department also set aside a period of time for parties to comment on product characteristics for use in the antidumping duty questionnaire. See *Initiation Notice,* 74 FR at 19050. On May 11, 2009, we received comments from the petitioners. After reviewing the petitioners' comments, we have adopted the characteristics and hierarchy as explained in the ''Product Comparisons'' section of this notice, below.

On May 29, 2009, the International Trade Commission (ITC) published its affirmative preliminary determination that there is a reasonable indication that imports of PRCBs from Taiwan are materially injuring the U.S. industry, and the ITC notified the Department of its finding. See *Polyethylene Retail Carrier Bags From Indonesia, Taiwan, and Vietnam; Determinations,* Investigation Nos. 701–TA–462 and 731–TA–1156–1158 (Preliminary), 74 FR 25771 (May 29, 2009).

On May 21, 2009, we selected Ipsido Corporation (Ipsido) and TCI Plastic Co., Ltd. (TCI), as mandatory respondents in this investigation. See the ''Selection of Respondents'' section of this notice, below.

On May 26, 2009, we issued the antidumping questionnaire to Ipsido and TCI. On July 20, 2009, we received a questionnaire response from TCI. We did not receive a questionnaire response from Ipsido. We issued a supplemental questionnaire to TCI and received its response on September 1, 2009. We issued a second supplemental questionnaire to TCI and received its response on October 5, 2009. Because TCI claimed it was affiliated during the period of investigation (POI) with three Taiwanese producers of PRCBs, Tis Dis International Co., Ltd. (Tis Dis), CBM Machinery Co., Ltd. (CBM), and Corporate Best Enterprise Co., Ltd. (Corporate Best), it provided a unified response to our questionnaire with respect to these companies. See the ''Affiliation and Collapsing'' section of this notice, below.

On July 22, 2009, based on a timely request from the petitioners, we extended the deadline for alleging targeted dumping.

On July 30, 2009, the petitioner alleged that TCI made home-market sales of PRCBs at prices below the cost of production (COP) during the POI. On August 12, 2009, we initiated an investigation to determine whether TCI made home-market sales of PRCBs at prices below the COP during the POI. See the ''Cost of Production'' section of this notice, below. In a letter dated August 13, 2009, we requested that TCI respond to the COP section of the antidumping questionnaire. On September 3, 2009, we received the cost response from TCI. We issued a supplemental cost questionnaire to TCI and received its response on October 5, 2009.

On August 7, 2009, the petitioners filed an allegation of targeted dumping by TCI. See the ''Targeted-Dumping Allegation'' section below.

On August 13, 2009, the petitioners requested that the Department postpone its preliminary determination by 42 days. In accordance with section 733(c)(1)(A) of the Act, we postponed our preliminary determination by 42 days. See *Postponement of Preliminary Determination of Antidumping Duty Investigations: Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and the Socialist Republic of Vietnam,* 74 FR 42229 (August 21, 2009).

On September 17, 2009, the petitioners requested that, in the event of a negative preliminary determination in this investigation, the Department postpone the final determination in accordance with section 735(a)(2)(B) of the Act and 19 CFR 351.210(b)(2)(i). The petitioners did not specify the number of days by which to postpone the final determination. On September 17, 2009, TCI requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination by 60 days in accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii) and extend the application of the provisional measures prescribed under 19 CFR 351.210(e)(2) from a four-month period to a six-month period. For further discussion, see the ''Postponement of Final Determination and Extension of Provisional Measures'' section of this notice, below.

On October 1, 2009, the petitioners submitted comments for consideration in the preliminary determination. On October 8, 2009, the petitioners submitted a second set of comments for consideration in the preliminary determination.

**Period of Investigation**

The POI is January 1, 2008, through December 31, 2008. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, March 2009. See 19 CFR 351.204(b)(1).

**Scope of the Investigation**

The merchandise subject to this investigation is PRCBs, which also may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.,* grocery, drug, convenience, department, specialty retail, discount stores, and restaurants to their customers to package and carry their purchased products. The scope of this investigation excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, *e.g.,* garbage bags, lawn bags, trash-can liners.

Imports of merchandise included within the scope of this investigation are currently classifiable under statistical category 3923.21.0085 of the Harmonized Tariff Schedule of the United States (HTSUS). This subheading may also cover products that are outside the scope of this investigation. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

**Selection of Respondents**

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Section 777A(c)(2) of the Act gives the Department discretion, when faced with a large number of exporters or producers, to limit its

examination to a reasonable number of such companies if it is not practicable to examine all companies. The data on the record indicates that there are over 20 potential producers or exporters from Taiwan that exported the subject merchandise to the United States during the POI. In the *Initiation Notice* we stated that we intended to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports under HTSUS number 3923.21.0085 during the POI and we invited comments on CBP data and selection of respondents for individual examination. See *Initiation Notice,* 74 FR at 19054.

On April 27, 2009, we released the CBP data to all parties with access to information protected by administrative protective order. Based on our review of the CBP data and our consideration of the comments we received from the petitioners on May 7, 2009, we determined that we had the resources to examine two companies. Accordingly, we selected TCI and Ipsido as mandatory respondents. These companies are the two major producers/exporters of subject merchandise that account for the largest volume of subject merchandise during the POI that we can reasonably examine in accordance with the statute. See Memorandum to John M. Andersen entitled ''Antidumping Duty Investigation on Polyethylene Retail Carrier Bags from Taiwan—Selection of Respondents'' dated May 21, 2009.

**Use of Facts Otherwise Available**

For the reasons discussed below, we determine the use of facts otherwise available with an adverse inference is appropriate for the preliminary determination with respect to Ipsido.

*A. Use of Facts Available*

As indicated in the **SUPPLEMENTARY INFORMATION** section above, Ipsido did not respond to our questionnaire dated May 26, 2009. As such, Ipsido withheld information necessary to calculate a margin for its sales to the United States. Section 776(a)(2) of the the Act provides that, if an interested party withholds information requested by the administering authority, fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(e) of the Act states further that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; (5) the information can be used without undue difficulties.

In this case, Ipsido did not respond to our questionnaire and, thus, has determined not to cooperate with our requests for information or to participate in this investigation. Ipsido's decision to abstain from participation in this investigation has precluded the Department from performing the necessary analysis and verification of Ipsido's questionnaire responses required by section 782(i)(1) of the Act. Because Ipsido chose to abstain from the proceeding and did not provide any information to the Department, section 782(e) of the Act is not applicable.

*B. Application of Adverse Inferences for Facts Available*

Section 776(b) of the Act stipulates that, if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, the Department may use an inference adverse to the interests of that party in selecting from the facts otherwise available. See *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India,* 70 FR 54023, 54025–26 (September 13, 2005), and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (August 30, 2002). It is the Department's practice to apply adverse inferences to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol.1 (1994) at 870 (SAA); see, *e.g., Certain Polyester Staple Fiber from Korea: Final Results of the 2005–2006 Antidumping Duty Administrative Review,* 72 FR 69663 (December 10, 2007). Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference. See, *e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan,* 65 FR 42985 (July 12, 2000), *Antidumping Duties; Countervailing Duties,* 62 FR at 27340, and *Nippon Steel Corp.* v. *United States,* 337 F.3d 1373, 1382–83 (CAFC 2003) (*Nippon*).

Although we provided Ipsido with notice informing it of the consequences of its failure to respond fully to our antidumping questionnaire, Ipsido refrained from participation in this investigation and has failed to provide any response to our request for information. This constitutes a failure on the part of Ipsido to cooperate to the best of its ability to comply with a request for information by the Department pursuant to section 776(b) of the Act.

Based on the above, the Department has preliminarily determined that Ipsido has failed to cooperate to the best of its ability and, therefore, in selecting from among the facts otherwise available, an adverse inference is warranted. See, *e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan,* 65 FR at 42986 (the Department applied total adverse facts available (AFA) where the respondent failed to respond to the antidumping questionnaire).

*C. Selection and Corroboration of Information Used as Facts Available*

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. See also 19 CFR 351.308(c) and the SAA at 868–870. It is the Department's practice to use the highest rate from the petition in an investigation when a respondent fails to act to the best of its ability to provide the necessary information. See, *e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Finland,* 69 FR 77216 (December 27, 2004) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose From Finland,* 70 FR 28279 (May 17, 2005)). Therefore, because an adverse inference is warranted, we have assigned to Ipsido the highest margin alleged in the petition, 95.81 percent, as discussed in

the *Initiation Notice.* See *Initiation Notice,* 74 FR at 19054.

When using facts otherwise available, section 776(c) of the the Act provides that, where the Department relies on secondary information (such as the petition) rather than information obtained in the course of an investigation, it must corroborate, to the extent practicable, information from independent sources that are reasonably at its disposal.

The SAA clarifies that ''corroborate'' means the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. As stated in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996) (unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part,* 62 FR 11825, 11843 (March 13, 1997)), to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. The Department's regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See 19 CFR 351.308(d) and the SAA at 870.

For the purposes of this investigation and to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the petition during our pre-initiation analysis and for purposes of this preliminary determination. See Antidumping Investigation Initiation Checklist dated April 20, 2009 (Initiation Checklist), at 7 through 13. See also *Initiation Notice,* 74 FR at 19051, 19053. We examined evidence supporting the calculations in the petition to determine the probative value of the margins alleged in the petition for use as AFA for purposes of this preliminary determination. During our pre-initiation analysis we examined the key elements of the export-price (EP) and normal-value calculations used in the petition to derive margins. During our pre-initiation analysis we also examined information from various independent sources provided either in the petition or in supplements to the petition that corroborates key elements of the EP and normal-value calculations used in the petition to derive estimated margins. *Id.*

Based on our examination of the information, as discussed in detail in the Initiation Checklist and the *Initiation Notice,* we consider the petitioners' calculation of normal value, based on constructed value, to be corroborated. Therefore, because we confirmed the accuracy and validity of the information underlying the derivation of margins in the petition by examining source documents as well as publicly available information, we preliminarily determine the margins in the petition are reliable for the purposes of this investigation.

With respect to the relevance aspect of corroboration the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. See *Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996) (the Department disregarded the highest dumping margin as best information available because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin).

Because Ipsido did not submit information we requested in this investigation, we do not have such information to consider in determining whether the petition rates are relevant to Ipsido. The calculation of the petition rates reflects commercial practices of the PRCBs industry and, as such, are relevant to Ipsido. The courts have acknowledged that the consideration of the commercial behavior inherent in the industry is important in determining the relevance of the selected AFA rate to the uncooperative respondent by virtue of it belonging to the same industry. See, *e.g., Ferro Union, Inc.* v. *United States,* 44 F. Supp. 2d 1310, 1334 (1999). Such consideration typically encompasses the commercial behavior of other respondents under investigation and the selected AFA rate is gauged against the margins we calculate for those respondents. Therefore, we compared the transaction-specific margins of TCI for the POI to the highest petition rate. We found that the highest transaction-specific rates we calculated for TCI in this investigation were higher than or within the range of the highest margin alleged in the petition.

Specifically, after calculating the margin for TCI as discussed in detail below, we examined individual transactions made by TCI during the POI and the margins we determined on those transactions in order to determine whether the rate of 95.81 percent is probative. We found a sale with a dumping margin above the rate of 95.81 percent and a number of sales with dumping margins within the range of 95.81 percent. Accordingly, the AFA rate is relevant as applied to Ipsido for this investigation because it falls within the range of TCI's transaction-specific margins in the current investigation. See *Ta Chen Stainless Steel Pipe, Inc.* v. *United States,* 298 F.3d 1330, 1340 (CAFC 2002) (''Because Commerce selected a dumping margin within the range of Ta Chen's actual sales data, we cannot conclude that Commerce 'overreached reality'.''). Accordingly, we find that the 95.81 percent rate in the petition has probative value for use as AFA for Ipsido in this investigation.

Similar to our position in *Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 71 FR 53405 (September 11, 2006) (unchanged in *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review,* 72 FR 1982 (January 17, 2007)), because this is the first proceeding involving this company, we find there are no probative alternatives to the margins alleged in the petition. Further, no information has been presented in the investigation that calls into question the relevance of the margins alleged in the petition. Accordingly, by using information that was corroborated in the pre-initiation stage of this investigation and preliminarily determining it to be relevant for the uncooperative respondent in this investigation, we have corroborated the AFA rate of 95.81 percent ''to the extent practicable'' as provided in section 776(c) of the Act. See also 19 CFR 351.308(d).

Therefore, with respect to Ipsido, we have used, as AFA, the highest margin in the petition of 95.81 percent, as set forth in the notice of initiation. See *Initiation Notice,* 74 FR at 19054.

**Affiliation and Collapsing**

Section 771(33)(F) of the Act defines affiliated persons as two or more persons directly or indirectly controlling, controlled by, or under

common control with any person. We find that TCI, Tis Dis, and Corporate Best are affiliated pursuant to section 771(33)(F) of the Act. Further, we find that CBM and TCI were affiliated during the majority of the POI pursuant to section 771(33)(F) of the Act. Because our analysis of affiliation involves extensive use of business-proprietary information, for a detailed discussion, see Memorandum to Laurie Parkhill entitled ''Polyethylene Retail Carrier Bags from Taiwan—Collapsing of Affiliated Producers'' dated October 19, 2009 (Collapsing Memo).

Section 351.401(f) of the Department's regulations outlines the criteria for collapsing (*i.e.,* treating as a single entity) affiliated producers for purposes of calculating a dumping margin. The regulations state that we will treat two or more affiliated producers as a single entity where (1) those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and (2) we conclude that there is a significant potential for the manipulation of price or production. In identifying a significant potential for the manipulation of price or production, the Department may consider the following factors: (i) The level of common ownership; (ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; (iii) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. See 19 CFR 351.401(f)(2).

With respect to the first criterion of 19 CFR 351.401(f), the information on the record indicates that TCI and Tis Dis currently produce and/or have the potential to produce similar or identical products. Further, the information on the record indicates that Corporate Best provided cutting, sealing, and packaging services to Tis Dis and Tis Dis provided the same services to TCI for the production of PRCBs during the POI. Thus, with respect to TCI, Tis Dis, and Corporate Best, we find that no substantial retooling of any of these entities' facilities would be required to restructure the manufacturing priorities because information on the record indicates they use similar production processes, production facilities, and production equipment to produce PRCBs. See Collapsing Memo. Because the facilities of TCI, Tis Dis, and Corporate Best either produce or have the potential to produce identical and similar products, the companies could shift production priorities from one company to the other without incurring prohibitive costs.

We also find that a significant potential for manipulation of prices, production costs, and production priorities exists pursuant to 19 CFR 351.401(f)(2). Specifically, the information on the record indicates that TCI, Tis Dis, and Corporate Best have high levels of common ownership. Further, the information on the record indicates that there is overlap in managerial employees and/or board members among these companies. See Collapsing Memo. Finally, the information on the record indicates that operations among these companies are intertwined at a significant level. See Collapsing Memo. Therefore, pursuant to 19 CFR 351.401(f), for this preliminary determination we have treated affiliated producers TCI, Tis Dis, and Corporate Best as a single entity for purposes of calculating a dumping margin.

We do not find that a significant potential for the manipulation of prices, production costs, and production priorities exists with respect to CBM. The information on the record of this investigation does not suggest that there were significant transactions between CBM and TCI (or Tis Dis or Corporate Best) during the POI. Moreover, the level of common ownership and extent of manager/board-member overlap between CBM and TCI is not sufficient to find a significant potential for the manipulation of price or production on this basis alone. See Collapsing Memo.

**Targeted-Dumping Allegation**

The statute allows the Department to employ the average-to-transaction margin-calculation methodology under the following circumstances: (1) There is a pattern of export prices that differ significantly among purchasers, regions, or periods of time; (2) the Department explains why such differences cannot be taken into account using the average-to-average or transaction-to-transaction methodology. See section 777A(d)(1)(B) of the Act.

On August 7, 2009, the petitioners submitted an allegation of targeted dumping with respect to TCI and asserted that the Department should apply the average-to-transaction methodology in calculating the margin for TCI. In their allegation, the petitioners assert that there are patterns of EPs and constructed export prices (CEPs) for comparable merchandise that differ significantly among purchasers, regions, and time periods. The petitioners relied on the Department's targeted-dumping test in *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea,* 72 FR 60630 (October 25, 2007) (*CFS*); the petitioners also made their allegations using the Department's test in *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value,* 73 FR 33985 (June 16, 2008), and *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008) (collectively, *Nails*).

Because our analysis includes business-proprietary information, for a full discussion see Memorandum to Gary Taverman entitled ''Less-Than-Fair-Value Investigation on Polyethylene Retail Carrier Bags from Taiwan: Targeted Dumping,'' dated October 19, 2009 (Targeted-Dumping Memo).

In our letter to the petitioners dated September 4, 2009, we stated that the petitioners' allegation using the *CFS* methodology lacked certain analysis for appropriately establishing the significance of differences in pricing patterns between targeted and non-targeted sales. In that letter we also stated that, because the methodology in *Nails* is our current targeted-dumping methodology, we planned to evaluate any targeted-dumping allegation concerning TCI only in the context of the determination we made in *Nails.* We also identified certain ministerial errors we had found in the computer program that was used in *Nails* and alerted the petitioners that they could re-submit their allegation which incorporates these corrections. The petitioners did not submit a revised allegation of targeted dumping with respect to TCI.

On October 1, 2009, the petitioners submitted comments for consideration in the preliminary determination. Specifically, the petitioners' comments relate to the issue of determining the proper rounding of prices in the targeting-dumping test and the issue of application of the average-to-transaction comparison method to all sales (not just to targeted sales) in an effort to unmask dumping associated with targeted sales.

*A. Targeted-Dumping Test*

After correcting certain ministerial errors mentioned above and described in detail in our September 4, 2009, letter, we conducted customer, regional, and time-period targeted-dumping analyses for TCI using the methodology we adopted in *Nails* and used most

recently in *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 40485 (July 15, 2008) (*Tires*).

The methodology we employed involves a two-stage test; the first stage addresses the pattern requirement and the second stage addresses the significant-difference requirement. See section 777A(d)(1)(B)(i) of the Act and *Nails.* In this test we made all price comparisons on the basis of identical merchandise (*i.e.,* by control number or CONNUM). The test procedures are the same for the customer, region, and time-period targeted-dumping allegations. We based all of our targeted-dumping calculations on the U.S. net price which we determined for U.S. sales by TCI in our standard margin calculations. For further discussion of the test and the results, see the Targeted-Dumping Memo.

As a result of our analysis, we preliminarily determine that there is a pattern of EPs and CEPs for comparable merchandise that differ significantly among certain customers, regions, and time periods for TCI in accordance with section 777A(d)(1)(B)(i) of the Act and our practice as discussed in *Nails.*

*B. Price-Comparison Method*

Section 777A(d)(1)(B)(ii) of the Act states that the Department may compare the weighted average of the normal value to EPs or CEPs of individual transactions for comparable merchandise if the Department explains why differences in the patterns of EPs and CEPs cannot be taken into account using the average-to-average methodology. As described above, we have preliminarily determined that, with respect to sales by TCI for certain customers, regions, or time-periods, there was a pattern of prices that differ significantly. We find that these differences cannot be taken into account using the average-to-average methodology because the average-to-average methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group.

In December 2008, the Department withdrew the regulation concerning targeted dumping. See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations,* 72 FR 74930 (December 10, 2008). The withdrawn targeted-dumping regulation normally would have limited the application of the average-to-transaction methodology to just those sales that constitute targeted dumping. In light of the withdrawn regulation and the petitioners' comments in this case, we have considered the following options:

1. Apply the average-to-transaction methodology just to sales found to be targeted as the withdrawn regulation directed and, consistent with our average-to-transaction practice, do not offset any margins found on these transactions.

2. Apply the average-to-transaction methodology to all sales to the customer, region, or time period found to be targeted (not just those specific sales found to be targeted) and, consistent with our average-to-transaction practice, do not offset any margins found on these transactions.

3. Apply the average-to-transaction methodology to all sales by TCI and, consistent with our average-to-transaction practice, do not offset any margins found on these transactions.

The Department received comments on the price-comparison methodology in response to the *Withdrawal of Regulation.* Because consideration of those comments is still underway, for purposes of this preliminary determination and consistent with our practice in the *Nails* investigations, we have applied the average-to-transaction methodology to any targeted sales and applied the average-to-average methodology to the remaining non-targeted sales. When calculating the weighted-average margin, we combined the margin we calculated for the targeted sales with the margin we calculated for the non-targeted sales without offsetting any margins found among the targeted sales. See Targeted-Dumping Memo.

We invite interested parties to comment on the issue of the appropriate price-comparison methodology to use for the final determination in this investigation. Further, given the timing and complexity of the petitioners' October 1, 2009, comments, we intend to address such comments fully in the context of the final determination.

**Date of Sale**

Section 351.401(i) of the Department's regulations states that the Department normally will use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. The regulation provides further that the Department may use a date other than the date of the invoice if the Secretary is satisfied that a different date better reflects the date on which the material terms of sale are established. The Department has a long-standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established. See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand,* 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10; see also *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany,* 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2. Based on record evidence, where shipment date occurs before the invoice date, all material terms of sale are set and do not change in the subsequent time, including the invoice date. Therefore, for home-market sales we used the earlier of shipment date or invoice date as the date of sale in accordance with our practice.

On October 8, 2009, the petitioners commented on the use of the long-term contract date as the date of sale for certain U.S. sales made pursuant to the long-term contract. Because there is insufficient time to analyze the record or gather additional information as necessary, we will continue to examine this issue and address it for the final determination.

**Fair-Value Comparisons**

To determine whether sales of PRCBs to the United States by TCI were made at LTFV during the POI, we compared EP or CEP to normal value, as described in the ''U.S. Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated POI-wide weighted-average EPs and CEPs except for those sales discussed above in the ''Targeted-Dumping Allegation'' section of this notice.

**Product Comparisons**

We have taken into account the comments that were submitted by the interested parties concerning product-comparison criteria. In accordance with section 771(16) of the Act, all products TCI produced that are covered by the description in the ''Scope of the Investigation'' section, above, and sold in Taiwan during the POI are considered to be foreign like product for purposes of determining appropriate product comparisons to U.S. sales. We have relied on thirteen criteria to match U.S. sales of subject merchandise to

home-market sales of the foreign like product: quality, bag type, length, width, gusset, thickness, percentage of high-density polyethylene resin, percentage of low-density polyethylene resin, percentage of low linear-density polyethylene resin, percentage of color concentrate, percentage of ink coverage, number of ink colors, and number of sides printed. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade for comparison to U.S. sales, we matched U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above.

**U.S. Price**

In accordance with section 772(a) of the Act, we used EP for TCI's sales where the subject merchandise was sold directly to unaffiliated customers in the United States prior to importation. In accordance with section 772(b) of the Act, we used CEP for those sales where the subject merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by a seller affiliated with the producer or exporter to a purchaser not affiliated with the producer or exporter.

We calculated EP and CEP based on the packed F.O.B., C.I.F., or delivered price to unaffiliated purchasers in, or for exportation to, the United States. We made deductions, as appropriate, for discounts and rebates. We also made deductions for any movement expenses in accordance with section 772(c)(2)(A) of the Act. See the TCI Analysis Memorandum to the file dated October 19, 2009, for additional information.

In accordance with section 772(d)(1) of the Act and the SAA at 823–824, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States which includes commissions, direct selling expenses, and indirect selling expenses. Finally, we made an adjustment for profit allocated to these expenses in accordance with section 772(d)(3) of the Act.

**Normal Value**

*A. Home-Market Viability and Comparison-Market Selection*

To determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating normal value (*i.e.,* the aggregate volume of home-market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared TCI's volume of home-market sales of the foreign like product to its volume of U.S. sales of the subject merchandise. See section 773(a)(1)(B) of the Act. Based on this comparison, we determined that TCI had a viable home market during the POI. Consequently, we based normal value on home-market sales.

*B. Level of Trade*

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine normal value based on sales in the comparison market at the same level of trade as the EP or CEP. Pursuant to 19 CFR 351.412(c)(1), the normal-value level of trade is based on the starting price of the sales in the comparison market or, when normal value is based on constructed value, the starting price of the sales from which we derive selling, general and administrative expenses and profit. For EP sales, the U.S. level of trade is based on the starting price of the sales in the U.S. market, which is usually from the exporter to the importer. For CEP sales, the U.S. level of trade is based on the starting price of the U.S. sales as adjusted under section 772(d) of the Act, which is from the exporter to the importer.

To determine whether comparison-market sales are at a different level of trade than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. See 19 CFR 351.412(c)(2). If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which normal value is based and the comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(7)(A) of the Act. For CEP sales, if the normal-value level of trade is at a more advanced stage of distribution than the CEP level of trade and there is no basis for determining whether the difference in levels of trade affects price comparability, we adjust normal value under section 773(a)(7)(B) of the Act (the CEP-offset provision). See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa,* 62 FR 61731 (November 19, 1997).

In this investigation, we obtained information from TCI regarding the marketing stages involved in making its reported home-market and U.S. sales, including a description of the selling activities TCI (or, where applicable, its affiliate(s)) performed for each channel of distribution.

During the POI, TCI reported that it sold PRCBs in the home market to retailers through two channels of distribution, direct sales and consignment sales. We found that the selling activities associated with these channels of distribution did not differ.[1] Accordingly, we found that the two home-market channels of distribution constituted a single level of trade for home-market sales.

TCI reported that its EP sales were made using two channels of distribution, direct F.O.B. Taiwan sales to retailers and sales to a Taiwanese trading company for export to a retail customer in the United States. We found that the selling activities associated with these channels of distribution did not differ. Accordingly, we found that the two EP channels of distribution constituted a single level of trade. We found that the EP level of trade was not similar to the home-market level of trade in terms of selling activities. For example, we found that the two levels of trade differ with respect to sales forecasting, strategic and economic planning, direct sales personnel, and inventory maintenance.[2] Accordingly, we considered the EP level of trade to be different from the home-market level of trade and to be at a less advanced stage of distribution than the home-market level of trade. Therefore, we could not match EP sales to sales at the same level of trade in the home market nor could we determine a level-of-trade adjustment because there is only one level of trade in the home market. See section 773(a)(7)(A) of the Act. Furthermore, we have no other information that provides an appropriate basis for determining a level-of-trade adjustment. Thus, we matched EP sales without regard to level of trade in the home market and made no level-of-trade adjustment.

With respect to CEP sales, although TCI made the sales to unaffiliated retail customers through two reported channels of distribution, we found both CEP channels of distribution similar in

[1] Although TCI designated the provision of warranty services for one home-market channel of distribution and incurrence of commissions in the other as the only selling functions allegedly differentiating the two channels, we did not consider them in our level-of-trade analysis because we adjust the starting price in the comparison market for these direct selling expenses pursuant to section 773(a)(6)(c)(iii) of the Act.

[2] Although TCI designated the provision of rebates and commissions in the home-market channels of distribution and reported that it did not provide such functions for its EP channels of distribution, we did not consider these functions in our level-of-trade analysis because we adjust the starting price in the comparison market for these direct selling expenses pursuant to section 773(a)(6)(c)(iii) of the Act.

terms of selling activities. For example, we found that the two channels differ only with respect to the provision of inventory maintenance.[3] Therefore, we considered the CEP to constitute only one level of trade. In comparing the home-market level of trade to the CEP level of trade, we found that the selling activities performed by TCI for its CEP sales were not significantly fewer than the selling activities that it performed for its home-market sales and that the home-market level of trade was not significantly more remote from the factory than the CEP level of trade.[4] Accordingly, we did not consider the CEP level of trade to be different from the home-market level of trade or at a less advanced stage of distribution than the home-market level of trade. Therefore, we matched CEP sales to sales at the same level of trade in the home market; as a result, no CEP-offset or level-of-trade adjustment with regard to CEP sales comparisons was appropriate.

*C. Cost of Production*

Based on our analysis of the petitioners' allegation, we found that there were reasonable grounds to believe or suspect that TCI made sales of PRCBs in the home market at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated a sales-below-cost investigation to determine whether these companies had sales that were made at prices below their respective COP. See Memorandum to John M. Andersen entitled ''Less-Than-Fair-Value Investigation on Polyethylene Retail Carrier Bags from Taiwan: Request to Initiate Cost Investigation for TCI Plastic Co. Ltd.,'' dated August 12, 2009.

1. *Calculation of Cost of Production*

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product plus an amount for general and administrative expenses (G&A), interest expenses, and home-market packing costs (see the ''Test of Home-Market Sales Prices'' section below for treatment of home-market selling expenses and packing costs). We relied on the COP data submitted by TCI in its October 5, 2009, supplemental response to our questionnaire with certain exceptions.

We increased TCI's reported cost of manufacturing (COM) to account for the unreconciled difference between the COM from its normal books and records and the COM it reported in its responses to our questionnaire. In accordance with section 773(f)(3) of the Act, we adjusted TCI's COM to reflect the higher of transfer price, market price, or cost of resins, a major input used in the production of PRCBs that were purchased from an affiliated company. For further discussion, see Memorandum to Neal Halper entitled ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—TCI Plastic Co. Ltd. and Tis Dis International Co. Ltd.'' dated October 19, 2009.

Further, we requested that TCI provide additional information related to the use of virgin versus recycled resins in the production of merchandise under consideration. Although TCI provided a response to our request for additional information, we find this information to be incomplete. As a result, for this preliminary determination, we do not have all of the information necessary to examine and analyze TCI's reported methodology for the allocation of resin costs. We intend to solicit additional cost information from TCI after the preliminary determination for consideration in the final determination.

2. *Test of Home-Market Sales Prices*

On a product-specific basis, we compared the adjusted weighted-average COP to the home-market sales of the foreign like product, as required under section 773(b) of the Act, to determine whether the sales were made at prices below the COP. For purposes of this comparison, we used the COP exclusive of selling and packing expenses. The prices were exclusive of any applicable movement charges, direct and indirect selling expenses, and packing expenses and we adjusted the home-market prices for discounts.

3. *Results of the COP Test*

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of the respondent's sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of the respondent's sales of a given product during the POI were at prices less than COP, we determine that such sales have been made in ''substantial quantities'' and, thus, we disregard below-cost sales. See section 773(b)(2)(C) of the Act. Further, we determine that the sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, because we examine below-cost sales occurring during the entire POI. In such cases, because we compare prices to POI-average costs, we also determine that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

In this case, we found that, for certain specific products, more than 20 percent of TCI's home-market sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. Therefore, we disregarded these sales and used the remaining sales as the basis for determining normal value in accordance with section 773(b)(1) of the Act.

*D. Calculation of Normal Value Based on Home-Market Prices*

We based normal value for TCI on packed, delivered prices to unaffiliated customers in the home market. We made an adjustment to the starting price, where appropriate, for discounts in accordance with 19 CFR 351.401(c). We made deductions, where appropriate, for movement expenses, limited to inland freight, under section 773(a)(6)(B)(ii) of the Act. See the TCI Analysis Memorandum to the file dated October 19, 2009, for additional information.

For comparisons to EP, we made circumstance-of-sale adjustments by deducting home-market direct selling expenses from, and adding U.S. direct selling expenses to, normal value. For comparisons to CEP, we made circumstance-of-sale adjustments by deducting home-market direct selling expenses from normal value. We also made adjustments in EP and CEP calculations, when applicable, for home-market indirect selling expenses incurred for U.S. sales to offset home-market commissions.

We made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act. We deducted home-market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

[3] Although TCI designated the provision of discounts, commissions, and rebates as well as the incurrence of freight and customs-related expenses for one U.S. channel of distribution and not in the other as the only remaining selling functions allegedly differentiating the two channels, we did not consider these functions in our level-of-trade analysis because we adjust the starting CEP for these direct selling and movement expenses pursuant to section 772(d)(1) of the Act.

[4] TCI made statements on the record asserting that it considers its level of trade to the affiliated importer the same as its level of trade in the home market; it did not claim a CEP offset.

*E. Calculation of Normal Value Based on Constructed Value*

In accordance with section 773(a)(4) of the Act, we used constructed value as the basis for normal value when there were no usable sales of the foreign like product in the comparison market. We calculated constructed value in accordance with section 773(e) of the Act. We included the cost of materials and fabrication, selling, general, and administrative (SG&A) expenses, interest expenses, U.S. packing expenses, and profit in the calculation of constructed value. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses, financial expenses, and profit on the amounts incurred and realized by TCI in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the home market.

When appropriate, we made adjustments to constructed value in accordance with section 773(a)(8) of the Act, 19 CFR 351.410, and 19 CFR 351.412 for circumstance-of-sale differences. For comparisons to EP, we made circumstance-of-sale adjustments by deducting home-market direct selling expenses from and adding U.S. direct selling expenses to constructed value. For comparisons to CEP, we made circumstance-of-sale adjustments by deducting home-market direct selling expenses from constructed value. We also made adjustments in EP and CEP comparisons, when applicable, for home-market indirect selling expenses incurred for U.S. sales to offset home-market commissions.

When possible, we calculated constructed value at the same level of trade with respect to CEP sales or without regard to level of trade with respect to EP sales.

**Currency Conversion**

It is our normal practice to make currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

**Verification**

As provided in section 782(i)(1) of the Act, we intend to verify the information relied upon in making our final determination for TCI.

**Suspension of Liquidation**

In accordance with section 733(d)(2) of the Act, we will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of PRCBs from Taiwan that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register.** We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average margins, as indicated below, as follows: (1) The rates for TCI and Ipsido will be the rates we have determined in this preliminary determination; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of the subject merchandise; (3) the rate for all other producers or exporters will be 28.69 percent, as discussed in the ''All-Others Rate'' section, below. These suspension-of-liquidation instructions will remain in effect until further notice.

| Manufacturer/exporter | Weighted-average margin (percent) |
|---|---|
| Ipsido Corporation | 95.81 |
| TCI Plastic Co., Ltd. | 28.69 |

**All-Others Rate**

Section 735(c)(5)(A) of the Act provides that the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated excluding any zero or *de minimis* margins and any margins determined entirely under section 776 of the Act. TCI is the only respondent in this investigation for which the Department has calculated a company-specific rate. Therefore, for purposes of determining the all-others rate and pursuant to section 735(c)(5)(A) of the Act, we are using the weighted-average dumping margin calculated for TCI, 28.69 percent. See, *e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy,* 64 FR 30750, 30755 (June 8, 1999), and *Coated Free Sheet Paper from Indonesia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 72 FR 30753, 30757 (June 4, 2007) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia,* 72 FR 60636 (October 25, 2007)).

**Disclosure**

We will disclose the calculations performed in our preliminary determination to interested parties in this proceeding in accordance with 19 CFR 351.224(b).

**ITC Notification**

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination. If the Department's final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether imports of PRCBs from Taiwan are materially injuring, or threatening material injury to, the U.S. industry (see section 735(b)(2) of the Act). Because we are postponing the deadline for our final determination to 135 days from the date of the publication of this preliminary determination, as discussed below, the ITC will make its final determination no later than 45 days after our final determination.

**Public Comment**

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs to the Department no later than seven days after the date of the issuance of the last verification report in this proceeding. Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs. See 19 CFR 351.309(d). A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. See 19 CFR 351.309(c)(2). Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette.

In accordance with section 774 of the Act, the Department will hold a public hearing, if timely requested, to afford interested parties an opportunity to comment on issues raised in case briefs, provided that such a hearing is requested by an interested party. See also 19 CFR 351.310. If a timely request for a hearing is made in this investigation, we intend to hold the hearing two days after the deadline for filing a rebuttal brief at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain

the following: (1) The party's name, address, and telephone number; (2) a list of participants; (3) a list of the issues to be discussed. See 19 CFR 351.310(c). At the hearing, oral presentations will be limited to issues raised in the briefs.

**Postponement of Final Determination and Extension of Provisional Measures**

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise or, in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of the Department's regulations requires that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

On September 17, 2009, TCI requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination by 60 days. At the same time, TCI requested that the Department extend the application of the provisional measures prescribed under section 733(d) of the Act and 19 CFR 351.210(e)(2) from a four-month period to a six-month period. In accordance with section 735(a)(2) of the Act and 19 CFR 351.210(b)(2), because (1) our preliminary determination is affirmative, (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting this request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register.** Suspension of liquidation will be extended accordingly.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: October 19, 2009.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. E9–25714 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–552–802]**
**[A–570–893]**

### Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China: Extension of Preliminary Results of Antidumping Duty Administrative Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (''Department'') is extending the time limit for the preliminary results of the administrative reviews of certain frozen warmwater shrimp from the Socialist Republic of Vietnam (''Vietnam'') and the People's Republic of China (''PRC''). The reviews cover the period February 1, 2008, through January 31, 2009.

**EFFECTIVE DATE:** October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Bobby Wong, Susan Pulongbarit, or Irene Gorelik, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: (202) 482–0409, (202) 482–4031, or (202) 482–482–6905, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On March 26, 2009, the Department published a notice of initiation of the administrative reviews of the antidumping duty orders on certain frozen shrimp from Vietnam and the PRC. *See Notice of Initiation of Administrative Reviews and Requests for Revocation in Part of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People's Republic of China*, 74 FR 13178 (March 26, 2009). The preliminary results of the reviews are currently due no later than October 31, 2009.

**Statutory Time Limits**

In antidumping duty administrative reviews, section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary determination to a maximum of 365 days after the last day of the anniversary month.

**Extension of Time Limit for Preliminary Results of Review**

We determine that it is not practicable to complete the preliminary results of these administrative reviews within the original time limit because the Department requires additional time to analyze questionnaire responses, issue supplemental questionnaires, conduct verification, and to evaluate surrogate value submissions for purposes of the preliminary results.

Therefore, the Department is extending the time limit for completion of the preliminary results of the administrative reviews by 120 days. The preliminary results will now be due no later than March 1, 2010, the first business day following 120 days from the current deadline. The final results continue to be due 120 days after the publication of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: October 20, 2009.

**John M. Andersen,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. E9–25856 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–580–818]**

### Corrosion–Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On September 8, 2009, the U.S. Department of Commerce (the Department) published in the **Federal Register** its preliminary results of the administrative review of the countervailing duty (CVD) order on corrosion–resistant carbon steel flat products (CORE) from the Republic of Korea (Korea) for the period of review (POR) January 1, 2007, through December 31, 2007. *See Corrosion–Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*, 74 FR 46100

(September 8, 2009) (*Preliminary Results*). We preliminarily found that Dongbu Steel Co., Ltd. (Dongbu), Hyundai HYSCO Ltd. (HYSCO), and Pohang Iron and Steel Co., Ltd. (POSCO) received *de minimis* countervailable subsidies during the POR. We did not receive any comments on our *Preliminary Results*, and we have made no revisions.

**EFFECTIVE DATE:** October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Gayle Longest at (202) 482–3338, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave, NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

## Background

On August 17, 1993, the Department published in the **Federal Register** the CVD order on CORE from Korea. *See Countervailing Duty Orders and Amendments to Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Korea*, 58 FR 43752 (August 17, 1993). On September 8, 2009, the Department published in the **Federal Register** its Preliminary Results of the administrative review of this order for the period January 1, 2007, through December 31, 2007. *See Preliminary Results*, 74 FR 46100. In accordance with 19 CFR 351.213(b), this administrative review covers Dongbu, HYSCO, and POSCO, producers and exporters of subject merchandise.

In the *Preliminary Results*, we invited interested parties to submit briefs or request a hearing. The Department did not conduct a hearing in this review because none was requested, and no briefs were received.

## Scope of Order

Products covered by this order are CORE from Korea. These products include flat–rolled carbon steel products, of rectangular shape, either clad, plated, or coated with corrosion–resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron–based alloys, whether or not corrugated or painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness. The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7210.30.0000, 7210.31.0000, 7210.39.0000, 7210.41.0000, 7210.49.0030, 7210.29.0090, 7210.60.0000, 7210.61.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.1000, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.21.0000, 7212.29.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.12.1000, 7217.13.1000, 7217.19.1000, 7217.19.5000, 7217.20.1500, 7217.22.5000, 7217.23.5000, 7217.29.1000, 7217.29.5000, 7217.30.15.0000, 7217.32.5000, 7217.33.5000, 7217.39.1000, 7217.39.5000, 7217.90.1000 and 7217.90.5000. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise subject to this order is dispositive.

## Period of Review

The POR for which we are measuring subsidies is from January 1, 2007, through December 31, 2007.

## Final Results of Review

As noted above, the Department received no comments concerning the *Preliminary Results*. Consistent with the *Preliminary Results*, we find that Dongbu, HYSCO, and POSCO received *de minimis* countervailable subsidies during the POR. As there have been no changes or comments from the *Preliminary Results*, a Decision Memorandum was not required for these final results and, therefore, no memo is attached to this **Federal Register** notice. For further details of the programs included in this proceeding, see the *Preliminary Results*, 74 FR 46100.

The rates for the reviewed companies are set forth in the following table:

| Company | Net Subsidy Rate |
|---|---|
| Dongbu Steel Co. Ltd. (Dongbu) | 0.21 percent *ad valorem (de minimis)* |
| Hyundai Hysco Ltd. (HYSCO) | 0.04 percent *ad valorem (de minimis)* |
| Pohang Iron and Steel Co., Ltd. (POSCO) | 0.01 percent *ad valorem (de minimis)* |

## Assessment Rates/Cash Deposits

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results of review to liquidate shipments of subject merchandise by Dongbu, HYSCO, and POSCO entered, or withdrawn form warehouse, for consumption on or after January 1, 2007, through December 31, 2007, without regard to countervailing duties. We will also instruct CBP not to collect cash deposits of estimated countervailing duties on shipments of the subject merchandise by Dongbu, HYSCO, and POSCO entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review.

For all non–reviewed companies, the Department will instruct CBP to assess countervailing duties at the cash deposit rates in effect at the time of entry, for entries between January 1, 2007, and December 31, 2007. The cash deposit rates for all companies not covered by this review are not changed by the results of this review.

## Return or Destruction of Proprietary Information

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: October 21, 2009.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. E9–25857 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**(A–570–964, A–201–838)**

### Seamless Refined Copper Pipe and Tube from the People's Republic of China and Mexico: Initiation of Antidumping Duty Investigations

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Maisha Cryor at (202) 482–5831 or Zhulieta Willbrand at (202) 482–3147 (the People's Republic of China (the ''PRC'')), AD/CVD Operations, Office 4; George McMahon at (202) 482–1167 or James Terpstra at (202) 482–3965 (Mexico), AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

#### The Petitions

On September 30, 2009, the Department of Commerce (the ''Department'') received petitions concerning imports of seamless refined copper pipe and tube (''copper pipe and tube'') from the PRC and Mexico filed in proper form by Cerro Flow Products, Inc., KobeWieland Copper Products, LLC, Mueller Copper Tube Products, Inc., and Mueller Copper Tube Company, Inc. (collectively, ''Petitioners''). *See* Petitions for the Imposition of Antidumping Duties on Seamless Refined Copper Pipe and Tube from the People's Republic of China and Mexico, dated September 30, 2009 (the ''Petitions''). On October 5, 2009, October 8, 2009, October 14, 2009, and October 16, 2009, the Department issued a request for additional information and clarification of certain areas of the Petitions. On October 14, 2009, the Department contacted Petitioners by telephone seeking additional information and clarification regarding the PRC portion of the Petition. *See* Memo to the File from Maisha Cryor, ''Seamless Refined Copper Pipe and Tube from the People's Republic of China and Mexico: Margin Calculation,'' dated October 15, 2009. On October 16, 2009, the Department contacted Petitioners by telephone seeking additional information and clarification regarding the scope of the Petition. *See* Memo to the File from Dana M. Griffies, Import Policy Analyst, '' Petition for the Imposition of Antidumping Duties Seamless Refined Copper Pipe and Tube from the People's Republic of China and Mexico: Suggested Scope Changes,'' dated October 16, 2009.

On October 19, 2009, the Department contacted Petitioners by telephone seeking additional information and clarification regarding industry support. *See* Memo to the File from Dana M. Griffies, Import Policy Analyst, '' Petition for the Imposition of Antidumping Duties Seamless Refined Copper Pipe and Tube from the People's Republic of China and Mexico: Industry Support,'' dated October 19, 2009. Based on the Department's requests, Petitioners filed additional information on October 13, 2009 (hereinafter, ''Supplement to the Petitions, dated October 13, 2009''), October 15, 2009 (hereinafter, ''Supplement to the PRC Petition, dated October 15, 2009''), October 16, 2009 (hereinafter, ''Second Supplement to the Petitions, dated October 16, 2009''), October 19, 2009 (hereinafter, ''Third Supplement to the Petitions[1],''), and October 20, 2009 (hereinafter, ''Fourth Supplement to the Petitions''). The period of investigation (''POI'') for the PRC is January 1, 2009, through June 30, 2009. The POI for Mexico is July 1, 2008, through June 30, 2009. *See* 19 CFR 351.204(b)(1).

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the ''Act''), Petitioners allege that imports of copper pipe and tube from the PRC and Mexico are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports are materially injuring, or threatening material injury to, an industry in the United States.

The Department finds that Petitioners filed the Petitions on behalf of the domestic industry because Petitioners are interested parties as defined in section 771(9)(C) of the Act and have demonstrated sufficient industry support with respect to the antidumping duty investigations that Petitioners are requesting that the Department initiate (*see* ''Determination of Industry Support for the Petitions'' section below).

#### Scope of Investigations

The products covered by these investigations are copper pipe and tube from the PRC and Mexico. For a full description of the scope of the investigations, please see the ''Scope of the Investigations,'' in Appendix I of this notice.

#### Comments on Scope of Investigations

During our review of the Petitions, we discussed the scope with Petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by November 9, 2009, twenty calendar days from the signature date of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

#### Comments on Product Characteristics for Antidumping Duty Questionnaires

We are requesting comments from interested parties regarding the appropriate physical characteristics of copper pipe and tube to be reported in response to the Department's antidumping questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to more accurately report the relevant factors and costs of production, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate listing of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as 1) general product characteristics and 2) the product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base

[1] Final amendments regarding the Petition for the Imposition of Antidumping Duties: Seamless Refined Copper Pipe and Tube from the People's Republic of China, and the Petition for the Imposition of Antidumping Duties: Seamless Refined Copper Pipe and Tube from Mexico, were filed on October 19, 2009 (collectively, ''Third Supplement to the Petitions, dated October 19, 2009'').

product comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe copper pipe and tube, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in product matching. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments at the above–referenced address by November 9, 2009. Additionally, rebuttal comments must be received by November 16, 2009.

**Determination of Industry Support for the Petitions**

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp., Ltd. v. United States*, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioners do not offer a definition of domestic like product distinct from the scope of the investigations. Based on our analysis of the information submitted on the record, we have determined that copper pipe and tube constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, see Antidumping Duty Investigation Initiation Checklist: Copper Pipe and Tube from the PRC (''PRC Initiation Checklist'') at Attachment II, and Antidumping Duty Investigation Initiation Checklist: Copper Pipe and Tube from Mexico (''Mexico Initiation Checklist'') at Attachment II, dated concurrently with this notice and on file in the Central Records Unit (''CRU''), Room 1117 of the main Department of Commerce building.

In determining whether Petitioners have standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in Appendix I of this notice. To establish industry support, Petitioners provided their own 2008 shipments of the domestic like product, and compared this to the estimated total shipments of the domestic like product for the entire domestic industry. *See* Petitions, at 2–9, and Exhibits 1–7, Supplement to the Petitions, dated October 13, 2009, at 8–10, and Exhibit G, Second Supplement to the Petitions, dated October 16, 2009, at 2–3, and Exhibit 54, and Fourth Supplement to the Petitions, dated October 20, 2009, at 7–8 and Exhibit 59. Petitioners argue that shipments are a reasonable proxy for production because most domestic production is sold on the merchant market. See Petitions, at 8 and Exhibits 4–7. Petitioners estimated total 2008 shipments of the domestic like product based on two industry–specific reports that publish shipment and production information, as well as two individuals who are knowledgeable of the U.S. industry. *See* Petitions, at 8 and Exhibits 2–3, Supplement to the Petitions, dated October 13, 2009, at 8–10 and Exhibit G, and Second Supplement to the Petitions, dated October 16, 2009, at 2–3 and Exhibit 54, and Fourth Supplement to the Petitions, dated October 20, 2009, at 7–8 and Exhibit 59; *see also* PRC Initiation Checklist at Attachment II, and Mexico Initiation Checklist at Attachment II.

Our review of the data provided in the Petitions, supplemental submissions, and other information readily available to the Department indicates that Petitioners have established industry support. First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 732(c)(4)(D) of the Act; *see also* PRC Initiation Checklist at Attachment II, and Mexico Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product. *See* PRC Initiation Checklist at Attachment II, and Mexico Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions. Accordingly, the Department determines that the Petitions were filed on behalf of the

domestic industry within the meaning of section 732(b)(1) of the Act. *See id.*

The Department finds that Petitioners filed the Petitions on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act and they have demonstrated sufficient industry support with respect to the antidumping duty investigations that they are requesting the Department initiate. *See id.*

**Allegations and Evidence of Material Injury and Causation**

Petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). In addition, Petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioners contend that the industry's injured condition is illustrated by reduced market share, lost sales and revenues, reduced production, reduced capacity utilization rate, underselling and price depression and suppression, reduced workforce, decline in financial performance, and an increase in import penetration. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* PRC Initiation Checklist at Attachment III and Mexico Initiation Checklist at Attachment III.

**Allegations of Sales at Less Than Fair Value**

The following is a description of the allegations of sales at less than fair value upon which the Department based its decision to initiate these investigations of imports of copper pipe and tube from the PRC and Mexico. The sources of data for the deductions and adjustments relating to the U.S. price, the factors of production (for the PRC) and cost of production (''COP'') (for Mexico) are also discussed in the country–specific initiation checklists. *See* PRC Initiation Checklist at 6–10 and Mexico Initiation Checklist at 6–10.

**Export Price**

**The PRC**

For the PRC, Petitioners calculated export price (''EP'') based on a price quote made during the POI for a copper pipe and tube product by a Chinese producer, sale term delivered. *See* PRC Initiation Checklist at 6; *see also* Petitions, at 28–29, and Exhibit 20, and Supplement to the Petitions, dated October 13, 2009, at 12, and Exhibit G. Petitioners substantiated the U.S. price quote with an affidavit. *See* Petitions, at Exhibit 20. Petitioners made adjustments to EP for ocean freight, foreign inland freight, and a distributor commission. *See* PRC Initiation Checklist at 6–7; see also Petitions, at Exhibits 21 and 23, and Supplement to the Petitions, dated October 13, 2009, at 18–20, and Exhibit L. Petitioners made no other adjustments. *See* PRC Initiation Checklist for additional details.

**Mexico**

For Mexico, Petitioners based U.S. price on the invoice from an actual sale of Type K and Type L copper pipe and tube, produced by a Mexican manufacturer and sold to a U.S. customer in January 2009. *See* Mexico Initiation Checklist; see also Petitions, at 31 and Exhibit 20, and Supplement to the Petitions, dated October 13, 2009, at 21 and Exhibit N. Petitioners substantiated the U.S. prices used with an affidavit and a declaration from persons who obtained the information. *See* Supplement to the Petitions, at 21 and Exhibit N. Petitioners conservatively assumed the selling expenses to be zero in their calculation of the net U.S. price. Petitioners deducted ocean freight and foreign inland freight expenses but made no other adjustments. *See* Mexico Initiation Checklist at 7; *see also* Petition, at 32 and Exhibit 35, and Supplement to the Petitions, dated October 13, 2009, at 22, and Exhibit P. *See* the Mexico Initiation Checklist for additional details.

**Normal Value**

**The PRC**

Petitioners state that the PRC is a non–market economy (''NME'') country and no determination to the contrary has been made by the Department. *See* Petitions, at 29; *see also Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Notice of Antidumping Duty Order, 74 FR 46971 (September 14, 2009); see also Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Antidumping Duty Order*, 74 FR 38395 (August 3, 2009).

In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of the initiation of the PRC investigation. Accordingly, the NV of the product for the PRC investigation is appropriately based on factors of production valued in a surrogate market–economy country in accordance with section 773(c) of the Act. In the course of the PRC investigation, all parties, including the public, will have the opportunity to provide relevant information related to the issue of the PRC's NME status and the granting of separate rates to individual exporters.

Citing section 773(c)(4) of the Act, Petitioners contend that India is the appropriate surrogate country for the PRC because: 1) it is at a level of economic development comparable to that of the PRC; and 2) it is a significant producer of copper pipe and tube. *See* Petitions, at 29–30, and Exhibits 26 and 27. Based on the information provided by Petitioners, we believe that it is appropriate to use India as a surrogate country for initiation purposes. After initiation of the investigation, interested parties will have the opportunity to submit comments regarding surrogate–country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value factors of production within 40 days after the date of publication of the preliminary determination.

Petitioners calculated the NV and dumping margins for the U.S. price, discussed above, using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. Petitioners calculated NV based on their own consumption rates for producing copper pipe and tube in 2009. See Petitions at 30, and Exhibits 28 and 34. In calculating NV, Petitioners based the quantity of each of the inputs used to manufacture and pack copper pipe and tube in the PRC based on their own production experience during the POI because they stated that the actual usage rates of the foreign manufacturers of copper pipe and tube were not reasonably available. *See* Petitions, at 30. However, Petitioners also stated that their production process and cost structure is representative of the PRC copper pipe and tube producers because the act of converting copper raw material into copper pipe and tube is ''fundamentally the same for all producers.'' *See* Supplement to the Petitions, dated October 13, 2009, at 18. Petitioners note that several methods to perform such a conversion exist in the marketplace indicating that no one method is superior to another for the production of copper pipe and tube. *Id.*

Given these facts, Petitioners assert that their experience ''should be representative of other Chinese producers when allowance is made for different wage rates and energy costs.'' *Id.*

Petitioners valued the factors of production based on reasonably available, public surrogate–country data, including Indian import statistics from the World Trade Atlas. *See* Petitions, at 30, and Exhibit 29. Petitioners excluded from these import statistics imports from countries previously determined by the Department to be NME countries, imports from Indonesia, the Republic of Korea, and Thailand as the Department has previously excluded prices from these countries because they maintain broadly available, non–industry-specific export subsidies, and imports labeled as being from ''unspecified countries.'' *See* Petitions, at Exhibit 29. In addition, Petitioners made currency conversions, where necessary, based on the POI–average rupee/U.S. dollar exchange rate, as reported on the Department's website. See Petitions, at 31, and Exhibit 25. Petitioners determined labor costs using the labor consumption, in hours, derived from their own experience. See Petitions, at Exhibits 28 and 34. Petitioners valued labor costs using the Department's NME Wage Rate for the PRC at http://ia.ita.doc.gov/wages/05wages/05wages–051608.html. *See* Petitions, at Exhibits 28 and 30. For purposes of initiation, the Department determines that the surrogate values used by Petitioners are reasonably available and, thus, acceptable for purposes of initiation.

Petitioners determined electricity costs using the electricity consumption, in kilowatt hours, derived from their own experience. *See* Petitions, at Exhibits 28 and 34. Petitioners valued electricity using the Indian electricity rate reported by the Central Electric Authority of the Government of India. *See* Petitions, at Exhibit 24 and, Supplement to the Petitions, dated October 13, 2009, at 17, and Exhibits I and J.

Petitioners determined natural gas costs using the natural gas consumption derived from their own experience. *See* Petitions, at Exhibits 28 and 34, and Supplement to the Petitions, dated October 13, 2009, at 17. Petitioners valued natural gas using the Indian rate reported by the Gas Authority of India, Ltd. *See* Petitions, at Exhibit 31.

Petitioners determined water costs using the water consumption derived from their own experience. *See* Petitions, at Exhibits 28 and 34. Petitioners valued water based on information from the Maharastra Industrial Development Corporation, which is contemporaneous with the POI. *See* Petitions, at Exhibit 24.

Petitioners based factory overhead, selling, general and administrative (''SG&A''), and profit on data from Multimetals Limited (''Multimetals''), a copper pipe and tube producer, for the fiscal year April 2008 through March 2009. *See* Petitions, at 31, and Exhibits 32 and 33, and Supplement to the Petitions, dated October 13, 2009, at 17, and Exhibit K. Petitioners state that Multimetals was an Indian producer of copper pipe and tube products during the fiscal year 2008–2009. *See* Petitions, at 31, and Exhibits 32 and 33, and Supplement to the Petition, dated October 13, 2009, at 17 and Exhibit K. Therefore, for purposes of the initiation, the Department finds Petitioners' use of Multimetals' financial ratios appropriate.

**Mexico**

Petitioners calculated NV for copper pipe and tube based on a price quote for a Type L copper tube offer from March 2009. *See* Petitions, at 32, and Supplement to the Petitions, dated October 13, 2009, at 24; *see also* Mexico Initiation Checklist. Petitioners substantiated the home market price quote with an affidavit and a declaration from persons who obtained the information. *See* Petitions, at 32, and Exhibit 20, and Supplement to the Petitions, dated October 13, 2009, at Exhibit N; *see also* Mexico Initiation Checklist.

**Sales–Below-Cost Allegation**

Petitioners have provided information demonstrating reasonable grounds to believe or suspect that sales of copper pipe and tube in the Mexican market were made at prices below the fully absorbed COP, within the meaning of section 773(b) of the Act, and requested that the Department conduct a country–wide sales–below-cost investigation. The Statement of Administrative Action (''SAA''), submitted to Congress in connection with the interpretation and application of the URAA, states that an allegation of sales below COP need not be specific to individual exporters or producers. *See* SAA, H.R. Doc. No. 103–316 at 833 (1994). The SAA, at 833, states that ''Commerce will consider allegations of below–cost sales in the aggregate for a foreign country, just as Commerce currently considers allegations of sales at less than fair value on a country–wide basis for purposes of initiating an antidumping investigation.''

Further, the SAA provides that section 773(b)(2)(A) of the Act retains the requirement that the Department have ''reasonable grounds to believe or suspect'' that below–cost sales have occurred before initiating such an investigation. Reasonable grounds exist when an interested party provides specific factual information on costs and prices, observed or constructed, indicating that sales in the foreign market in question are at below–cost prices. *Id.*

**Cost of Production**

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (''COM''); SG&A expenses; financial expenses; and packing expenses. Petitioners calculated the quantity of each of the material inputs into COM based on the production experience of a U.S. producer of copper pipe and tube during the POI, multiplied by the value of inputs used to manufacture copper pipe and tube in Mexico using publicly available data. *See* Mexico Initiation Checklist at 8–9; *see also* Second Supplement to the Petitions, dated October 16, 2009, at 3–4 and Exhibits 55 and 56.[2] Petitioners calculated labor, energy, overhead and packing costs based on their own experience adjusted for known differences between costs in the United States and costs in Mexico. *Id.* To calculate the SG&A and financial expense rates, Petitioners relied on the fiscal year 2008 financial statements of a Mexican producer of welded steel pipe, products in the same general category of merchandise as copper pipe and tube. *Id.* at 8. Petitioners indicated that they calculated surrogate financial ratios using the financial statements of the most comparable company in Mexico during the most recent period for which data were available. *See* Petitions at 33, footnote 35. Specifically, Petitioners stated that the data sourced from this Mexican producer's financial statements was the best available surrogate for estimating the SG&A and financial expense rates because, in addition to producing and selling circular welded non–alloy pipe, this Mexican producer was also involved in the sale and distribution of seamless refined copper tube in the Mexican market. *See* Petitions at 33, footnote 35;

[2] Petitioners excluded from these import statistics imports from countries previously determined by the Department to be NME countries, imports from Indonesia, the Republic of Korea, and Thailand as the Department has previously excluded prices from these countries because they maintain broadly available, non-industry-specific export subsidies, and imports labeled as being from ''unspecified countries.''

*see also* Supplement to the Petitions, dated October 13, 2009, at 29.

Based upon a comparison of the prices of the foreign like product in the home market to the calculated COP of the product, we find reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department is initiating a country–wide cost investigation.

**Normal Value Based on Constructed Value**

Because it alleged sales below cost, pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, Petitioners calculated NV based on constructed value (''CV''). Petitioners calculated CV using the same COM, SG&A, financial expense and packing figures used to compute the COP. Petitioners then added a profit rate based on the fiscal year 2008 financial statements of a Mexican producer of welded steel pipe. *Id.*

**Fair–Value Comparisons**

Based on the data provided by Petitioners, there is reason to believe that imports of copper pipe and tube from the PRC and Mexico are being, or are likely to be, sold in the United States at less than fair value. Based on a comparison of EPs and NV calculated in accordance with section 773(c) of the Act, the estimated dumping margin for copper pipe and tube from the PRC is 60.5 percent. *See* PRC Initiation Checklist at 10; *see also* Supplement to the PRC Petition, dated October 15, 2009, at Exhibit W. Based on a comparison of EPs and CV calculated in accordance with section 773(a)(4) of the Act, the estimated dumping margins for copper pipe and tube from Mexico range from 76.5 percent to 85.7 percent. *See* Mexico Initiation Checklist at 10, Supplement to the Petitions, dated October 13, 2009, at 31 and Supplement to the Petitions, dated October 16, 2009 at 3–4, and Exhibits 55 and 56.

**Initiation of Antidumping Investigations**

Based upon the examination of the Petitions on copper pipe and tube from the PRC and Mexico, the Department finds that the Petitions meet the requirements of section 732 of the Act. Therefore, we are initiating antidumping duty investigations to determine whether imports of copper pipe and tube from the PRC and Mexico are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of these initiations.

**Targeted–Dumping Allegations**

On December 10, 2008, the Department issued an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions governing the targeted-dumping analysis in antidumping duty investigations, and the corresponding regulation governing the deadline for targeted–dumping allegations, 19 CFR 351.301(d)(5). *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008). The Department stated that ''{w}ithdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.'' *See id.* at 74931.

In order to accomplish this objective, if any interested party wishes to make a targeted- dumping allegation in either of these investigations pursuant to section 777A(d)(1)(B) of the Act, such allegations are due no later than 45 days before the scheduled date of the country–specific preliminary determination.

**Respondent Selection**

**The PRC**

For this investigation, the Department will request quantity and value information from all known exporters and producers identified with complete contact information in the Petitions, and Supplement to the Petitions, dated October 13, 2009, at 13–15. The quantity and value data received from NME exporters/producers will be used as the basis to select the mandatory respondents.

The Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate–rate application by the respective deadlines in order to receive consideration for separate–rate status. *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 10221, 10225 (February 26, 2008); *Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China*, 70 FR 21996, 21999 (April 28, 2005). The Department will post the quantity and value questionnaire along with the filing instructions on the Import Administration website at http://ia.ita.doc.gov/ia–highlights-and–news.html and a response to the quantity and value questionnaire is due no later than November 10, 2009.

**Mexico**

For this investigation, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports under the Harmonized Tariff Schedule of the United States (''HTSUS'') numbers 7411.10.1030 and 7411.10.1090, the two HTSUS categories most specific to the subject merchandise, during the POI. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO within five days of publication of this **Federal Register** notice and make our decision regarding respondent selection within 20 days of publication of this notice. The Department invites comments regarding the CBP data and respondent selection within ten days of publication of this **Federal Register** notice.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Instructions for filing such applications may be found on the Department's website at http://ia.ita.doc.gov/apo.

**Separate Rates**

In order to obtain separate–rate status in NME investigations, exporters and producers must submit a separate–rate status application. *See* Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non–Market Economy Countries (April 5, 2005) (''Separate Rates and Combination Rates Bulletin''), available on the Department's website at http://ia.ita.doc.gov/policy/bull05–1.pdf. Based on our experience in processing the separate–rate applications in previous antidumping duty investigations, we have modified the application for this investigation to make it more administrable and easier for applicants to complete. *See, e.g., Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off–the-Road Tires From the People's Republic of China*, 72 FR 43591, 43594–95 (August 6, 2007). The specific requirements for submitting the separate–rate application in this investigation are outlined in detail in the application itself, which will be available on the Department's website at http://ia.ita.doc.gov/ia–highlights-and–news.html on the date of publication of this initiation notice in the **Federal Register**. The separate–rate application

will be due 60 days after publication of this initiation notice. For exporters and producers who submit a separate–rate status application and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for consideration for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents. As noted in the ''Respondent Selection'' section above, the Department requires that respondents submit a response to both the quantity and value questionnaire and the separate–rate application by the respective deadlines in order to receive consideration for separate–rate status. The quantity and value questionnaire will be available on the Department's website at http://ia.ita.doc.gov/ia–highlights-and–news.html on the date of the publication of this initiation notice in the **Federal Register**.

**Use of Combination Rates in an NME Investigation**

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. The Separate Rates and Combination Rates Bulletin states:

{w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non–investigated firms receiving the weighted–average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash–deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation. *See* Separate Rates and Combination Rates Bulletin, at 6 (emphasis added).

**Distribution of Copies of the Petitions**

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public versions of the Petitions have been provided to the representatives of the Governments of the PRC and Mexico. Because of the large number of producers/exporters identified in the Petitions, the Department considers the service of the public version of the Petitions to the foreign producers/exporters satisfied by the delivery of the public versions of the Petitions to the Governments of the PRC and Mexico, consistent with 19 CFR 351.203(c)(2).

**ITC Notification**

We have notified the ITC of our initiations, as required by section 732(d) of the Act.

**Preliminary Determinations by the ITC**

The ITC will preliminarily determine, no later than November 16, 2009, whether there is a reasonable indication that imports of copper pipe and tube from the PRC and Mexico are materially injuring, or threatening material injury to a U.S. industry. A negative ITC determination with respect to any country will result in the investigation being terminated for that country; otherwise, these investigations will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: October 20, 2009.

**Ronad K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

**Appendix I**

**Scope of the Investigations**

For the purpose of these investigations, the products covered are all seamless circular refined copper pipes and tubes, including redraw hollows, greater than or equal to 6 inches (152.4 mm) in length and measuring less than 12.130 inches (308.102 mm) (actual) in outside diameter (''OD''), regardless of wall thickness, bore (*e.g.*, smooth, enhanced with inner grooves or ridges), manufacturing process (*e.g.*, hot finished, cold–drawn, annealed), outer surface (*e.g.*, plain or enhanced with grooves, ridges, fins, or gills), end finish (*e.g.*, plain end, swaged end, flared end, expanded end, crimped end, threaded), coating (*e.g.*, plastic, paint), insulation, attachments (*e.g.*, plain, capped, plugged, with compression or other fitting), or physical configuration (*e.g.*, straight, coiled, bent, wound on spools).

The scope of these investigations covers, but is not limited to, seamless refined copper pipe and tube produced or comparable to the American Society for Testing and Materials (''ASTM'') ASTM–B42, ASTM–B68, ASTM–B75, ASTM–B88, ASTM–B88M, ASTM–B188, ASTM–B251, ASTM–B251M, ASTM–B280, ASTM–B302, ASTM–B306, ASTM–359, ASTM–B743, ASTM–B819, and ASTM–B903 specifications and meeting the physical parameters described therein. Also included within the scope of these investigations are all sets of covered products, including ''line sets'' of seamless refined copper tubes (with or without fittings or insulation) suitable for connecting an outdoor air conditioner or heat pump to an indoor evaporator unit. The phrase ''all sets of covered products'' denotes any combination of items put up for sale that is comprised of merchandise subject to the scope.

''Refined copper'' is defined as: (1) metal containing at least 99.85 percent by weight of copper; or (2) metal containing at least 97.5 percent by weight of copper, provided that the content by weight of any other element does not exceed the following limits:

| ELEMENT | LIMITING CONTENT PERCENT BY WEIGHT |
|---|---|
| Ag - Silver | 0.25 |
| As - Arsenic | 0.5 |
| Cd - Cadmium | 1.3 |
| Cr - Chromium | 1.4 |
| Mg - Magnesium | 0.8 |
| Pb - Lead | 1.5 |
| S - Sulfur | 0.7 |
| Sn - Tin | 0.8 |
| Te - Tellurium | 0.8 |
| Zn - Zinc | 1.0 |
| Zr - Zirconium | 0.3 |
| Other elements (each) | 0.3 |

Excluded from the scope of these investigations are all seamless circular hollows of refined copper less than 12 inches in length whose OD (actual) exceeds its length.

The products subject to these investigations are currently classifiable under subheadings 7411.10.1030 and 7411.10.1090 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Products subject to these investigations may also enter under HTSUS subheadings 7407.10.1500, 7419.99.5050, 8415.90.8065, and 8415.90.8085. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these investigations is dispositive.

[FR Doc. E9–25855 Filed 10–26–09; 8:45 am]

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## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No.: PTO–P–2008–0045]**

### Legal Framework for Electronic Filing System—Web (EFS-Web)

**AGENCY:** Patent and Trademark Office, Commerce.

**ACTION:** Notice.

**SUMMARY:** This Legal Framework provides guidance on the background statutes, regulations and policies that support the Electronic Filing System—Web (EFS-Web) project. The document is provided as a reference for applicants, parties in reexamination proceedings, attorneys, and agents, as well as their employees using the system.

**FOR FURTHER INFORMATION CONTACT:** Joni Y. Chang, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy; directly by phone at 571–272–7720, or by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

Inquiries regarding EFS-Web and other USPTO information technology (IT) systems may be directed to the Patent Electronic Business Center (Patent EBC), by telephone: 1–866–217–9197 (toll-free) and 571–272–4100, or by e-mail: *ebc@uspto.gov.*

Inquiries regarding IT policy for U.S. national patent applications may be directed to Mark Polutta (571–272–7709), Senior Legal Advisor, Office of Patent Legal Administration.

Inquiries regarding IT policy for international patent applications may be directed to Tamara Graysay (571–272–6728), Special Program Examiner, Office of Patent Cooperation Treaty (PCT) Legal Administration.

**SUPPLEMENTARY INFORMATION:** This notice substantively contains the same information as the EFS-Web Legal Framework posted on the USPTO Web site (September 2008), with certain exceptions. The following is a brief summary of the major differences:

1. The sections have been reorganized so that sections on similar topics are combined or grouped together, and clarifications and definitions of terms related to electronic filings have been added;

2. Section A (former sections II, III and V) has been revised to provide updated general information on EFS-Web;

3. Section B (former sections IV, VI, XII, XX, and XXXI) has been revised to provide a list of applications and documents that are permitted to be filed via EFS-Web, information on how applications filed via EFS-Web are counted for the application size fee purposes, and fee payments are permitted to be filed via EFS-Web;

4. Section D (part of former sections IV and XXIX) has been revised to provide information on proper usages of EFS-Web;

5. Section E (including subsection E1 and E2, former sections VII, X, and XXVIII) has been revised to permit a Public Key Infrastructure (PKI) certificate holder to designate a single employee of the holder's organization, or a single employee of a contractor, who may use the holder's certificate under the holder's direction and control;

6. Section H (former section XXII) has been revised to permit color and grayscale drawings and photographs to be submitted via EFS-Web in provisional and nonprovisional utility patent applications including reissue applications and national stage applications;

7. Subsection I5 is added to provide that complex work units (such as chemical structure drawings, mathematical formulae, three-dimensional protein crystalline structure data and table data) may be submitted as text files via EFS-Web under the Complex Work Units Pilot Program; and

8. Section J (former sections IX, XVII, XVIII and XIX) has been revised to permit PCT–EASY.zip compressed files to be submitted via EFS-Web when users are filing international applications with the United States Receiving Office, and to provide that tables related to a sequence listing in an international application must be submitted in a PDF file rather than in a text file.

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**A. General Information on EFS-Web**

EFS-Web is the USPTO's system for electronic filing of patent correspondence. EFS-Web is accessible via the Internet on the USPTO Web site. The system utilizes standard Web-based screens and prompts to enable users to submit patent documents in Portable Document Format (PDF) directly to the USPTO. Users may electronically submit most patent applications, reexamination requests, and other patent-related documents securely using EFS-Web. Users may also use EFS-Web to submit payments of most patent fees including patent application filing fees. Users need not provide a duplicate copy of any document filed through EFS-Web unless the USPTO specifically requires the filing of a duplicate in a particular situation. Users may review and check their electronic submissions including their attached PDF files before submitting the documents to the USPTO. After submitting the documents via EFS-Web, the system will display a page that states that the USPTO has received the user's submission. The users, generally within two hours, will receive an Electronic Acknowledgement Receipt of a successful submission received by the USPTO. The processing of fees may delay the issuance of the Electronic Acknowledgement Receipt. The Electronic Acknowledgement Receipt is the electronic equivalent of a postcard receipt. *See* Manual of Patent Examining Procedure (MPEP) § 503. Most documents submitted via EFS-Web will be viewable via the Patent Application Information Retrieval (PAIR) system within an hour after the USPTO receives the documents if the users have associated their applications with their customer numbers. Therefore, users will be able to immediately check the contents of their applications for completeness and accuracy of their electronic submissions.

A user may become a registered user by obtaining a PKI digital certificate. *See* section E of this notice for more information on PKI digital certificates. A registered user may file most patent applications and follow-on documents in a patent application, but a non-registered user is not permitted to file most follow-on documents in a patent application. *See* section B of this notice for more information.

EFS-Web is a PDF-based filing system. Accordingly, all EFS-Web submissions are required to be in PDF format unless otherwise indicated in this notice. EFS-Web permits submission of: (1) The American Standard Code of Information Interchange (ASCII) text files (.TXT) to submit bio-sequence listings, computer program listings, mega tables, and Complex Work Units; and (2) PCT–EASY.zip compressed files to submit the Request form generated by PCT–EASY in international applications with the United States Receiving Office. *See* sections I and J of this notice for more information on ASCII text files and electronic filing of international applications, respectively. In addition, the USPTO provides users with PDF EFS-Web fillable forms, such as the Provisional Application for Patent Cover Sheet, the Information Disclosure Statement, the Application Data Sheet, Petition to Make Special Under Accelerated Examination Program, Petition to Accept Unintentionally Delayed Payment of Maintenance Fee in an Expired Patent, Request for Continued Examination (RCE) Transmittal, and Petition to Make Special Based on Age. When users submit information using an EFS-Web fillable form, the information will directly load into the USPTO databases which will increase accuracy and facilitate faster processing. Users may use other USPTO-created PDF fillable forms available on the USPTO Web site, or user-created forms, and submit the completed forms via EFS-Web. The information entered on these forms, however, will not be automatically loaded into the USPTO databases.

The USPTO Web site provides additional information on EFS-Web and PAIR, such as instructions, guidelines, frequently asked questions, and tutorials (*http://www.uspto.gov/ebc/efs_help.html*). Users may contact the Patent Electronic Business Center (Patent EBC) for assistance with EFS-Web and PAIR as well as for requesting PKI digital certificates and customer numbers.

**B. Legal and Document Policies**

To the extent that any USPTO regulation is inconsistent with the procedures for EFS-Web, the regulation will be interpreted in a manner to support EFS-Web. This notice sets forth the USPTO's policies concerning documents submitted electronically using EFS-Web, including patent applications and requests for reexamination, as well as follow-on documents in patent applications and reexamination proceedings.

*B1. Types of Patent Applications and Documents Permitted to be Filed via EFS-Web:* EFS-Web permits registered users (who have a PKI digital certificate) and non-registered users to file the following patent applications, requests for reexamination, and documents:

1. Provisional patent applications under 35 U.S.C. 111(b);
2. Nonprovisional utility patent applications under 35 U.S.C. 111(a) (including reissue utility patent applications);
3. Nonprovisonal design patent applications under 35 U.S.C. 171 (including reissue design patent applications);
4. International applications under PCT Article 11, designating the United States, for filing in the United States Receiving Office;
5. National stage applications under 35 U.S.C. 371;
6. Requests for *ex parte* reexamination under 35 U.S.C. 302 for utility or design patents;
7. Requests for *inter partes* reexamination under 35 U.S.C. 311 for utility or design patents;
8. Petitions to make special based on age under 37 CFR 1.102(c); and
9. Petitions to accept an unintentionally delayed payment of maintenance fee under 37 CFR 1.378(c), and payments of maintenance fees when submitted with the petition.
10. Petition to make special under accelerated examination program (must be filed with a nonprovisional utility patent application under 35 U.S.C. 111(a)).

*Follow-on documents:* Registered users are permitted to file follow-on documents in the patent applications and reexamination proceedings listed above via EFS-Web. Follow-on documents are documents filed after the initial submission of the application or request for reexamination, which include, but are not limited to, the following: amendments, information disclosure statements (IDS), replies to Office actions and notices, evidence, petitions, and other documents filed after the filing of a patent application or request for reexamination. In addition, registered users may file copies of the patent application (*e.g.,* a copy of the amended specification including the claims, and drawings, for the purposes of publication of the application) for the following pre-grant (eighteen-month) publication requests via EFS-Web: amended publication under 37 CFR 1.215(c), redacted publication under 37 CFR 1.217, early publication under 37 CFR 1.219, and voluntary publication or republication under 37 CFR 1.221(a). *See* section G for more information on filing these publication requests via EFS-Web. Follow-on documents also include any documents submitted on the same day as the application, but after the initial submission. In

reexamination proceedings, both the reexamination requester and the patent owner may file documents via EFS-Web, if they are registered users. Registered users may also file a second or subsequent submission for patent term extension under 35 U.S.C. 156 in a patent file via EFS-Web.

Non-registered users are not permitted to file follow-on documents via EFS-Web, except those listed in items 8–10 above. Non-registered users may file follow-on documents by mail (with a certificate of mailing in accordance with 37 CFR 1.8), Express Mail from USPS in accordance with 37 CFR 1.10, or hand delivery.

*B2. Types of Patent Applications and Documents Not Permitted to be Filed via EFS-Web:* The following is a list of submission types that are *not* permitted to be filed using EFS-Web:

1. Plant patent applications under 35 U.S.C. 161 and documents associated with plant patent applications.
2. Requests for Reexamination under 35 U.S.C. 302 and 311 for plant patents and documents associated with reexamination proceedings for plant patents.
3. Third party submissions under 37 CFR 1.99.
4. Protests under 37 CFR 1.291.
5. Public use papers under 37 CFR 1.292.
6. Color drawings and color photographs for international applications that have not entered the national stage.
7. Initial submissions for patent term extension under 35 U.S.C. 156.
8. Correspondence concerning registration practice as specified in 37 CFR 1.4(e). *See also* 37 CFR 1.6(d)(1).
9. Certified documents as specified in 37 CFR 1.4(f). *See also* 37 CFR 1.6(d)(2). An example of such a submission is a certified copy of a foreign patent application filed pursuant to 35 U.S.C. 119 or a certified copy of an international application filed pursuant to 35 U.S.C. 365.
10. Correspondence to be filed in a patent application subject to a secrecy order under 37 CFR 5.1 through 5.5. *See also* 37 CFR 1.6(d)(6).
11. Documents filed in contested cases before the Board of Patent Appeals and Interferences (BPAI), except as the BPAI may expressly authorize. *See also* 37 CFR 1.6(d)(9).
12. Documents filed in contested cases before the BPAI, which are governed by 37 CFR 41.106(f). *See also* 37 CFR 1.6(d)(3) and 1.8(a)(2)(i)(C).
13. Correspondence filed in connection with a disciplinary proceeding under 37 CFR parts 10 and 11. *See also* 37 CFR 1.6(d)(3).
14. Maintenance fees submitted under 37 CFR 1.366 that are not submitted with a petition under 37 CFR 1.378(c) (see item 9 in section B1 of this notice). Patent owners may be paid electronically using the Office of Finance On-Line Shopping Page at *https://ramps.uspto.gov/eram/. See* MPEP § 2510 for information regarding the proper methods for submitting maintenance fees.
15. Assignment documents under 35 U.S.C. 261, which may be electronically filed using the Electronic Patent Assignment System (EPAS) or the Electronic Trademark Assignment System (ETAS). Information regarding EPAS is available at: *http://epas.uspto.gov.* Information regarding ETAS is available at: *http://etas.uspto.gov.*
16. Submissions that are not associated with a patent application or reexamination proceeding.

If any of the documents listed above is submitted via EFS-Web, the document will not be accorded a date of receipt and it will not be considered officially filed in the USPTO. Furthermore, no benefit will be given to a certificate of transmission under 37 CFR 1.8 on the document.

*B3. What is the official record of documents submitted via EFS-Web?* When the USPTO successfully receives documents filed in accordance with the EFS-Web requirements, the USPTO will convert the PDF files submitted by users into Tagged Image File Format (TIFF) image files and then store the TIFF image files in the Image File Wrapper (IFW) as part of the official record, except for color and grayscale drawings which are stored in the Supplemental Complex Repository for Examiners (SCORE) as part of the official record. In addition, certain submissions may be filed as ASCII text files (*e.g.,* sequence listings or computer program listings), which are stored in SCORE as part of the official record. Accordingly, the official record for the patent application and reexamination proceeding comprises:

(1) ASCII text documents as well as color and grayscale drawings in PDF format as stored in SCORE; and

(2) TIFF images of all other original documents as stored in IFW as well as the Electronic Acknowledgement Receipt and the Electronic Patent Application Fee Transmittal, both of which contain information entered via the EFS-Web graphical user interface (GUI) data collection screens.

*See also Legal Framework for the Use of the Electronic Filing System*, 1286 *Off. Gaz. Pat. Office* 113, 114 (Sept. 14, 2004). The original documents submitted via EFS-Web (*e.g.*, applications and reexamination proceeding documents) are stored exactly as filed in an independent location. *See* section I of this notice for more information on ASCII text documents and section H on color and grayscale drawings. Submissions for pre-grant (eighteen-month) publication are forwarded to the Pre-Grant Publication Division and are not stored in IFW or SCORE as part of the official record of the patent application. *See* section G for more information on publication requests.

*B4. How are applications filed via EFS-Web counted for application size fee purposes?* For patent applications filed under 35 U.S.C. 111 (including provisional applications, utility and design nonprovisional applications, and reissue applications), the paper size equivalent of the specification (including claims) and drawings of an application submitted via EFS-Web will be considered to be seventy-five percent (75%) of the number of sheets of paper present in the specification (including claims) and drawings of the application when entered into IFW after being rendered by EFS-Web for purposes of determining the application size fee required by 37 CFR 1.16(s). *See* 37 CFR 1.52(f)(2) and MPEP § 607. The paper size equivalency under 37 CFR 1.52(f)(2) for EFS-Web filings does not apply to national stage submissions. See MPEP § 1893.01(c).

Any sequence listing in compliance with 37 CFR 1.821(c) or (e), and any computer program listing in compliance with 37 CFR 1.96, submitted via EFS-Web will be excluded when determining the application size fee required by 37 CFR 1.16(s) if the listing is submitted in ASCII text as part of an associated file of the application. *See* 37 CFR 1.52(f)(2) and sections I2 and J3 of this notice. Sequence listing or computer program listings submitted as PDF files would not be excluded.

*B5. Can fee payments be submitted via EFS-Web?* Yes, non-registered and registered users may submit the filing fees (*e.g.*, the basic filing fee, search and examination fee, and excess claims fee) using the online fee payment in EFS-Web at the time of filing a patent application or request for reexamination. Only registered users may submit payment of fees in a previously filed application or reexamination proceeding. EFS-Web permits users to electronically submit the payment of fees with a credit card, USPTO deposit account, or electronic fund transfer. Users may also provide authorizations to charge fees to a deposit account with the documents

being submitted electronically via EFS-Web (*e.g.*, a fee transmittal letter or form). However, users should not submit a credit card charge authorization including the Credit Card Payment Form (PTO–2038) electronically via EFS-Web, because the electronic submission automatically will be loaded into the application file in IFW, and the credit card information may become part of the record of an application file that is open to public inspection.

When the online fee payment in EFS-Web is unavailable, a deposit account authorization transmittal (*e.g.*, PTO/SB/17) may be included with the documents being submitted via EFS-Web. A credit card authorization transmittal (*e.g.*, PTO–2038) may also be submitted by facsimile transmission to the USPTO Central Facsimile (571) 273–8300, or sent via Express Mail from the United States Postal Service (USPS) in accordance with 37 CFR 1.10. Applicants must include the application number from the Electronic Acknowledgement Receipt to ensure that the fees are paid in the correct application. Facsimile submission of the basic national fee for national stage under 35 U.S.C. 371 is not accepted. Failure to timely pay the basic national fee prior to the expiration of 30 months from the priority date will result in abandonment of the international application. If applicant wishes to submit the application filing fees on the filing date of a patent application to avoid the surcharge, the payment of the filing fees must be submitted and received by the USPTO before midnight on the filing date of application. Failure to pay the fees on the filing date of the application will result in a surcharge.

When the online fee payment in EFS-Web is unavailable, the following types of submissions cannot be filed via EFS-Web, since online fee payment must accompany the submission:

(1) Petitions under 37 CFR 1.378(c) for auto-processing by EFS-Web; and

(2) Pre-grant publication submissions under 37 CFR 1.211 to 1.221 that require a fee.

**C. Electronic Acknowledgement Receipt and Date of Receipt**

The Electronic Acknowledgement Receipt establishes the date of receipt by the USPTO of documents submitted via EFS-Web. The electronic documents are itemized in the Electronic Acknowledgement Receipt, which will contain a full listing of the documents submitted to the USPTO as described by the user during the submission process, including the count of pages and/or byte sizes for each document. Thus, the Electronic Acknowledgement Receipt is the electronic equivalent of the postcard receipt described in MPEP section 503.

The official application filing date will be noted on the Filing Receipt (37 CFR 1.54) after the submitted application parts are reviewed for compliance with 35 U.S.C. 111 (or for compliance with 35 U.S.C. 371 for entry into the U.S. national stage of an international application). The filing date is based on the dates indicated on the Electronic Acknowledgement Receipt assuming that, after review, the documents submitted are found to be entitled to an application filing date. Likewise the official reexamination filing date will be noted on the ''Notice of * * * Reexamination Request Filing Date,'' after Central Reexamination Unit (CRU) review for filing date compliance, and is based on the dates indicated on the Electronic Acknowledgement Receipt.

If the official version of any document received by EFS-Web is lost, damaged or rendered unreadable and if it cannot be recovered from the stored files received by electronic submission, then the user will be promptly notified. Such events are expected to be rare. In that situation, the user may have to resubmit any lost document and petition for the original filing date. The user would be required to present: (1) The Electronic Acknowledgement Receipt; (2) a copy of the missing files as submitted; and (3) a signed petition accompanied by a statement stating that the attached files are the same as those originally submitted and mentioned in the Electronic Acknowledgement Receipt for that application number (*e.g.,* a petition under 37 CFR 1.53(e) or 37 CFR 1.182 with the appropriate petition fee under 37 CFR 1.17(f)).

The Electronic Acknowledgement Receipt and statement will serve as *prima facie* evidence that the resubmitted documents are the same as those submitted on the date of receipt, except when the document description used by the user does not match the document. For example, if an applicant originally filed a specification and a set of claims and used the correct document descriptions for a specification and a set of claims, then the Electronic Acknowledgement Receipt will serve as *prima facie* evidence that the applicant filed the specification and set of claims on the original filing date. However, if the applicant actually filed two sets of claims, the Electronic Acknowledgement Receipt will not serve as *prima facie* evidence that the applicant filed a specification and a set of claims (even though the applicant used the document descriptions for a specification and a set of claims). Note the Electronic Acknowledgement Receipt only indicates that the USPTO received what was actually sent, as opposed to what may have been intended to be transmitted. Users should exercise the same care in preparing and preserving a copy of a submission in electronic form as in paper.

*C1. What is the date of receipt of a follow-on document received by the USPTO through EFS-Web?* Follow-on documents filed in a patent application or reexamination proceeding after the initial filing of the application or request for reexamination will be accorded a receipt date, which is the date the follow-on document is received at the USPTO. *See* 37 CFR 1.6(a)(4).

A follow-on document required to be filed in the USPTO within a set period of time (*e.g.,* a reply to an Office action) will be considered as being timely filed if the follow-on document is submitted in compliance with the procedure set forth in 37 CFR 1.8(a):

(1) The follow-on document is submitted via EFS-Web prior to expiration of the set period of time in accordance with the requirements for EFS-Web; and

(2) The document includes a certificate of transmission stating the date of transmission and signed by a person that has reasonable basis to expect that the document would be transmitted on or before the date of transmission. *See* 37 CFR 1.8(a)(1)(i)(C) and (ii). However, the certificate of transmission practice under 37 CFR 1.8 does not apply to the documents listed in 37 CFR 1.8(a)(2) (*e.g.*, a document filed for the purpose of obtaining an application filing date).

*C2. What is the date of receipt of an application submitted via EFS-Web?* 35 U.S.C. 111(a)(4) states in part (emphasis added):

> The filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.

Thus, the filing date of an application is the date of receipt of the application in the USPTO. Further, the USPTO is located in the Eastern Standard Time zone. Accordingly, the date of filing of an application officially submitted through EFS-Web will be the date in the Eastern Standard Time zone when the USPTO received the submission. As such, the submission's ''date of receipt,'' as shown on the Electronic Acknowledgement Receipt, is the Eastern Standard Time date that the documents are fully, successfully, and officially received at the USPTO, after

the user clicks the SUBMIT button on the Confirm and Submit screen. *See* 37 CFR 1.6(a)(4). This date is controlling for filing date purposes of a newly filed application. There is no ''certificate of transmission'' practice for new application filings (37 CFR 1.8). This applies by analogy to reexamination proceedings.

To be very specific, the EFS-Web system records as the date of receipt of documents the local date in Eastern Standard Time on which the USPTO receives the documents, after the user clicks the SUBMIT button on the Confirm and Submit screen for those documents.

For example, if an applicant in California officially files a patent application with the USPTO through EFS-Web by clicking on the SUBMIT button at 1 p.m. Pacific Time in California on May 1, that application would be officially received by the USPTO at 1 a.m. Eastern Standard Time on May 2. Accordingly, the application would receive a filing date of May 2. However, the applicant could alternatively file the application using Express Mail from the USPS in accordance with 37 CFR 1.10 in which case the applicant would have until midnight on May 1 in his or her local time zone to file the application and obtain a filing date of May 1.

*C3. Can users file documents during non-business hours via EFS-Web?* Hours of operation of EFS-Web will be clearly provided in the EFS-Web instructions when users log on to the system. The USPTO will post information on any scheduled down time due to system maintenance in advance. Users may file patent documents electronically during the hours of operation of EFS-Web every day of the week, including weekends and holidays. If the submission is successfully received (even on a Saturday, Sunday or Federal holiday within the District of Columbia), the USPTO will assign that receipt date to the submission.

If a transmission is attempted during a down time, the USPTO cannot accept it and will, if possible, transmit back a notice that the USPTO is not accepting submissions. No Electronic Acknowledgement Receipt will be sent. Instead a notice will advise the user to use alternative filing methods, such as Express Mail from the USPS in accordance with 37 CFR 1.10 or hand delivery of paper to the USPTO, to establish the filing date. Note that applications filed under 37 CFR 1.53, and reexamination requests, cannot be submitted by facsimile transmission (37 CFR 1.6(d)(3) and (5)), and that certificate of mailing procedures do not apply to new applications and reexamination requests (37 CFR 1.8(a)(2)(i)(A) and (D)). Users are strongly advised to transmit their electronic filings sufficiently early in the day to allow time for alternative paper filing when transmission cannot be initiated or correctly completed.

*C4. What if the applicant electronically files an application via EFS-Web, and on that same day, realizes that the applicant has inadvertently omitted a document from the application?* One advantage of filing a patent application via EFS-Web is that applicant (who is a registered user) may view the submission in PAIR and file a document directly into the application on the same day as the filing date of the application. In certain situations, applicant may correct an error by filing a missing item(s) on the same day as the filing date of the application. Applicant, however, may wish to file another new application in other certain situations.

The following examples describe implications raised when applicant inadvertently omits an item when filing an application electronically via EFS-Web:

1. *Oath or Declaration*—Applicant may file an executed oath or declaration on the same day as the filing date as the application via EFS-Web. The oath or declaration will not be considered late and thus a surcharge for filing a late oath or declaration will not be required.

2. *Filing Fees*—Applicant may file the filing fees (*e.g.*, the basic filing fee, search and examination fees, application size fee, or excess claims fee) on the same day as the filing date of the application via EFS-Web. The fees will *not* be considered late and thus a surcharge for filing the filing fees will *not* be required.

3. *Nonpublication request*—Since 37 CFR 1.213(a)(1) requires any nonpublication request to be filed with the application, applicant cannot simply file the nonpublication request to correct the error. If applicant does not wish to have the application publish, applicant must file: (a) a new application with a nonpublication request; and (b) in the initial application, a petition for express abandonment to avoid publication under 37 CFR 1.138(c) and fee under 37 CFR 1.17(h) in sufficient time to permit the appropriate officials in the Pre-Grant Publication Division to recognize the abandonment and remove the application from the publication process.

4. *Drawings*—Applicant may file the missing drawings as a preliminary amendment on the same day as the filing date of the application. The drawings will be considered as part of the original disclosure of the application. *See* 37 CFR 1.115(a)(2). If the application was filed with the ''wrong drawings,'' a preliminary amendment could be filed on the same day as the filing date of the application adding the correct drawings and deleting the ''wrong drawings.'' An amendment adding new drawings and deleting the ''wrong drawings,'' filed on a day after the filing date of the application may raise new matter issues.

5. *Claims*—Applicant may file claims as a preliminary amendment on the same day that applicant filed the application papers and such claims will be considered as part of the original disclosure of the application. Please note that the application will not be entitled to a filing date until applicant files at least one claim in the application.

6. *Part of the specification*—Applicant may file the missing portion of the written description as a preliminary amendment on the filing date of the application. Such amendment will be considered as part of the original disclosure.

If applicant files another new application to correct an error in the first application, applicant will have filed two applications. Applicant may continue to prosecute the first application that has the error or abandon the first application by filing a declaration of express abandonment. Please note that any fees paid in the first application will not be refunded or applied to the second application. Applicant may request refund of the search fee and any excess claims fees (but not the basic filing fee, examination fee, and application size fee) paid in the first application if the application was filed under 35 U.S.C. 111(a) on or after December 8, 2004, and the applicant files a petition for express abandonment in accordance with 37 CFR 1.138(d).

*C5. Are there any legal consequences of the USPTO's accepting electronic patent applications on Saturday and Sunday?* Applicants may file patent applications electronically during the hours of operation of EFS-Web every day of the week, including weekends and holidays. EFS-Web will provide applicants with the opportunity to receive a filing date on any day of the week, including Saturday, Sunday, and Federal holidays. In addition, 35 U.S.C. 21(b) states:

> When the day, or the last day, for taking any action or paying any fee in the United States Patent and Trademark Office falls on Saturday, Sunday, or a Federal holiday within the District of Columbia, the action

may be taken, or fee paid, on the next succeeding secular or business day.

Further, 35 U.S.C. 119((e)(3)) states:

If the day that is 12 months after the filing date of a provisional application falls on a Saturday, Sunday, or Federal holiday within the District of Columbia, the period of pendency of the provisional application shall be extended to the next succeeding secular or business day.

Thus, under United States law, applicants will be permitted to take action on the next business day when the last day for taking action falls on a weekend or Federal holiday, regardless of the mode or form of filing.

However, Article 4 of the Paris Convention addresses the priority period and in Article 4(c)(3) it states:

If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day.

Further, as stated above, the USPTO is capable of accepting electronic patent application filings every day of the week, including weekends and holidays, through EFS-Web. Thus, applicants are cautioned to consider possible adverse consequences regarding the determination in other countries of priority periods under Article 4(C)(3) of the Paris Convention when filing international applications with the United States Receiving Office. Specifically, the ability to file applications electronically on weekends and holidays in the USPTO may result in loss of priority rights in foreign jurisdictions designated in international applications filed with the United States Receiving Office, if applicants elect, in accordance with 35 U.S.C. 21(b) or 119(e)(3), to file an international application on the next succeeding business day in the event that the twelve-month Paris Convention priority period set out in Article 4(C)(1) falls on a Saturday, Sunday, or Federal Holiday. In such circumstances, other patent offices *may* deny the priority claim on the basis that the international application was not timely filed if their national law strictly incorporates the provision of Paris Convention Article 4(c)(3) and considers the USPTO to be open for the filing of applications on weekends and holidays. For this reason, applicants may prefer not to rely upon the ''next business day'' provisions of 35 U.S.C. 21(b) and 119(e)(3) when filing international applications with the USPTO, and instead file the international application before the Paris Convention twelve-month priority period has expired.

**D. Proper Usage of EFS-Web**

Users should follow the instructions and guidelines for EFS-Web provided on the USPTO Web site. Before clicking the SUBMIT button, the user should check whether the correct documents have been attached to the submission, and whether the information related to the submission has been entered correctly. Once the user clicks the SUBMIT button on the Confirm and Submit screen, the submission will be electronically sent to the USPTO. A submission is officially filed at the USPTO when the documents are received by the USPTO (Eastern Time). Use of EFS-Web in a manner significantly in violation of the instructions and guidelines for EFS-Web provided on the USPTO Web site and in this notice may result in non-entry of the submission or failure to accord a filing date in the event the USPTO does not fully, successfully, and officially receive all of the elements necessary to obtain a filing date for an intended submission. Furthermore, electronic files submitted via EFS-Web must be free of executables, worms, viruses, or any other type of potentially malicious content. Please note that 18 U.S.C. 1030 imposes a duty on users not to intentionally cause damage to a federal government system.

*D1. Filing documents as PDF Files via EFS-Web:* EFS-Web accepts standard PDF documents up to 25 megabytes for each file, and 60 electronic files per submission. *See* section I4 of this notice for more information. PDF files created from scanned documents and submitted via EFS-Web must be created using a scanning resolution no lower than 300 dpi. Lower resolution scans have significantly delayed processing and publication of applications, *e.g.*, resubmission has been required for documents failing to comply with the legibility requirements. *See* 37 CFR 1.52(a)(1)(v) and (a)(5) regarding document legibility requirements.

In addition, because the PDF format is so feature-rich, certain PDF features are currently not supported by the USPTO systems. For example, PDF documents with multiple layers must be flattened prior to submission to ensure that the complete document is received by the USPTO and readable to the examiner or other deciding officials. If a document contains layers that are marked as ''invisible'', the invisible layers will be lost when the document is processed by the USPTO, and thus the official records in IFW will not contain the information on the invisible layers. Furthermore, if a user uses the PDF comments or annotations to enter the information on a form, only the blank form without the PDF comments and annotations will be processed. Therefore, the complete document will not be officially filed at the USPTO and the user cannot rely on the Electronic Acknowledgement Receipt as evidence that the completed form was filed at the USPTO. Users are encouraged to check the contents of their submissions for completeness and accuracy via PAIR.

Users must follow the PDF Guidelines for EFS-Web and PDF Creation for EFS-Web (available on the USPTO Web site at *http://www.uspto.gov/ebc/portal/tools.htm*) to create and submit PDF files via EFS-Web to ensure that all of the information in the PDF files is successfully received and processed by the USPTO.

*D2. Entering information on EFS-Web Screens:* EFS-Web collects information from on-screen entries made by the user through the EFS-Web graphical user interface (GUI) data collection screens. Through these data collection screens, the user provides the USPTO with information regarding the electronic submission, such as the type of application being filed, the application number of the application in which a follow-on document is being submitted, or the type of document being submitted. The USPTO systems (*e.g.*, EFS-Web, IFW, etc.) will use the information entered by the user on the EFS-Web screens to automatically: (1) Assign the application number, create the application, and process the application, if a new patent application is being filed; (2) upload the follow-on document into the application file specified by the user; or (3) message the deciding official based on the document description selected by the user. Therefore, providing incorrect information regarding the submission could lead to: (1) An incorrect type of application file being created; (2) a delay in processing the document; (3) filing a document in an incorrect application; or (4) the deciding official not recognizing the document in sufficient time to avoid publication, to withdraw the application from issue, or to avoid the abandonment of the application.

1. *Follow-on documents:* When a user submits a follow-on document (*e.g.*, a reply to an Office action or notice) via EFS-Web, the user is required to enter the correct application number and confirmation number of the application in which the follow-on document is being filed. Providing the incorrect application number and confirmation number pair will result in filing the follow-on document in the wrong application. Therefore, it is important

for the user to enter the correct application number on the EFS-Web screen when filing the follow-on document.

After the submission of the follow-on document is completed, the user should log on to PAIR to review the application file and check whether the follow-on document has been filed in the correct application. Checking the application file via PAIR would also help the user to discover other filing errors, such as filing a wrong document or omitting a portion of the document.

2. *Filing a new patent application:* When a user is submitting a new patent application via EFS-Web, the user is required to select the application type (*e.g.*, design, utility, provisional or nonprovisonal) being filed on the EFS-Web screen. Only document descriptions and fee codes pertinent to the selected application type will be available for the submission. The system will also automatically generate the application number based on the user's selection. For example, if the user indicates that the submission is a provisional application by selecting the EFS-Web radio button for a provisional application, the application will be assigned a provisional application number, provisional application fees will be collected or required, and the application will be further processed as a provisional application. Furthermore, the application will not be assigned to an examiner for examination and will not be published because the submission is processed as a provisional application. Therefore, it is important for the user to select the correct application type on the EFS-Web screen, and review the Electronic Acknowledgement Receipt and the application file using PAIR after the submission is completed.

3. *Document indexing:* When a user submits a patent application or a follow-on document in a patent application using EFS-Web, the user must select from the list of document descriptions to specify the files being submitted via EFS-Web. For instance, when the user is filing a patent application, the submission must be separated into appropriate sections: specification, claims, abstract, and drawing; and when the user is filing an amendment, the user must select the appropriate type of amendment: amendment after non-final, amendment after allowance, preliminary amendment, and amendment after final. Based on the document description selected by the user, a document code is assigned and a message regarding the document submitted to the USPTO will be forwarded to the appropriate organization for processing, and to the appropriate official for consideration. Furthermore, the IFW and PAIR systems use the document code for identifying the document maintained in the application file. Therefore, accurate document indexing is important to facilitate efficient processing and proper consideration of the document by the USPTO. For example: (a) If the user indicated an after-final amendment as a non-final amendment, the processing of such amendment may be delayed and the examiner may not have sufficient time to consider the amendment before the time period expires; (b) if the user selects the ''Pre-Grant Publication'' radio button on the EFS-Web data collection screen for submitting a substitute specification filed in response to a non-final Office action, the submission will be forwarded to the publication branch rather than processed into IFW and forwarded to the examiner for consideration; and (c) if the user selects ''drawings—only black and white line drawings'' for submitting color drawings in a utility application rather than ''drawing—other than black and white line drawings'', the color drawings would not be processed as color drawings, and would be maintained as black and white drawings in IFW.

More information on document indexing is available on the USPTO Web site at *http://www.uspto.gov/ebc/portal/infodocuments.htm*. It is important for users to select the correct document description, and check the application file via PAIR after the submission is completed.

*D3. Under what conditions will the USPTO allow refunds for fees paid via EFS-Web?* The USPTO will grant refunds to users when, due to a malfunction with the EFS-Web system, the EFS-Web system has misled a user into paying a fee in error. If it cannot be determined that a malfunction occurred, but rather it seems to be a user error, no refund will be given. The users should contact the Patent EBC if there are any issues associated with their submissions.

**E. Security and Authentication**

The USPTO requires PKI certificates to meet federal government computer system authentication guidelines as defined by the National Institute of Standards and Technology (NIST) and the Office of Management and Budget (OMB). The required evaluation of EFS-Web and PAIR determined that level three authentication was needed; this is met by the USPTO's PKI.

Only a PKI certificate holder (or the designated employee under the certificate holder's direction and control) can submit follow-on documents. This preserves confidentiality, and is consistent with power of attorney and correspondence regulations. In order to obtain a PKI certificate, the user must be a registered practitioner (*i.e.*, an attorney or agent) or an inventor, and complete the appropriate paperwork (*e.g.*, review the PKI subscriber agreement and complete the certificate action form, available on the USPTO Web site). Once the user has a PKI certificate, the user can authenticate himself or herself to the USPTO through the EFS-Web sign-on. This will generate a secure, encrypted connection with the USPTO.

For users that do not have, or do not wish to use, a PKI certificate to authenticate to the USPTO, they may still submit new application filings only via a non-authenticated workflow. The user would go to the EFS-Web page and choose to submit without a PKI certificate as a non-registered user, which would generate a Transport Layer Security (TLS) connection for the session, thus allowing secure data transmission to the USPTO. Non-registered users have the same level of protection for filing as a registered user, but are limited to submission of initial filings. This practice minimizes the risk of improperly-filed third party submissions and other documents. Non-registered users may file follow-on documents by mail (with a certificate of mailing in accordance with 37 CFR 1.8), Express Mail from USPS in accordance with 37 CFR 1.10, or hand delivery.

**Note:** Users are advised that the USPTO may revoke a user's digital PKI certificate if the user makes an improper submission through EFS-Web. *See* section B and paragraph 4 of the ''United States Patent and Trademark Office Public Key Infrastructure Subscriber Agreement'' located at [*http://www.uspto.gov/ebc/documents/subscribersagreement.pdf*].

*E1. PKI Subscriber Agreement:* A PKI certificate holder may designate a single employee of the holder's organization, or a single employee of a contractor, who may use the holder's USPTO certificate under the holder's direction and control in compliance with the PKI subscriber agreement. Accordingly, a practitioner who is a PKI certificate holder, or the designated employee acting under the direction and control of the practitioner, may file documents signed by either the practitioner or another practitioner via EFS-Web, in compliance with the PKI subscriber agreement. Filing of a document that is unauthorized to be filed via EFS-Web (*e.g.*, a third party submission under 37

CFR 1.99 or a protest under 37 CFR 1.291) is inconsistent with the subscriber agreement and the rules and policies of the USPTO. Thus, the certificate holder, and designated employee acting under the direction and control of the certificate holder, must make sure that document being submitted is authorized to be filed via EFS-Web, regardless of whether the document is signed by the practitioner exercising the direction and control or by another practitioner.

EFS-Web also permits a legal assistant or paralegal to submit an application or a request for reexamination previously reviewed by a registered practitioner without the registered practitioner being present. *See* section E2 for more information.

*E2. Under what authority does an authorized assistant of the digital certificate holder submit signed documents?* A PKI digital certificate holder is permitted to designate a single employee of the holder's organization, or a single employee of a contractor, under the PKI subscriber agreement and certificate action form. The designated employee under the direction and control of the digital certificate holder may use the certificate holder's certificate to submit documents through EFS-Web in compliance with the PKI subscriber agreement and the rules and policies of the USPTO.

The documents submitted through EFS-Web must be signed in accordance with 37 CFR 1.4, 1.33(b), and 11.18. If the designated employee is an assistant who is not an authorized party to sign the documents, the designated employee is not responsible for the contents of the documents submitted. Instead, the person who signs the documents (*e.g.*, the inventor or a registered practitioner who is representing the inventor) is responsible for the contents. For example, the documents may be electronically signed or ink signed by the applicant or attorney of record. The assistant who serves the ministerial function of pickup and delivery of documents may submit the signed documents electronically via EFS-Web under the direction and control of the certificate holder. (Ink signed documents can be electronically scanned and then e-filed.) The assistant may also view and retrieve documents from Private PAIR under the direction and control of the certificate holder in compliance with the PKI subscriber agreement.

In the submission process, the assistant who is using the holder's certificates to submit the documents through EFS-Web is required to specify certain ''locator information'' so the documents can be associated with the proper application file in the IFW system. That locator information may include the application's title, first named inventor, docket number, application number, confirmation number, correspondence address and filing date, all if available. The type of application (*e.g.*, 35 U.S.C. 111(a), national stage application under 35 U.S.C. 371, international application) and information necessary for the payment of fees are not considered to be locator information. The ''locator information'' is entered on submission to assure that the documents are placed in the proper file, and do not constitute a signed submission of bibliographic data on behalf of the applicant or reexamination party. Errors made in the ''locator information'' may be corrected by the USPTO on its own initiative, or by the applicant or reexamination party, similar to the way they are corrected in paper processing.

It also should be noted that the assistant could pay the fees associated with the submission in the EFS-Web process. This is comparable to the paper practice in which law firms designate individuals to pay fees.

**F. Signature Policy**

Signatures, other than handwritten signatures meeting the standard of 37 CFR 1.4(d)(1), included in image attachments submitted via EFS-Web are governed by the S-signature requirements of 37 CFR 1.4(d)(2) (*See also Changes To Support Implementation of the United States Patent and Trademark Office 21st Century Strategic Plan*, 69 FR 56481, 56486 (Sept. 21, 2004), 1287 *Off. Gaz. Pat. Office* 67 (Oct. 12, 2004).

If the signer is submitting an application through EFS-Web as PDF files, he or she should apply either a handwritten signature in compliance with 37 CFR 1.4(d)(1) or an S-signature in compliance with 37 CFR 1.4(d)(2) before scanning the document or converting it to a PDF file. Any follow-on documents, such as an amendment filed in an application, must also be signed in accordance with 37 CFR 1.33(b). Even though a new patent application is entitled to a filing date if it complies with all the statutory requirements set forth in 35 U.S.C. 111(a) or (b), it is noted that when filing a new application by EFS-Web, a signed transmittal form or a signed application data sheet (ADS) is recommended for identification purposes, and any nonpublication request and certification that accompany the application must be signed.

A legible electronic image of a handwritten signature inserted, or copied and pasted by the person signing the correspondence into an application document may be considered to be an acceptable signature. The legible image of the handwritten signature of the person signing the correspondence must be inserted by the person. Additionally, the signature must be surrounded by a first single forward slash mark before the electronic image and a second single forward slash mark after the electronic image. That is, the legible electronic image of a handwritten signature must be enclosed between two single forward slashes and the signer's name is indicated below or adjacent the signature as per 37 CFR 1.4(d)(2). The slashes may be inserted into the document prior to the insertion of the signature.

The presentation to the USPTO (whether by signing, filing, submitting, or later advocating) of any document constitutes a certification under 37 CFR 11.18(b) (or former 37 CFR 10.18(b)). *See* 37 CFR 1.4(d)(4).

**G. May pre-grant (eighteen-month) publication requests be submitted via EFS-Web?**

Yes, EFS-Web enables users to electronically submit pre-grant publication requests for amended publication, redacted publication, early publication, voluntary publication, or republication under 37 CFR 1.215, 1.217, 1.219, and 1.221(a) via EFS-Web. When filing pre-grant publication requests via EFS-Web, the form-fillable application data sheet (PTO/SB/14) is required to be used for fulfilling the bibliographic data requirements. An electronic submission for voluntary publication, amended publication, republication (37 CFR 1.221(a)) or redacted publication must be submitted as a ''Pre-Grant Publication'' by selecting the ''Pre-Grant Publication'' radio button on the EFS-Web data collection screen. It is not sufficient for a user to submit a document via EFS-Web requesting amended publication, redacted publication, early publication, voluntary publication, or republication without also selecting the ''Pre-Grant Publication'' radio button on the EFS-Web data collection screen.

**H. May photographs and color drawings be submitted via EFS-Web?**

The USPTO prefers black and white line drawings as prescribed in 37 CFR 1.84(a)(1) when applicants are required to submit drawings in patent applications. As stated in 37 CFR 1.84(a)(2) and (b), photographs and color drawings are not ordinarily

permitted in utility and design patent applications, but the USPTO will accept photographs and color drawings in utility or design patent applications, if they are the only practicable medium for illustrating the claimed subject matter. The photographs and color drawings submitted in utility or design patent applications must be of sufficient quality such that all details in the photographs and drawings are reproducible in black and white in the printed patent.

Drawings submitted in international applications are required to comply with PCT Rule 11.13, which does not permit color drawings. Furthermore, there is no provision for photographs. Nevertheless, black and white photographs will be accepted where it is impossible to present in a drawing what is to be shown (*e.g.,* crystalline structures). Color photographs are not permitted in international applications.

The USPTO may object to the drawings and photographs, and require corrections or deletions if they do not comply with 37 CFR 1.84 or PCT Rule 11.13. Additionally, since color drawings are not permitted in international applications, color drawings and color photographs filed in a national stage application will be treated as an amendment and will be objected to if they introduce new matter.

*Types of Photographs and Drawings Permitted to be Filed via EFS-Web:* Black and white line drawings may be submitted via EFS-Web in the types of patent applications and proceedings listed in section B1 of this notice. However, photographs, color drawings, grayscale drawings, and other drawings that are not black and white line drawings may be submitted via EFS-Web in only the following types of applications and proceedings:

1. Nonprovisional design patent applications, including reissue design patent applications;
2. Provisional applications under 35 U.S.C. 111(b);
3. Nonprovisional utility patent applications under 35 U.S.C. 111(a), including reissue utility patent applications; and
4. U.S. national stage applications under 35 U.S.C. 371; and
5. Reexamination proceedings for utility or design patents.

Only black and white photographs may be submitted via EFS-Web in international applications.

*Document Description for Photograph and Drawings:* Users must select the correct document description when submitting photographs and drawings via EFS-Web. Selecting an incorrect document description may cause the photographs and drawings to be processed in a quality that is not sufficient for examination and publication. Applicant must select:

1. ''Drawings—only black and white line drawings'' (document code ''DRW'') for the following:

a. Black and white line drawings in: (i) Provisional applications under 35 U.S.C. 111(b); (ii) nonprovisional utility patent applications under 35 U.S.C. 111(a), including reissue utility patent applications; (iii) international applications and national stage applications under 35 U.S.C. 371; and (iv) reexamination proceedings for utility patents. These drawings will be converted into TIFF images and stored in IFW.

b. Black and white line drawings, grayscale drawings, photographs, color drawings, and other drawings that are not black and white line drawings in design patent applications, including reissue design patent applications, and reexamination proceedings for design patents. These drawings will be stored in SCORE, and a black and white copy will be stored in IFW along with a SCORE placeholder sheet.

2. ''Drawings—other than black and white line drawings'' (document code ''DRW.NONBW'') for the following:

a. Photographs, color drawings, grayscale drawings, and other drawings that are not black and white line drawings in: (i) provisional applications under 35 U.S.C. 111(b); (ii) nonprovisional utility patent applications under 35 U.S.C. 111(a), including reissue utility patent applications; (iii) national stage applications under 35 U.S.C. 371; and (iv) reexamination proceedings for utility patents. These drawings will be stored in SCORE, and a black and white copy will be stored in IFW along with a SCORE placeholder sheet.

b. Black and white photographs, and grayscale drawings, in international applications. These drawings will be stored in SCORE, and a black and white copy will be stored in IFW along with a SCORE placeholder sheet.

*Other Requirements:* For color drawings, a petition filed under 37 CFR 1.84(a)(2) explaining why the color drawings are necessary is required. *See* MPEP § 608.02. The requirement for three (3) sets of color drawings under 37 CFR 1.84(a)(2)(ii) is not applicable to color drawings submitted via EFS-Web. Therefore, only one set of such color drawings is necessary when filing via EFS-Web.

EFS-Web supports the use of black and white, color, or grayscale images within the PDF document. However, grayscale or color images filed as ''drawings—other than black and white line drawings'' in a utility patent application will be converted to black and white images when stored into IFW. The quality of black and white images may be degraded.

To obtain sufficient quality so that all details in the images are reproducible in black and white in the eighteen-month publication and the printed patent, images should be scanned at a minimum resolution of 300 DPI. Furthermore, PAIR is only capable of displaying portrait orientation. Users should not submit landscape oriented drawings via EFS-Web because PAIR will automatically convert the image to portrait, which may cause the images to be distorted during viewing.

**I. Text Files and File Limits**

*I1. May biotechnology sequence listings, large tables, or computer program listing appendices be submitted as text files via EFS-Web?* Yes, all of these types of documents may be submitted as ASCII text files with a ''.txt'' extension (*e.g.,* ''seqlist.txt'') for national applications (other than international applications) and reexamination proceedings. The compact disc practice of 37 CFR 1.52(e) and 1.821 et seq. remains as a filing option. The filing of international applications via EFS-Web is discussed in section J of this notice.

Users may submit the following document types, as specified in 37 CFR 1.52(e), as ASCII text files via EFS-Web instead of on compact disc, provided the specification contains a statement in a separate paragraph that incorporates by reference the material in the ASCII text file identifying the name of the ASCII text file, the date of creation, and the size of the ASCII text file in bytes:

1. A computer program listing (*see* 37 CFR 1.96);
2. A sequence listing (submitted under 37 CFR 1.821); or
3. Any individual table (*see* 37 CFR 1.58) if the table is more than 50 pages in length, or if the total number of pages of all of the tables in an application exceeds 100 pages in length, wherein a table page is a page printed on paper in conformance with 37 CFR 1.52(b) and 1.58(c).

The requirements of 37 CFR 1.52(e)(3)–(6) for documents submitted on compact disc are not applicable to computer program listings, sequence listings, and tables submitted as ASCII text files via EFS-Web. However, each text file must be in compliance with ASCII and has a file name with a ''.txt'' extension. Further, the specification must contain an incorporation-by-reference of the material in the ASCII

text file in a separate paragraph identifying the name of the ASCII text file, the date of creation, and the size of the ASCII text file in bytes similar to the requirements of 37 CFR 1.52(e)(5) for compact discs.

It is recommended that a sequence listing be submitted in an ASCII text file via EFS-Web rather than in a PDF file. If the sequence listing text file submitted via EFS-Web complies with the requirements of 37 CFR 1.824(a)(2)–(6) and (b) (*i.e.,* is a compliant sequence listing ASCII text file), the text file will serve as both the paper copy required by 37 CFR 1.821(c) and the computer readable form (CRF) required by 37 CFR 1.821(e). Thus, the following are not required and should not be submitted: (1) A second copy of the sequence listing in a PDF file; (2) a statement under 37 CFR 1.821(f) (indicating that the paper copy and CRF copy of the sequence listing are identical); and (3) a request the use of a compliant computer readable ''Sequence Listing'' that is already on file for another application pursuant to 37 CFR 1.821(e). If such a request is filed, the USPTO will not carry out the request but will use the sequence listing submitted in an ASCII text file with the application via EFS-Web. Checker software that may be used to check a sequence listing for compliance with the requirements of 37 CFR 1.824 is available on the USPTO web site at *http://www.uspto.gov/web/offices/pac/checker/.*

If a user submits a sequence listing (under 37 CFR 1.821(c) and (e)) as an ASCII text file via EFS-Web in response to a requirement under 37 CFR 1.821(g) or (h), the sequence listing text file must be accompanied by a statement that the submission does not include any new matter which goes beyond the disclosure of the application as filed. In addition, if a user submits an amendment to, or a replacement of, a sequence listing (under 37 CFR 1.821(c) and (e)) as an ASCII text file via EFS-Web, the sequence listing text file must be accompanied by: (1) A statement that the submission does not include any new matter, and (2) a statement that indicates support for the amendment in the application, as filed. *See* 37 CFR 1.825.

Submission of the sequence listing in a PDF file is not recommended because applicant would still be required to provide the CRF required by 37 CFR 1.821(e) and the sequence listing in the PDF file will not be excluded when determining the application size fee. The USPTO prefers the submission of a sequence listing in an ASCII text file because as stated above, the text file will serve as both the paper copy required by 37 CFR 1.821(c) and the CRF required by 37 CFR 1.821(e). Any sequence listing in PDF format is treated as the paper copy required by 37 CFR 1.821(c). If applicant submits a sequence listing in a PDF file and a copy of the sequence listing in an ASCII text file, a statement that the sequence listing content of the PDF copy and the ASCII text file copy are identical is required. In situations where applicant files the sequence listing in PDF format and requests the use of the CRF of another application under 37 CFR 1.821(e), applicant must submit a letter and request in compliance with 37 CFR 1.821(e) and a statement that the PDF copy filed in the new application is identical to the CRF filed in the other application.

*I2. How are text files counted for application size fee purposes?* Any sequence listing submitted as an ASCII text file via EFS-Web that is otherwise in compliance with 37 CFR 1.52(e) and 1.821(c) or (e), and any computer program listing submitted as an ASCII text file via EFS-Web that is otherwise in compliance with 37 CFR 1.52(e) and 1.96, will be excluded when determining the application size fee required by 37 CFR 1.16(s) or 1.492(j) as per 37 CFR 1.52(f)(1).

Regarding a table submitted as an ASCII text file via EFS-Web that is part of the specification or drawings, each three kilobytes of content submitted will be counted as a sheet of paper for purposes of determining the application size fee required by 37 CFR 1.16(s) or 1.492(j). Each table should be submitted as a separate text file. Further, the file name for each table should indicate which table is contained therein.

*I3. What is the size limit for text files?* One hundred (100) megabytes is the size limit for sequence listing text files submitted via EFS-Web. If a user wishes to submit an electronic copy of a sequence listing text file that exceeds 100 megabytes, it is recommended that the user file the application without the sequence listing using EFS-Web to obtain the application number and confirmation number, and then file the sequence listing on compact disc in accordance with 37 CFR 1.52(e) on the same day by using Express Mail from the USPS in accordance with 37 CFR 1.10, or hand delivery, in order to secure the same filing date for all parts of the application. Alternatively, a user may submit the application on paper and include the electronic copy of the sequence listing text file on compact disc in accordance with 37 CFR 1.52(e). Sequence listing text files may not be partitioned into multiple files for filing via EFS-Web as the EFS-Web system is not currently capable of handling such submissions. If the sequence listing is filed on a compact disc, the sequence listing must be a single document, but the document may be split using software designed to divide a file, that is too large to fit on a single compact disc, into multiple concatenated files. If the user breaks up a sequence listing so that it may be submitted on multiple compact discs, the compact discs must be labeled to indicate their order (*e.g.,* ''1 of X'', ''2 of X'').

For all other file types, 25 megabytes is the size limit. If a user wishes to submit an electronic copy of a computer program listing or table that is larger than 25 megabytes, it is recommended that the electronic copy be submitted on compact disc via Express Mail from the USPS in accordance with 37 CFR 1.10 on the date of the corresponding EFS-Web filing in accordance with 37 CFR 1.52(e) if the user wishes the electronic copy to be considered to be part of the application as filed. Alternatively, the user may submit the application in paper and include the electronic copies on compact disc in accordance with 37 CFR 1.52(e). Another alternative would be for the user to break up a computer program listing or table file that is larger than 25 megabytes into multiple files that are no larger than 25 megabytes each and submit those smaller files via EFS-Web. If the user chooses to break up a large computer program listing or table file so that it may be submitted electronically, the file names must indicate their order (*e.g.,* ''1 of X'', ''2 of X'').

*I4. What is the limit on the number of electronic files that may be included in a single EFS-Web submission?* Sixty (60) electronic files is the file number limit per submission, as EFS-Web is not currently capable of accepting more than 60 electronic files in any one submission. Accordingly, if an application file is comprised of more than 60 electronic files, it is recommended that the user submit 60 or fewer files in an initial filing via EFS-Web at which time the application will be assigned an application number. Note that regarding the 60 electronic file limit per submission, an applicant may upload and validate in sets of up to 20 files each, with a limit of three sets of 20 files. If applicant chooses to divide a file into multiple parts using the multi-doc feature, each part is counted as one file. Then the user may submit any additional electronic files as follow-on documents later on the same day as the initial filing. This will allow all of the electronic files making up the application to receive the same filing date.

*I5. May Complex Work Units be submitted electronically via EFS-Web?* Yes, under the Complex Work Unit Pilot Program, complex work units (such as chemical structure drawings, mathematical formulae, three-dimensional protein crystalline structure data and table data) may be submitted as ASCII text files via EFS-Web for national applications (other than international applications) and reexamination proceedings. Complex work units cannot be submitted as ASCII text files in international applications. More information is available on the USPTO Web site at *http://www.uspto.gov/web/patents/cwupilot.html*.

**J. International Applications and Documents for International Applications**

*J1. May international applications filed under the PCT with the United States Receiving Office be electronically submitted via EFS-Web?* Yes, EFS-Web enables users to electronically file international applications under the PCT with the United States Receiving Office. Applicants are advised that EFS-Web may be used to file either: (1) International applications in fully electronic form; or (2) follow-on papers to previously filed international applications, regardless of the manner in which the international application was initially filed. The required page size for international applications filed via EFS-Web in PDF format is A4 (29.7 cm × 21 cm). *See* PCT Rule 11.5.

EFS-Web permits users to submit PCT-EASY.zip files created by PCT-SAFE when operated in the PCT-EASY mode. A PCT-EASY.zip file will contain the Request and fee calculation sheet in PDF format. All other documents or application parts (*e.g.,* description, claims, drawings and abstract) MUST be separately prepared and attached as PDF documents, except for sequence listings. *See* section J3 of this notice for more information on sequence listings. PCT-SAFE permits users to create and electronically sign using an S-signature the PCT Request Form and the Declaration of Inventorship for the purposes of filing via EFS-Web with the United States Receiving Office. PCT-SAFE when operated in the PCT-EASY mode creates a validated PCT Request which will entitle the applicant to a reduction of the international filing fee. If applicant chooses not to use PCT-SAFE to create the Request and fee calculation sheet, the applicant may use Form PCT/RO/101 (or equivalent) for the Request and attach it as a PDF document. More information regarding filing international applications is available on the USTPO Web site (*http://www.uspto.gov/ebc/portal/efs/dct_pct_file_new_tutorial.pdf*).

The term ''international application'' as used in this notice refers to an international application filed under the PCT where papers have not been submitted to enter the national stage under 35 U.S.C. 371. The term ''national stage'' as used in this notice refers to an international application where papers have been submitted to enter the national stage under 35 U.S.C. 371.

*J2. Entry in the U.S. national stage under 35 U.S.C. 371:* It is recommended that applicants continue to use the Transmittal Letter to the United States Designated/Elected Office (DO/EO/US) Concerning a Submission Under 35 U.S.C. 371 (Form PTO–1390) when electronically filing documents for entry into the U.S. national stage under 35 U.S.C. 371. The PTO–1390 Form includes useful information that is not otherwise collected by EFS-Web at this time.

If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements, Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt. For more information on fees associated with international applications entering the national stage under 35 U.S.C. 371, *see* MPEP § 1893.01(c).

*J3. May EFS-Web be used to file international applications containing a nucleotide or amino acid sequence listing and/or tables related thereto in the United States Receiving Office?*

*a. Sequence Listing:* Under PCT Rule 5.2(a), the sequence listing part must always be presented as a separate part of the description. When filing an international application using EFS-Web, the sequence listing part of the description should preferably be submitted as a single ASCII text file with a ''.txt'' extension (*e.g.,* ''seqlist.txt''). If the sequence listing part is submitted as an ASCII text file, applicant need not submit any additional copies. The ASCII text file will serve both as the sequence listing part of the description under PCT Rule 5.2 and the electronic form under PCT Rule 13ter.1(a). Furthermore, the required statement in paragraph 4(v) of Annex C that ''the information recorded in the electronic form furnished under Rule 13ter is identical to the sequence listing as contained in the international application'' is not required. The sequence listing in an ASCII text file will not be taken into account when calculating the application page count, *i.e.,* no excess page fees will be required for the sequence listing in the text file.

Submission of the sequence listing part in a PDF file is not recommended because applicant would still be required to supply a copy of the sequence listing in an ASCII text file in accordance with AI Annex C, ¶40. When a sequence listing is filed in both a PDF file and an ASCII text file, the PDF copy of the sequence listing will be considered to form part of the application and the ASCII text file will be used for search purposes and will be transmitted to the International Bureau with the record copy. The pages of the PDF file that contain the sequence listing will be taken into account when calculating the application page count, *i.e.,* excess page fees may be required for the PDF file.

*b. Tables Related to a Sequence Listing:* Tables related to a sequence listing must be an integral part of the description of the international application, and must not be included in the sequence listing part. Such table will be taken into account when calculating the application page count, and excess page fees may be required. When applicant submits tables related to a sequence listing in an international application via EFS-Web, the tables must be in a PDF file. If applicant submits tables related to a sequence listing in a text file, such tables will not be accepted as part of the international application. For more information, *see Sequence Listings and Tables Related Thereto in International Applications Filed in the United States Receiving Office,* 1344 *Off. Gaz. Pat. Office* 50 (July 7, 2009).

*c. File Size and Quantity Limits:* One hundred (100) megabytes is the size limit for sequence listing text files. Sequence listing text files must not be partitioned into multiple files for filing via EFS-Web as the EFS-Web electronic filing system is not currently capable of handling such submissions. For all other file types EFS-Web is currently not capable of accepting files that are larger than 25 megabytes. Additionally, a single EFS-Web submission may include no more than 60 electronic files. Note that regarding the 60 electronic file limit, an applicant may upload and validate in sets of up to 20 files each, with a limit of three sets of 20. If applicant chooses to divide a file into multiple parts using the multi-doc feature, each part is counted as one file. The need to submit unusually large sequence listings and/or numerous electronic files may prevent applicant from making a complete international application filing in a single EFS-Web

submission. Applicant may use EFS-Web to file part of the international application and to obtain the international application number and the confirmation number, and then file the remainder of the international application on the same day as one or more follow-on submissions using EFS-Web, in order to secure the same filing date for all parts of the international application. However, applicant is not permitted to file part of the international application electronically via EFS-Web, and then file the remainder of the international application on paper to secure a filing date of all parts of the international application.

In the situation where applicant needs to file a sequence listing that is over one hundred megabytes, applicant may use EFS-Web to file the international application without the sequence listing to obtain the international application number and the confirmation number, and then file the sequence listing on compact discs on the same day by using Express Mail from the USPS in accordance with 37 CFR 1.10, or hand delivery, in order to secure the same filing date for all parts of the international application. However, USPS Express Mail and hand-carried submissions may not contain PDF files and must fully comply with the guidelines for filing a sequence listing on electronic media as set forth in MPEP § 1823.02, except that only one copy of the sequence listing is required, and applicant need not make any reference to AI Part 8 or AI § 801. The sequence listing must be a single document, but the document may be split using software designed to divide a file, that is too large to fit on a single compact disc, into multiple concatenated files. If the user breaks up a sequence listing into multiple concatenated files so that it may be submitted on multiple compact discs, the compact discs must be labeled to indicate their order (*e.g.,* ''1 of X'', ''2 of X'').

*d. Fee Determination for International Applications Containing a Sequence Listing:* The calculation of the international filing fee for an international application, including a sequence listing, filed via EFS-Web is determined based on the type of sequence listing file. A sequence listing filed in an ASCII text file will not be included in the page count of the international application. A sequence listing filed in a PDF file will be included in the page count of the international application. Therefore, the page count for an EFS-Web filed application containing both a PDF and text format sequence listing will be determined by the number of pages of the PDF sequence listing.

*J4. Follow-on Submissions for International Applications:* As noted above, a sequence listing in an ASCII text file, as well as additional PDF files, may be submitted in one or more follow-on submissions, via EFS-Web. Such follow-on submissions will form part of the international application if filed on the same date on which the international application was filed. Note that follow-on submissions of PDF files (including, but not limited to, PDF sequence listings) may change the number of pages in the international application and therefore may affect the international filing fee.

EFS-Web may also be used to submit a sequence listing in an ASCII text file after the international filing date in response to a requirement under 37 CFR 1.821(h) and PCT Rule 13*ter.* Such sequence listing will not form part of the international application as set forth in PCT Rule 13*ter.*1(e).

*J5. Policy of Annex F of the PCT Administrative Instructions:* EFS-Web employs a Web-based approach to document submission which is different from the Annex F ''wrapped, bundled and signed package'' approach. Thus EFS-Web does not meet Annex F requirements. *See* Annex F of the PCT Administrative Instructions located at [*http://www.wipo.int/pct/en/texts/*].

Dated: October 21, 2009.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. E9–25785 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–16–P**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–949]**

### Wire Decking from the People's Republic of China: Postponement of Preliminary Determination of Antidumping Duty Investigation

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Frances Veith or Trisha Tran, 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) 482–4295 or (202) 482–4852, respectively.

**SUPPLEMENTARY INFORMATION:**

**Postponement of Preliminary Determination**

On June 25, 2009, the Department of Commerce (''the Department'') initiated an antidumping duty investigation on wire decking from the People's Republic of China.[1] The notice of initiation stated that, unless postponed, the Department would issue its preliminary determination no later than 140 days after the date of issuance of the initiation, in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended (''the Act''). The preliminary determination is currently due no later than November 12, 2009.

On October 15, 2009, petitioners, AWP Industries, Inc., ITC Manufacturing, Inc., J&L Wire Cloth LLC, Nashville Wire Products Mfg. Co., Inc., and Wireway Husky Corporation (collectively, ''Petitioners''), made a timely request, pursuant to 19 CFR 351.205(b)(2) and (e), for a 50-day postponement of the preliminary determination, in order to allow additional time for the Department to review respondents' sections C and D questionnaire submissions.[2] Because there are no compelling reasons to deny the request, in accordance with section 733(c)(1)(A) of the Act, the Department is postponing the deadline for the preliminary determination by 50 days.

An extension of 50 days from the current deadline of November 12, 2009, would result in a new deadline of January 1, 2010. However, since January 1, 2010, falls on a federal holiday, a non–business day, the deadline for the preliminary determination will now be due no later than January 4, 2010, the next business day. The deadline for the final determination will continue to be 75 days after the date of the preliminary determination, unless extended.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: October 20, 2009.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. E9–25852 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–DS–S**

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[1] *See Wire Decking From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 74 FR 31691 (July 2, 2009).

[2] *See* Petitioners letter regarding, ''Wire Decking from the People's Republic of China - Request to Postpone the Preliminary Antidumping Duty Determination,'' dated October 15, 2009.

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

**[Docket No.: PTO–P–2009–0032]**

### Request for Comments on Patents Ombudsman Pilot Program

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Request for comments.

**SUMMARY:** The United States Patent and Trademark Office (USPTO) is currently developing a Patents Ombudsman Pilot Program. The Patents Ombudsman Pilot Program is intended to provide patent applicants, attorneys and agents with assistance with application-specific issues including prosecution advancement concerns. The Patents Ombudsman Pilot Program is not intended to circumvent normal communication between pro se applicants or applicant's representatives and examiners or Supervisory Patent Examiners (SPEs). The USPTO is inviting public comment on the proposed Patents Ombudsman Pilot Program.

*Comment Deadline Date:* Written comments must be received on or before November 27, 2009. No public hearing will be held.

**ADDRESSES:** Written comments should be sent by electronic mail message over the Internet addressed to *ombudsmanprogram@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop Comments (Attention: Patents Ombudsman Pilot Program), Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450. Although comments may be submitted by mail, the USPTO prefers to receive comments via the Internet.

The written comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the USPTO Internet Web site (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** Mindy Fleisher, Special Programs Advisor, Technology Center 2400, at (571) 272–3365, or Pinchus M. Laufer, Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, at (571) 272–7726.

**SUPPLEMENTARY INFORMATION:** The majority of patent applications filed with the USPTO proceed through the examination process consistent with established USPTO procedure. However, some patent applicants, attorneys, and agents have expressed that their applications have not proceeded in accordance with established procedure. In some situations, the patent applicants, attorneys, and agents have felt that examination has stalled and that their efforts to move their applications forward through the normal channels have not been effective. Patent applicants, attorneys, and agents have suggested that there be a dedicated resource they can turn to in such instances. These suggestions have led the USPTO to consider implementing a Patents Ombudsman Pilot Program.

After considering its resources, the USPTO is proposing that the pilot program take the following form. It is envisioned that pro se applicants or applicant's representatives would initiate use of the Patents Ombudsman Pilot Program via a link on the USPTO web site where pro se applicants or applicant's representatives would provide their name and phone number and select the ombudsman for the patent division (*e.g.,* Technology Center) in which they are seeking assistance; replies to the initial communication for this pilot program will be by telephone rather than by written communication, such as e-mail. The ombudsman in the appropriate division will call the pro se applicant or applicant's representative within one business day to obtain a full description of the issue. Once the full description is obtained, the ombudsman would create a record in a database. The record in the database will be solely limited to the contact information and a broad description of the issue at a level not requiring being made part of the application record. All requests for assistance made to the pilot program will be tracked in the database to: (1) Ensure that all requests for assistance are addressed; (2) identify and use trends to develop targeted training for employees as appropriate; and (3) enhance customer service. After the USPTO gains greater experience with the Patents Ombudsman Pilot Program, the USPTO will reassess whether additional information concerning the issue should be recorded and where best to make a record of that information.

If possible, the ombudsman will immediately resolve the issue (*e.g.,* certain routine administrative issues); otherwise, the ombudsman will forward the issue to the appropriate area for review (*e.g.,* Technical Support Staff, Technology Center Director, SPE, another business unit) and will request that the area send a message back to the ombudsman when the issue has been treated and the pro se applicant or applicant's representative has been notified.

It is intended that all issues be considered and treated within ten business days. The ombudsman in each division will regularly monitor the database to ensure that issues are being treated in a timely manner. In particular, the ombudsman will inquire into instances where five business days have elapsed and there is no indication that the issue has been closed out or is actively in the process of being treated.

The Patents Ombudsman Pilot Program is not intended as an alternative forum for resolution of disagreements between the applicant and the examiner that are currently resolved via appeal or petition. The Patents Ombudsman Pilot Program does not supplant the requirement that all business with the USPTO be conducted in writing.

*See* 37 CFR 1.2.

The USPTO is publishing this request for comments to gather public feedback on the Patent Ombudsman Pilot Program to ensure that it will serve the patent community as intended.

Dated: October 21, 2009.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. E9–25798 Filed 10–26–09; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Availability of the Fiscal Year 2008 Defense Commissary Agency (DeCA) Services Contract Inventory

**AGENCY:** Defense Commissary Agency, DoD.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with Section 2330a of Title 10 United States Code as amended by the National Defense Authorization Act for Fiscal Year 2008 (NDAA 08) Section 807, the DeCA Director of Contracting, in coordination with the Office of the Director, Defense Procurement and Acquisition Policy, Office of Strategic Sourcing (DPAP/SS) will make available to the public the first inventory of activities performed pursuant to contracts for services. The inventory will be published to the DeCA Web site at the following location:

*http://www.commissaries.com/business/services.cfm*.

**DATES:** Inventory to be made publicly available within 30 days of publication of this notice.

**ADDRESSES:** Send written comments or suggestions concerning the inventory to Ms. Cindy Hildner, Directorate of Contracting (AMP), Defense Commissary Agency, 1300 E Avenue, Fort Lee, VA 23801–1800.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cindy Hildner, (804) 734–8000, extension 4–8483, or *cindy.hildner@deca.mil*.

**SUPPLEMENTARY INFORMATION:** NDAA 08, Section 807 amends Section 2330a of Title 10 United States Code to require annual inventories and reviews of activities performed on services contracts. The Deputy Under Secretary of Defense (Acquisition and Technology) (DUSD(AT)) transmitted the DeCA inventory to Congress on September 29, 2009.

The DeCA Director of Contracting submitted the DeCA Fiscal Year 2008 Services Contract Inventory to the Office of the DPAP/SS on August 28, 2009. Included with this inventory was a narrative that describes the methodology for data collection, the inventory data, and the plan for review of this inventory. The narrative and cover letters may be downloaded in electronic form (.pdf file) from the following location: *http://www.commissaries.com/business/services.cfm*. The inventory does not include contract numbers, contractor identification, or other proprietary or sensitive information as these data can be used to disclose a contractor's proprietary proposal information.

Dated: October 21, 2009.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. E9–25762 Filed 10–26–09; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Science Board

**AGENCY:** Department of Defense.

**ACTION:** Notice of advisory committee meeting date change.

**SUMMARY:** On Thursday, September 17, 2009 (74 FR 47787) the Department of Defense announced closed meetings of the Defense Science Board (DSB) Fall quarterly. These meetings have been rescheduled from October 28–29, 2009, to January 11–12, 2010; at the Pentagon. Additional information can be found in the September 17, 2009, notice.

**FOR FURTHER INFORMATION CONTACT:** Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140, via e-mail at *debra.rose@osd.mil,* or via phone at (703) 571–0084.

Dated: October 21, 2009.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. E9–25761 Filed 10–26–09; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DoD–2009–OS–0153]**

### Privacy Act of 1974; System of Records

**AGENCY:** Defense Threat Reduction Agency, DoD.

**ACTION:** Notice to amend a system of records.

**SUMMARY:** Defense Threat Reduction Agency is amending a system of records notices in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on November 27, 2009 unless comments are received which result in a contrary determination.

**ADDRESSES:** Send comments to the Freedom of Information and Privacy Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

**FOR FURTHER INFORMATION CONTACT:** Ms. Brenda Carter at (703) 767–1771.

**SUPPLEMENTARY INFORMATION:** The Defense Threat Reduction Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record systems being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: October 21, 2009.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

### HDTRA 006

**SYSTEM NAME:**

Employee Occupational Health Programs (August 9, 2005, 70 FR 46152).

**CHANGES:**

* * * * *

**STORAGE:**

Delete entry and replace with ''Records are stored in paper file folders and electronic storage media.''

**RETRIEVABILITY:**

Delete entry and replace with ''Records may be retrieved by the individual's name and date of birth.''

**SAFEGUARDS:**

Delete entry and replace with ''During the employment of the individual, medical records are maintained in locked file cabinets located in a secured room with access limited to those whose official duties require access. Buildings are protected by security guards and an intrusion alarm system.''

**RETENTION AND DISPOSAL:**

Delete entry and replace with ''Records are retained until the individual leaves the DTRA. Records are combined with the official personnel folder which is forwarded to the Federal Personnel Records Center or to the new employing agency, as appropriate.''

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with ''Chief, Environmental, Safety and Occupational Health Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.''

**NOTIFICATION PROCEDURE:**

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Chief, Environmental, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

The letter should contain the full name, date of birth and signature of the requester and the approximate period of time, by date, during which the case record was developed.''

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with ''Individuals seeking access to information about themselves contained

in this system of records should address written inquires to the Chief, Environmental, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Written requests for information should contain the full name, date of birth, and signature of the requester. For personal visits the individual should provide a military or civilian identification card.

**CONTESTING RECORD PROCEDURES:**

Delete entry and replace with ''The DTRA rules for accessing records and for contesting contents and appealing initial agency determinations are published in DTRA Instruction 5400.11, DTRA Privacy Program; 32 CFR part 318; or may be obtained from the Chief, Environmental, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.''

* * * * *

## HDTRA 006

**SYSTEM NAME:**

Employees Occupational Health Programs

**SYSTEM LOCATION:**

Environment, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, MS 6201 Ft Belvoir, VA 22060–6201.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Any individual, military, civilian, or contractor personnel employed by the Defense Threat Reduction Agency (DTRA) and other Government Agency employees assigned to DTRA.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

File contains a variety of records relating to an employee's participation in the DTRA Occupational Health Program. Information which may be included in this system are the employee's name, Social Security Number (SSN), date of birth, weight, height, blood pressure, medical history, blood type, nature of injury or complaint, type of treatment/medication received, immunizations, examination findings and laboratory findings, exposure to occupational hazards.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 7901, Health Services Program; DTRA Directive 6055.1, DTRA Safety and Occupational Health Program; and E.O. 9397 (SSN), as amended.

**PURPOSE(S):**

For use by authorized medical personnel in providing any medical treatment or referral; to provide information to agency management officials pertaining to job-related injuries or potential hazardous conditions and to provide information relative to claims or litigation.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The Office of Personnel Management, and the Federal Labor Relations Authority (including the General Counsel) in the Performance of official duties.

The Department of Labor in connection with claims for compensation.

The Department of Justice in connection with litigation relating to claims.

The Occupational Safety and Health Agency in connection with job-related injuries, illnesses, or hazardous condition.

The ''Blanket Routine Uses'' published at the beginning of DTRA's compilation of systems of records notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are stored in paper file folders and electronic storage media.

**RETRIEVABILITY:**

Records may be retrieved by the individual's name and date of birth.

**SAFEGUARDS:**

During the employment of the individual, medical records are maintained in locked file cabinets located in a secured room with access limited to those whose official duties require access. Buildings are protected by security guards and an intrusion alarm system.

**RETENTION AND DISPOSAL:**

Records are retained until the individual leaves the DTRA. Records are combined with the official personnel folder which is forwarded to the Federal Personnel Records Center or to the new employing agency, as appropriate.

**SYSTEM MANAGER(S) AND ADDRESS:**

Chief, Environmental, Safety and Occupational Health Office, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Chief, Environmental, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

The letter should contain the full name, date of birth and signature of the requester and the approximate period of time, by date, during which the case record was developed.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Chief, Environmental, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Written requests for information should contain the full name, date of birth, and signature of the requester. For personal visits the individual should provide a military or civilian identification card.

**CONTESTING RECORD PROCEDURES:**

The DTRA rules for accessing records and for contesting contents and appealing initial agency determinations are published in DTRA Instruction 5400.11, DTRA Privacy Program; 32 CFR part 318; or may be obtained from the Chief, Environmental, Safety and Occupational Health Division, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

**RECORD SOURCE CATEGORIES:**

Information is supplied directly by the individual. It can also be derived from information supplied by the individual, the medical officer, or nurse providing treatment, medication, or supplied by the individual's private physician.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E9–25763 Filed 10–26–09; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF EDUCATION

**[Docket ID ED–2009–OESE–0011]**

**RIN 1810–AB05**

## American Recovery and Reinvestment Act of 2009 (ARRA); Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended (ESEA); Part B, Section 611 of the Individuals With Disabilities Education Act (IDEA)

**AGENCY:** Office of Elementary and Secondary Education; Office of Special Education and Rehabilitative Services, U.S. Department of Education.

**ACTION:** Final notice of adjustments to Title I, Part A and IDEA, section 611 statutory caps on State administration for Federal fiscal year (FY) 2009.

**SUMMARY:** The U.S. Secretary of Education (Secretary) adjusts the statutory caps on State administration under Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended (Title I, Part A), and Part B, section 611 of the Individuals with Disabilities Education Act (IDEA, section 611) with respect to data collection requirements pertaining to these two programs under the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111–5. The adjustments allow a State educational agency (SEA) to reserve additional State administrative funds from its FY 2009 allocations under Title I, Part A and IDEA, section 611 to help defray the costs of data collections that are specifically related to ARRA funding for these programs (including, for Title I, Part A, data collection related to waivers). An SEA may use administrative funds from its regular Title I, Part A and IDEA, section 611 appropriations; the additional administrative funds allowed by the adjustments in this notice; or a combination of these funds to meet the costs of ARRA-related data collection requirements for the Title I, Part A and IDEA, section 611 programs, respectively. For costs associated with ARRA data collections unrelated to Title I, Part A or IDEA, section 611, an SEA may use the State's Government Services grant under the State Fiscal Stabilization Fund (SFSF or Stabilization) program or funds allowable for that purpose under other ARRA programs.

**DATES:** The adjustments are effective November 27, 2009.

**FOR FURTHER INFORMATION CONTACT:**

*For Title I, Part A:* Dr. Zollie Stevenson, Jr., U.S. Department of Education, Office of Elementary and Secondary Education, 400 Maryland Avenue, SW., room 3W320, Washington, DC 20202. Telephone: (202) 260–0826 or by e-mail: *Zollie.Stevenson@ed.gov*.

*For IDEA, section 611:* Dr. Andrew J. Pepin, U.S. Department of Education, Office of Special Education and Rehabilitative Services, 400 Maryland Avenue, SW., Potomac Center Plaza, room 5106, Washington, DC 20202. Telephone: (202) 245–7605 or by e-mail: *Andrew.Pepin@ed.gov*.

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

**SUPPLEMENTARY INFORMATION:**

*Purpose of Programs:* The ARRA provides billions of dollars in new funding for education in order to ''jump start'' school reform efforts and serve special populations while also saving and creating jobs and stimulating the economy. In particular, the ARRA provides $10 billion in new funding under Title I, Part A and $11.3 billion in new funding under IDEA, section 611. Title I, Part A provides assistance through SEAs to local educational agencies (LEAs) and schools with high concentrations of students from families that live in poverty to strengthen teaching and learning for students at risk of failing to meet State academic achievement standards and to close the achievement gap. Section 611 of IDEA provides funds through SEAs to LEAs to help them ensure that children with disabilities, from ages three through 21, have access to a free appropriate public education to meet each child's unique needs and prepare each child for further education, employment, and independent living.

*Program Authority:* Division A, Title XV, section 1552 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5; 20 U.S.C. 6301 *et seq.* (Title I, Part A); 20 U.S.C. 1400 *et seq.* (IDEA, section 611).

### Background

Section 1552 of the ARRA authorizes the Secretary, after following the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 500), to ''reasonably adjust applicable limits on administrative expenditures for Federal awards to help [States] defray the costs of data collection requirements initiated pursuant to [the ARRA].'' The Title I, Part A and IDEA, section 611 programs, which received significant funding increases through the ARRA, have caps on the amount of funds for State administration that an SEA may reserve from its allocations for these programs.

Specifically, section 1004(b) of the ESEA restricts the amount of funds an SEA may reserve for State administration from its Title I, Part A allocation to no more than one percent of the amount the SEA would receive under Title I, Part A, if $14 billion were appropriated for Parts A, C, and D of Title I (with any SEA whose amount under section 1004(b) would be less than $400,000 permitted to reserve up to $400,000). The total amount appropriated in FY 2009 exceeds $14 billion, triggering this cap. Similarly, section 611(e)(1) of IDEA restricts the amount of funds an SEA may reserve for administration of the IDEA, Part B program to not more than the maximum amount the SEA was eligible to reserve for FY 2004 or $800,000 (adjusted annually for inflation), whichever is greater. (The Secretary is not adjusting the cap on State administration contained in section 619(e) of IDEA because the Department has concluded that the ARRA appropriation for section 619 results in a sufficient increase in the amount an SEA may reserve for State administration under that program.)

The ARRA imposes a number of specific data collection and reporting requirements on an SEA that substantially increase its data burden in administering Title I, Part A and IDEA, section 611. Specifically, the ARRA data collection requirements affecting Title I, Part A include, but are not limited to, the following:

- Each LEA that receives Title I, Part A ARRA funds must provide to its SEA, by December 1, 2009, a school-by-school listing of per-pupil education expenditures from State and local sources during school year 2008–2009. The SEA, in turn, must submit this information to the Department by March 31, 2010. This is a new data collection, as many SEAs do not currently collect this school-level information from their LEAs.
- Under section 1512 of the ARRA, an SEA must report, on a quarterly basis, specific information regarding its obligation and use of Title I, Part A ARRA funds.
- Under 2 CFR 176.210, an SEA and its LEAs must track Title I, Part A ARRA funds separately from their regular FY 2009 allocations, which will necessitate increased management and collection of data.
- An SEA will likely assume increased administrative responsibilities in a number of other areas related to ARRA data collection activities, including the following:
  - Providing guidance to LEAs regarding ARRA data quality, and

monitoring the quality of the ARRA data that LEAs must provide.

○ Monitoring and auditing LEAs' use of Title I, Part A ARRA funds.

○ Submitting requests for waivers of Title I, Part A requirements related to ARRA funds.

○ Collecting data to address the criteria involving Title I, Part A for ''Race to the Top'' submissions and other activities.

○ Supporting data collection activities affecting Title I, Part A ARRA funds and ARRA School Improvement Grants under section 1003(g) of the ESEA.

○ Addressing additional data collection requirements that could affect Title I, Part A ARRA funds.

Similarly, the ARRA data collection requirements affecting the programs funded through section 611 of IDEA include, but are not limited to, the following:

• Under section 1512 of the ARRA, an SEA must report, on a quarterly basis, specific information regarding its obligation and use of IDEA, section 611 ARRA funds.

• Under 2 CFR 176.210, an SEA and its LEAs must track IDEA, section 611 ARRA funds separately from their regular FY 2009 allocations, which will necessitate increased management and collection of data.

• An SEA will likely assume increased administrative responsibilities in a number of other areas related to ARRA data collection activities, including the following:

○ Providing guidance to LEAs regarding ARRA data quality and monitoring the quality of the ARRA data that LEAs must provide.

○ Monitoring and auditing LEAs' use of IDEA, section 611 ARRA funds.

○ Addressing additional data collection requirements that could affect the programs funded under IDEA, section 611.

We do not believe that Congress could have contemplated these additional data-related requirements that an SEA must implement under Title I, Part A and IDEA, section 611 when initially establishing the administrative caps for both programs. Accordingly, to provide States with some assistance in defraying the costs of meeting these additional requirements related to data collection under the ARRA, on August 17, 2009, we published a notice of proposed adjustments (NPA) to statutory caps on State administration in the **Federal Register** (74 FR 41402). There is one significant clarification between the NPA and this final notice, which we explain in the *Analysis of Comments and Changes* section.

*Analysis of Comments and Changes:* In response to our invitation in the NPA, 18 parties submitted comments. An analysis of the comments and of changes since publication of the NPA follows. Generally, we do not address technical and other minor changes.

*Comment:* Many commenters supported the proposed adjustments to the statutory caps on State administration under Title I, Part A and IDEA, section 611 with respect to the funds available under the ARRA. These commenters acknowledged that the ARRA data collection requirements impose increased costs at the State level and, therefore, expressed appreciation for the option to reserve additional State administrative funds from their FY 2009 allocations under Title I, Part A and IDEA, section 611 to help defray the costs of these new requirements. Some commenters suggested that the adjustments to the caps will assist SEAs in ensuring that LEAs use their Title I, Part A and IDEA, section 611 funds in an appropriate manner.

A few of the commenters who supported the proposed adjustments expressed concern that some SEAs will be unable to take advantage of these adjustments because they have already allocated ARRA funds to their LEAs. Those commenters were concerned that reserving funds at this point in time would require SEAs to recalculate LEA allocations, which, in turn, would cause LEAS to make extensive budget adjustments.

*Discussion:* The Secretary appreciates the support expressed by the commenters. In the course of considering these comments, we realized that the NPA inadvertently restricted an SEA's ability to take the increased administrative funds from its regular FY 2009 allocations. Although the amount of the increase in the administrative caps is based on the funds available through the ARRA, an SEA may reserve the increase in administrative funds from its Title I, Part A and IDEA, section 611 ARRA funds, its regular FY 2009 appropriations under those programs, or a combination of both. The ''Final Adjustments'' section below includes new language explicitly permitting an SEA to reserve the additional funds from its regular FY 2009 allocations and/or its ARRA allocations for Title I, Part A and IDEA, section 611. It also specifies that an SEA may exercise the options in 34 CFR 200.100(d) with respect to consideration of the applicable hold-harmless provisions under Title I, Part A. By clarifying these points, we intend to provide an SEA with additional flexibility in reserving State administrative funds that are the subject of this notice without unduly affecting its LEAs.

For example, with respect to Title I, Part A, at the same time an SEA reduces its LEAs' FY 2009 allocations to reserve additional State administrative funds, the SEA may have unused FY 2009 funds reserved under section 1003(a) or FY 2008 carryover funds that it can allocate to its LEAs under section 1126(c) of the ESEA. Likewise, under 34 CFR 300.705(c), if an SEA determines that an LEA is adequately providing a free appropriate public education (FAPE) with State and local funds to all children with disabilities residing in the area served by the LEA, the SEA may reallocate any portion of IDEA, section 611 funds to LEAs not adequately providing special education and related services to all children with disabilities or retain those IDEA funds that are not needed by that LEA if the SEA has not reserved the maximum amount for State-level activities, which in this year includes the adjustment to the administrative cap. An SEA also may retain IDEA funds that have not been obligated by an eligible LEA that is not serving any children with disabilities, up to the maximum amount for State-level activities, which in this year includes the adjustment to the administrative cap.

*Changes:* We have added language immediately prior to Table 1 and Table 2 in the adjustments, and revised the Note following Tables 1 and 2 to clarify that an SEA may reserve administrative funds, up to the caps as adjusted by this notice, from its funds for Title I, Part A and IDEA, section 611 available through the ARRA, the regular FY 2009 appropriations for those programs, or a combination of both. We also have included language before Table 1 noting that an SEA may exercise the options in 34 CFR 200.100(d) with respect to consideration of the applicable hold-harmless provisions.

*Comment:* A few commenters expressed concern that allowing an SEA to reserve additional funds for State administrative costs would decrease the amount of funds available to LEAs for programs for disadvantaged children, low-performing schools, and students with disabilities.

*Discussion:* With the enactment of the ARRA, Congress appropriated an additional $10 billion in Title I, Part A funds and an additional $11.3 billion in IDEA, section 611 funds for FY 2009. The ARRA imposed a number of specific data collection and reporting requirements on SEAs that significantly increase SEAs' data burden in administering Title I, Part A and IDEA,

section 611. Congress could not have contemplated these additional ARRA requirements when initially establishing the administrative caps for Title I, Part A and IDEA, section 611 because it established the caps well before the ARRA's enactment. Therefore, we believe it is appropriate to adjust the caps to defray the costs of implementing the data collection requirements associated with the ARRA.

We do not believe the cap adjustments will substantially affect direct services for students under Title I, Part A or IDEA, section 611. In FY 2009, States received their regular fiscal year awards allocated under those programs. In addition to these regular amounts, the ARRA provided billions of dollars in new funding for the Title I, Part A and IDEA, section 611 programs. Of the additional $10 billion in Title I, Part A funds available through the ARRA, the maximum additional amount an SEA may reserve is 0.5 percent of the State's FY 2009 Title I, Part A ARRA allocation, or $1,000,000, whichever is less. Similarly, of the additional $11.3 billion in IDEA, section 611 funds available through the ARRA, the maximum additional amount an SEA may reserve is 0.1 percent of the State's FY 2009 IDEA, section 611 allocation, or $500,000, whichever is less. If all SEAs reserved the maximum amounts of additional administrative funds under Title I, Part A and IDEA, section 611 funds allowed by this notice, the increase would amount to less than 0.2 percent of the combined ARRA Title I, Part A and IDEA, section 611 funding. Although we understand the commenters' concerns about reserving additional funds for State administration at the expense of LEAs, we believe the additional amount of funds that an SEA may reserve is necessary to assist the SEA in meeting its ARRA data reporting requirements. Moreover, LEAs also will benefit from an SEA's use of these funds through, for example, the SEA's ability to implement waivers with respect to its LEAs or assist its LEAs in evaluating the effectiveness of their programs funded through the ARRA.

*Changes:* None.

*Comment:* Some commenters argued that the proposed adjustments did not provide enough additional resources to an SEA, given the SEA's additional responsibilities under the ARRA, as well as reporting requirements for other Department ARRA programs.

*Discussion:* The Secretary's intent in adjusting the State administrative caps for Title I, Part A and IDEA, section 611 is to provide SEAs with a reasonable amount of additional administrative resources to help defray the costs of ARRA-related data collections under those programs without substantially affecting LEA services to students. We note that an SEA may not use the additional administrative funds it may reserve under Title I, Part A and IDEA, section 611 pursuant to this notice, no matter how large that amount might be, to comply with data collection requirements under other ARRA programs. Rather, the SEA may use funds available for administration under those other programs or its Government Services funds under the SFSF program to cover increased administrative costs.

*Changes:* None.

*Comment:* One commenter asked that the Secretary also consider adjusting Federal caps on administrative expenses at the LEA level in light of ARRA funding.

*Discussion:* Even with the SEA administrative cap adjustments, almost all LEAs will have considerably more Title I, Part A and IDEA, section 611 resources in FY 2009 compared to previous years due to the additional $10 billion in Title I, Part A ARRA funds and $11.3 billion in IDEA, section 611 funds. In addition, while LEAs also are subject to new data collection requirements under the ARRA with respect to Title I, Part A and IDEA, section 611, there is no Federal cap on administration at the LEA level for either program.

*Changes:* None.

*Comment:* One commenter asked if the Department had information on whether States planned to use the Government Services grant under the SFSF program to meet ARRA's reporting requirements.

*Discussion:* States were not required to indicate in their initial applications for SFSF funds how they intended to spend Government Services funds, although a State has the option of providing that information to the Department. Seven States, however, indicated in their SFSF applications that they would use Government Services funds to pay for activities related to reporting or administering the SFSF. In addition, a State may amend its application to revise how it will spend its Government Services funds. The Department does not have any information indicating that States are using their SFSF funds to free up other State funds that could then be used to pay for reporting and administrative activities.

*Changes:* None.

*Comment:* A commenter asked how an adjustment to the administrative caps for Title I, Part A and IDEA, section 611 would relate to funding that a State is permitted to recover through its State-wide Cost Allocation Plan (SWCAP).

*Discussion:* A State's SWCAP has no effect on the amount of Title I, Part A and IDEA, section 611 funds an SEA may reserve for administration. A modification to a State's SWCAP approved by the Federal Government might affect the amount of Title I, Part A and IDEA, section 611 administrative funds an SEA may use for indirect costs in relation to other administrative expenses but not the overall amount of Title I, Part A funds and IDEA, section 611 funds the SEA may reserve for administration.

*Changes:* None.

*Comment:* One commenter asked how the Department established the proposed adjustments to the State administrative caps and what criteria the Department used when calculating the funding levels.

*Discussion:* The final adjusted caps are based on the additional reporting requirements that the ARRA prescribes for SEAs with respect to the Title I, Part A and IDEA, section 611 programs. The adjusted caps recognize that both programs currently have administrative caps that do not take into account these new requirements.

*As we explained in the NPA, the adjustments include:* (1) A floor to the amount that may be reserved that enables an SEA, on average, to add at least the equivalent of one additional full-time-equivalent (FTE) employee for each program; and (2) a ceiling that, although limiting the amount that may be reserved, enables an SEA, on average, to add the equivalent of ten FTEs for Title I, Part A and five FTEs for IDEA, section 611. This approach parallels the manner in which an SEA may reserve funds for administration under Title I, Part A and IDEA, section 611 (*i.e.*, in both statutes the amount an SEA may reserve for administration is based on the amount the SEA has received under each program with a minimum and maximum factored in). We also reached these specific adjustment figures following consultations with staff in several SEAs, our own experience with data collections, a review of the ARRA data collection requirements, and consideration of the amounts an SEA may currently reserve for administration under both programs.

*Changes:* None.

*Comment:* Several commenters asked why the amount of the Title I, Part A adjustment differed from the amount for IDEA, section 611.

*Discussion:* The adjustments for Title I, Part A are higher than those for IDEA, section 611 because Title I, Part A has more ARRA reporting requirements. For

example, the ARRA requires the Department to collect from SEAs by March 31, 2010, a report of school-by-school expenditures of State and local funds for LEAs receiving Title I, Part A funds. Because this is a new data collection for many SEAs, which do not currently collect this school-level information from their LEAs, we believe SEAs will have additional responsibilities to provide guidance to LEAs and monitor the quality of these data. Similarly, we believe SEAs need additional administrative resources to take on new responsibilities related to the large increase in school improvement funds available through the ARRA.

*Changes:* None.

*Comment:* One commenter asked whether, in establishing the adjusted caps, the Department analyzed individual State capacity to meet the ARRA reporting requirements and whether it surveyed SEAs and LEAs about their data systems' capacity to provide the required information to the Federal government.

*Discussion:* The Department did not conduct a formal analysis or survey. However, as indicated earlier, we did discuss the idea of adjusting the caps on State administration under Title I, Part A and IDEA, section 611 with representatives of SEAs in a variety of settings, including conference calls, informal telephone calls, professional conferences, and meetings of State directors of Title I and IDEA. Through these conversations, we heard about the challenges SEAs face with meeting the new data collection requirements within the existing administrative caps.

The Secretary did not consult directly with LEAs on this matter. LEAs, unlike SEAs, are not subject to an administrative cap under Title I, Part A or IDEA, section 611. We note that, because of the ARRA, almost all LEAs, even with this one-time adjustment to State administrative caps, have received unprecedented amounts of Title I, Part A and IDEA, 611 funds.

*Changes:* None.

*Comment:* One commenter suggested that the Department was imposing additional burden on SEAs by inviting them to request waivers of certain ARRA-related Title I requirements. Another commenter asked the Department to reduce the burden on SEAs and LEAs of reporting Title I, Part A school-by-school State and local expenditures.

*Discussion:* We wish to make clear that no SEA is required to request a waiver of any Title I, Part A requirement. The Secretary believes, however, that waivers with respect to certain Title I, Part A ARRA-related provisions and to the maintenance of effort requirements that SEAs may request could be particularly helpful to LEAs. (Information on these waivers is available at *http://www.ed.gov/programs/titleiparta/title-i-waiver.doc.*) Rather than processing thousands of LEA requests and risking significantly delaying approval of those requests, the Secretary invited SEAs to apply on behalf of their LEAs. Although this approach benefits both SEAs and LEAs, it does entail some additional administrative costs for SEAs, which is why we are permitting an SEA that requests and receives waivers of Title I, Part A ARRA-related requirements or maintenance of effort to reserve more State administrative funds.

With respect to easing the burden of reporting school-by-school expenditures of State and local funds, we note that this report is expressly required by the ARRA. In devising the data collection instrument for this report, we have been mindful of the burden this requirement could create and have proposed, for public comment, data items that we believe LEAs already must collect for other reporting purposes.

*Changes:* None.

*Comment:* One commenter asked whether burden estimates related to ARRA data collection requirements are available.

*Discussion:* Concerning ARRA-related burden hours for collections initiated by the Department with respect to Title I, Part A, see the following links:

- *http://edicsweb.ed.gov/browse/browsecoll.cfm?pkg_serial_num=4119*; and
- *http://edicsweb.ed.gov/browse/browsecoll.cfm?pkg_serial_num=4002.*

For information on quarterly reporting burden hours required by section 1512 of the ARRA, see the following link:

*http://edocket.access.gpo.gov/2009/E9-24320.htm.*

*Changes:* None.

*Final Adjustments:*

*Title I, Part A:*

Notwithstanding section 1004(b) of the ESEA and 34 CFR 200.100(b)(3), the Secretary adjusts the administrative cap under Title I, Part A to:

1. *Provide administrative funds to support ARRA data collection, excluding data collection for obtaining and implementing Title I, Part A waivers related to the ARRA and maintenance of effort.* The Secretary adjusts the statutory cap on State administration under section 1004(b) of the ESEA to permit an SEA to reserve, from its FY 2009 Title I, Part A allocation, an amount equal to or less than the figure shown for the State in Column 2 in Table 1 to help defray the costs associated with Title I, Part A ARRA data collection. The amount shown in Column 2 for each State is equal to 0.3 percent of the portion of the State's FY 2009 Title I, Part A allocation attributable to the ARRA, or $600,000, whichever is less.[1] A State's amount in Column 2 is $100,000 if 0.3 percent of the State's Title I, Part A ARRA allocation is less than $100,000.

2. *Provide administrative funds to support ARRA data collection, including data collection for obtaining and implementing Title I, Part A waivers related to the ARRA and maintenance of effort.* The Secretary adjusts the Title I, Part A administrative cap to allow an SEA that requests and receives a waiver under Section C (Waivers related to Title I, Part A ARRA Funds) or Section E (Waivers of Maintenance of Effort for LEAs) of the Department's Non-Regulatory Guidance on Title I, Part A Waivers[2] (Title I, Part A Waiver Guidance) to reserve a larger amount of additional administrative funds than it would otherwise be permitted to reserve. Specifically, in this case, the Secretary permits an SEA to reserve, from its FY 2009 Title I, Part A allocation, an amount equal to or less than the figure shown for the State in Column 3 in Table 1. These funds can help defray the costs associated with Title I, Part A ARRA data collection, including additional data collection costs that an SEA may have already incurred or will incur in processing requests from its LEAs that wish to benefit from waivers the SEA has received or may request.

The amount shown in Column 3 for each State is equal to 0.5 percent of the portion of the State's FY 2009 Title I, Part A allocation attributable to the ARRA, or $1,000,000, whichever is less. A State's amount in Column 3 is $200,000 if 0.5 percent of the State's Title I, Part A ARRA allocation is less than $200,000.

The amount in Column 2 or 3 that each SEA may reserve is in addition to the amount the SEA is able to reserve for State administration under section 1004(b) of the ESEA.

**Note:** An SEA may only reserve additional funds for administration up to the amount shown in Column 3 if it has received a

[1] The U.S. Department of Education's budget page [available at *http://www.ed.gov/about/overview/budget/statetables/10stbyprogram.pdf*] shows the amount each State received in Title I, Part A ARRA funds.

[2] The guidance provides comprehensive information on how to request a waiver of specific statutory and regulatory provisions of Title I, Part A and is available at [*http://www.ed.gov/programs/titleiparta/title-i-waiver.doc*].

waiver from the Department under Section C or E of the Title I, Part A Waiver Guidance. An SEA that has not received such a waiver may only reserve additional funds for administration up to the amount shown in Column 2. (In other words, an SEA may reserve either the amount in Column 2 or the amount in Column 3, as appropriate.)

An SEA may reserve these additional funds from its regular FY 2009 Title I, Part A allocation, its Title I, Part A ARRA allocation, or a combination of the two allocations provided that the total amount reserved does not exceed the figure listed in Column 2 or Column 3 for each State. An SEA may only reserve these additional funds from the allocations of LEAs receiving Title I, Part A ARRA funds. In reserving these additional funds, an SEA may exercise the options in 34 CFR 200.100(d) with respect to consideration of the applicable hold-harmless provisions.

TABLE 1—TITLE I, PART A

| Column 1 | Column 2 (Administrative funds for ARRA data collection excluding data collection for waivers)* | Column 3 (Administrative funds for ARRA data collection including data collection for waivers)* |
|---|---|---|
| Alabama | $488,908 | $814,846 |
| Alaska | 100,000 | 200,000 |
| Arizona | 585,262 | 975,437 |
| Arkansas | 333,276 | 555,461 |
| California | 600,000 | 1,000,000 |
| Colorado | 333,408 | 555,680 |
| Connecticut | 212,143 | 353,571 |
| Delaware | 100,000 | 200,000 |
| District of Columbia | 112,807 | 200,000 |
| Florida | 600,000 | 1,000,000 |
| Georgia | 600,000 | 1,000,000 |
| Hawaii | 100,000 | 200,000 |
| Idaho | 104,867 | 200,000 |
| Illinois | 600,000 | 1,000,000 |
| Indiana | 506,031 | 843,385 |
| Iowa | 154,491 | 257,485 |
| Kansas | 212,604 | 354,340 |
| Kentucky | 466,044 | 776,739 |
| Louisiana | 531,470 | 885,784 |
| Maine | 111,553 | 200,000 |
| Maryland | 407,875 | 679,792 |
| Massachusetts | 491,041 | 818,401 |
| Michigan | 600,000 | 1,000,000 |
| Minnesota | 284,133 | 473,555 |
| Mississippi | 398,665 | 664,442 |
| Missouri | 443,185 | 738,642 |
| Montana | 103,950 | 200,000 |
| Nebraska | 143,427 | 239,045 |
| Nevada | 210,378 | 350,631 |
| New Hampshire | 100,000 | 200,000 |
| New Jersey | 548,914 | 914,856 |
| New Mexico | 242,410 | 404,017 |
| New York | 600,000 | 1,000,000 |
| North Carolina | 600,000 | 1,000,000 |
| North Dakota | 100,000 | 200,000 |
| Ohio | 600,000 | 1,000,000 |
| Oklahoma | 328,328 | 547,213 |

TABLE 1—TITLE I, PART A—Continued

| Column 1 | Column 2 (Administrative funds for ARRA data collection excluding data collection for waivers)* | Column 3 (Administrative funds for ARRA data collection including data collection for waivers)* |
|---|---|---|
| Oregon | 281,207 | 468,678 |
| Pennsylvania | 600,000 | 1,000,000 |
| Puerto Rico | 600,000 | 1,000,000 |
| Rhode Island | 107,503 | 200,000 |
| South Carolina | 428,517 | 714,195 |
| South Dakota | 103,950 | 200,000 |
| Tennessee | 582,225 | 970,374 |
| Texas | 600,000 | 1,000,000 |
| Utah | 148,609 | 247,681 |
| Vermont | 100,000 | 200,000 |
| Virginia | 496,056 | 826,760 |
| Washington | 405,369 | 675,615 |
| West Virginia | 182,944 | 304,906 |
| Wisconsin | 443,188 | 738,647 |
| Wyoming | 100,000 | 200,000 |

For the purposes of this table, ''waivers'' refer to waivers described in Section C or E of the Title I, Part A Waiver Guidance that have been obtained by an SEA from the Department.

**IDEA, Section 611**

Notwithstanding section 611(c)(1) of IDEA and 34 CFR 300.704(a), the Secretary adjusts the statutory cap on State administration to permit an SEA to reserve, from its FY 2009 IDEA, section 611 allocation, an amount equal to or less than the figure shown for such State in Column 2 in Table 2 to help defray the costs associated with ARRA data collection under IDEA, section 611. The amount for each State shown in Column 2 is equal to 0.1 percent of the portion of the State's FY 2009 IDEA, section 611 allocation attributable to the ARRA, or 500,000, whichever is less.[3] A State's amount in Column 2 is 100,000 if 0.1 percent of the State's IDEA, section 611 ARRA allocation is less than $100,000. The amount each SEA may reserve is in addition to the amount the SEA is able to reserve for State administration under section 611(e)(1) of the IDEA.

An SEA may reserve these additional funds from its regular FY 2009 IDEA, section 611 allocation, its IDEA, section 611 ARRA allocation, or a combination of the two allocations provided that the total amount reserved does not exceed the figure listed in Column 2 for each State. An SEA may only adjust the allocations of LEAs receiving IDEA, section 611 ARRA funds in order to reserve the additional amount.

[3] The U.S. Department of Education's budget page [available at *http://www.ed.gov/about/overview/budget/statetables/10stbyprogram.pdf*] shows the amount each State received in IDEA, section 611 ARRA funds.

TABLE 2—IDEA, SECTION 611

| Column 1 | Column 2 |
|---|---|
| Alabama | $181,865 |
| Alaska | 100,000 |
| Arizona | 178,476 |
| Arkansas | 112,178 |
| California | 500,000 |
| Colorado | 148,731 |
| Connecticut | 132,971 |
| Delaware | 100,000 |
| District of Columbia | 100,000 |
| Florida | 500,000 |
| Georgia | 313,758 |
| Hawaii | 100,000 |
| Idaho | 100,000 |
| Illinois | 500,000 |
| Indiana | 253,535 |
| Iowa | 122,095 |
| Kansas | 106,872 |
| Kentucky | 157,570 |
| Louisiana | 188,750 |
| Maine | 100,000 |
| Maryland | 200,242 |
| Massachusetts | 280,552 |
| Michigan | 400,608 |
| Minnesota | 189,839 |
| Mississippi | 117,836 |
| Missouri | 227,175 |
| Montana | 100,000 |
| Nebraska | 100,000 |
| Nevada | 100,000 |
| New Hampshire | 100,000 |
| New Jersey | 360,691 |
| New Mexico | 100,000 |
| New York | 500,000 |
| North Carolina | 314,410 |
| North Dakota | 100,000 |
| Ohio | 437,736 |
| Oklahoma | 147,925 |
| Oregon | 128,979 |
| Pennsylvania | 427,178 |
| Puerto Rico | 109,098 |
| Rhode Island | 100,000 |
| South Carolina | 173,240 |
| South Dakota | 100,000 |
| Tennessee | 229,613 |
| Texas | 500,000 |
| Utah | 105,541 |
| Vermont | 100,000 |
| Virginia | 281,415 |
| Washington | 221,357 |
| West Virginia | 100,000 |
| Wisconsin | 208,200 |
| Wyoming | 100,000 |

**Note to Tables 1 and 2:** The adjustments in this notice are based on funds available to each State under the ARRA. The adjustments in this notice to the amounts an SEA may reserve for administration under Title I, Part A and IDEA, section 611 do not apply to the reservation of funds for administration in any other fiscal year (i.e., Title I, Part A and IDEA, section 611 allocations for FY 2008, FY 2010, and subsequent years).

**Executive Order 12866**

Under Executive Order 12866, the Secretary must determine whether this

regulatory action is ''significant'' and therefore subject to the requirements of the Executive order and to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. Pursuant to the Executive order, the Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action and we have determined that the benefits of the adjustments justify the costs.

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

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Dated: October 22, 2009.

**Arne Duncan,**

*Secretary of Education.*

[FR Doc. E9–25839 Filed 10–26–09; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### National Board for Education Sciences

**AGENCY:** Department of Education, Institute of Education Sciences.

**ACTION:** Notice of an open meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of an upcoming meeting of the National Board for Education Sciences. The notice also describes the functions of the Committee. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend the open portion of the meeting. This notice is being posted less than 15 days prior to the meeting due to logistical issues with scheduling the meeting.

**DATES:** November 9, 2009.

*Time:* 8:30 a.m. to 5 p.m.

**ADDRESSES:** 80 F Street, NW., Room 100, Washington, DC 20208.

**FOR FURTHER INFORMATION CONTACT:** Norma Garza, Executive Director, National Board for Education Sciences, 555 New Jersey Ave., NW., Room 602 K, Washington, DC 20208; *phone:* (202) 219–2195; *fax:* (202) 219–1466; *e-mail: Norma.Garza@ed.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FRS) at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** The National Board for Education Sciences is authorized by Section 116 of the Education Sciences Reform Act of 2002 (ESRA). The Board advises the Director of the Institute of Education Sciences (IES) on the establishment of activities to be supported by the Institute, on the funding for applications for grants, contracts, and cooperative agreements for research after the completion of peer review, and reviews and evaluates the work of the Institute. At this time, the Board consists of only six of fifteen appointed members due to the expirations of the terms of nine members. The Board shall meet and can carry out official business because the ESRA states that a majority of the voting members serving at the time of a meeting constitutes a quorum.

On November 9 from 8:30 a.m. to 8:45 a.m., the Board will approve the agenda and hear remarks from the chair and the executive director. From 8:45 a.m. to 10 a.m., IES director John Easton will give an update on the work of the agency, followed by updates on the IES centers until 11:30 a.m. Ex officio members will give overviews of their agencies' work from 11:30 a.m. to 12:30 p.m., after which there will be a break for lunch until 2 p.m.

The afternoon's sessions will include a Practice Guides Overview from 2 to 3 p.m. This will be followed by presentations on recently released IES Teacher Quality Evaluations and a discussion of findings, which will conclude at 4:30 p.m. The Board will conclude the meeting with a consideration of summary views and next steps prior to adjournment at 5 p.m. A final agenda will be available from Norma Garza (see contact information above) on October 26. Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistance listening devices, or materials in alternative format) should notify Norma Garza no later than October 26. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Records are kept of all Committee proceedings and are available for public inspection at 555 New Jersey Ave., NW., Room 602 K, Washington, DC 20208, from the hours of 9 a.m. to 5 p.m., Eastern Standard Time Monday through Friday.

*Electronic Access to This Document:* You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http:/www.ed.gov/news/fed-register/index.html*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO

Access at: *http://www.gpoaccess.gov/nara/index.html.*

**John Q. Easton,**

*Director, Institute of Education Sciences.*

[FR Doc. E9–25838 Filed 10–26–09; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Notice of Intent To Prepare an Environmental Assessment, To Open a Public Scoping Period, and To Conduct a Public Scoping Meeting

**AGENCY:** Office of Science, Department of Energy.

**ACTION:** Notice of Intent to Prepare an Environmental Assessment, to open a public scoping period, and to conduct a public scoping meeting for the funding of the construction and operation of the Facility for Rare Isotope Beams at Michigan State University, East Lansing, Michigan.

**SUMMARY:** The Department of Energy (DOE) announces its intent to prepare an Environmental Assessment (EA) pursuant to the National Environmental Policy Act (NEPA) and to hold a public scoping meeting on the proposed Federal action to fund the construction and operation of the Facility for Rare Isotope Beams (FRIB) on the campus of Michigan State University (MSU) in East Lansing, Michigan. FRIB's design is composed of buildings and/or building additions for a heavy ion/proton accelerator, ancillary laboratories, and support facilities. Construction/operation would occur adjacent to the existing National Superconducting Cyclotron Laboratory (NSCL), which would ultimately be subsumed into FRIB. The EA will identify and assess potential environmental impacts from the Proposed Action and a range of reasonable alternatives so DOE can determine whether to prepare an environmental impact statement (EIS) or issue a finding of no significant impact (FONSI). DOE is also opening a 45-day scoping period to allow the public the opportunity to voice any concerns it might have and to make recommendations about the analytical approach and alternatives. During the scoping period, a public meeting will be held. If at any point during the preparation of the EA DOE determines that it is necessary to prepare an EIS, this scoping process will serve as the scoping process that would normally follow a Notice of Intent to prepare an EIS.

**DATES:** The public scoping period starts with the publication of this Notice in the **Federal Register** and will continue until December 11, 2009. DOE will consider all comments received or postmarked by that date in defining the scope of the EA. Comments received or postmarked after that date will be considered to the extent practicable.

DOE invites public comment on the scope of this EA during a public scoping meeting from 6:30 p.m. to 10 p.m. on November 11, 2009 in room 1400 of the Biomedical and Physical Sciences Building (BPS) on the campus of Michigan State University, in East Lansing, Michigan. The scoping meeting will be preceded by an educational open house to be held from 4 p.m. to 6 p.m. at the NSCL, which is adjacent to BPS.

**ADDRESSES:** Written comments or suggestions on the scope of the EA may be submitted by mail to: FRIB Comments, U.S. Department of Energy, Office of Science, Chicago Office (STS), 9800 South Cass Avenue, Argonne, Illinois 60439; by toll free fax to 1–888–676–3672; by e-mail to *frib.comments@ch.doe.gov;* or through the EA Web site at *http://www.frib.msu.edu/NEPA/.*

The Pre-approval Draft EA is expected to be completed in the Spring of 2010. Advance requests for copies can also be made at this time via the methods above. In making your request, please specify whether you would like a paper copy, a compact disc, or notification of its availability on the Internet.

**FOR FURTHER INFORMATION CONTACT:** For further information on the proposed project, contact Mr. James Hawkins, FRIB Program Manager, U.S. Department of Energy, SC–26.2/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290, by telephone at 301–903–3613, or via e-mail at *James.Hawkins@science.doe.gov;* or Dr. Thomas Glasmacher, FRIB Project Manager, Facility for Rare Isotope Beams, Michigan State University, East Lansing, MI 48824–1321, by telephone at 517–908–7750, or via e-mail at *glasmacher@frib.msu.edu.* The FRIB project is described in detail at the FRIB Web site, *http://www.frib.msu.edu/.*

For general information concerning DOE's NEPA process, contact: Peter Siebach, NEPA Compliance Officer, U.S. Department of Energy, Office of Science-Chicago Office (STS), 9800 South Cass Avenue, Argonne, Illinois 60439, by telephone at 603–252–2007, or via e-mail at *Peter.Siebach@ch.doe.gov.* This Notice of Intent and general information on the DOE NEPA process are available at *http://www.gc.energy.gov/NEPA/.*

**SUPPLEMENTARY INFORMATION:**

**Background**

DOE published a ''funding opportunity announcement'' on May 20, 2008 seeking applications for the design and establishment of a particle acceleration facility—the FRIB—as a National User Facility. The FRIB would take about a decade to design and build and would cost an estimated $550 million, including cost sharing from MSU. MSU would also make other, non-monetary contributions. The research conducted at FRIB would involve experimentation with intense beams of rare isotopes—short-lived nuclei not normally found on earth—that will enable researchers to address pressing questions in nuclear structure and nuclear astrophysics. Two applications were received. The results of an independent merit review process, as well as an environmental critique, i.e., a comparison of environmental information provided in the applications, were considered by DOE and on December 11, 2008, MSU was selected to design and establish the FRIB. A cooperative agreement with DOE was signed on June 8, 2009, establishing terms and conditions for the work to be performed and ensuring DOE's substantial ongoing involvement in the project.

**Purpose and Need for Action**

DOE has a mission to advance our basic understanding of science. Scientific research at a FRIB holds the promise to vastly expand our understanding of nuclear astrophysics and nuclear structure. DOE determined that the establishment of the FRIB is a high priority for the future of U.S. nuclear science research. The FRIB establishes a highly sophisticated research laboratory that would produce intense beams of rare isotopes. These beams enable scientists to study the nuclear reactions that power stars and generate the elements found on earth; explore the structure of the nuclei of atoms, which form the core of all matter and the forces that bind them together; test current theories about the fundamental nature of matter; and play a role in developing new nuclear medicines and other societal applications of rare isotopes.

The FRIB concept has undergone numerous studies and assessments within DOE and by independent parties such as the National Research Council of the National Academy of Sciences. These studies—in addition to the joint DOE/National Science Foundation (NSF) Nuclear Science Advisory Committee (NSAC) 2007 Long Range Plan—concluded that such a facility is

a vital part of the U.S. nuclear science portfolio, complements existing and planned international efforts, and will provide capabilities unmatched elsewhere.

**Proposed Action and Alternatives**

DOE and MSU propose to construct and operate the FRIB on approximately 10 acres on its East Lansing, Michigan campus. Its design is composed of buildings and/or building additions for a heavy ion/proton accelerator and ancillary laboratories, support facilities such as a cryomodule, and offices. Construction/operations would occur on campus, adjacent to the existing NSCL, which would ultimately be subsumed into FRIB. The function and scope of operations of FRIB would be similar to NSCL, but FRIB would have substantially more power. The existing NSCL research program relies on a 200 MeV/u coupled cyclotron driver accelerator with 1–2 kW beam power. FRIB would be capable of 200 MeV/u energy for all species, higher energies for lighter ions up to 600 MeV/u for protons with up to 400 kW beam power. A 12 MeV/u reaccelerator is also planned for the facility. Upgrade is possible, but not currently planned.

Most of the structures that would house the accelerator would be thick-walled, reinforced concrete structures. The heavy ion linear accelerator (linac) would be located in a tunnel below grade. A trench (varying between 30 and 75 feet below grade up to 1,800 feet long) would be excavated for the accelerator, necessitating that Bogue Street be closed between Wilson Road and East Shaw Lane two years and portions of East Shaw Lane possibly to be closed for a number of months. The high energy end of the accelerator would join with the existing NSCL building.

The ground where FRIB would be located has been previously disturbed. Like the NSCL, the FRIB would be licensed by the Nuclear Regulatory Commission (NRC). Operation would result in low levels of activation of air and groundwater, which MSU would manage in accordance with NRC license requirements and Environmental Protection Agency regulations. Radiation doses to workers and members of the public from operation of the FRIB would be limited to well below NRC radiation protection standards.

As required by NEPA, the EA will evaluate a No Action alternative to serve as a basis for comparison with the action alternatives. Under the No Action alternative, a FRIB would not be constructed and operated at MSU, although other use of the site could not be ruled out.

**Preliminary Identification of Environmental Issues**

In the EA, DOE will examine public health and safety effects and environmental impacts from the construction and operation of the proposed FRIB at MSU. This notice is to inform the public of the proposed project and to solicit comments and suggestions for consideration in the preparation of the EA. To help the public frame its comments, this notice contains a preliminary list of potential environmental issues that DOE has tentatively identified for analysis. It is not intended to be comprehensive, nor to imply any predetermination of impacts. These issues include:

1. Impacts from construction accidents;
2. Impacts to both workers and the public from potential exposure to radiation and other hazards under routine operations and credible accident scenarios including natural disasters (e.g., floods, hurricanes, tornadoes, and seismic events);
3. Transportation related impacts;
4. Impacts on surface and groundwater and on water use and quality;
5. Impacts on air and soil;
6. Socioeconomic impacts;
7. Disproportionately high and adverse impacts on minority and low income populations;
8. Impacts on land-use plans, policies and controls, and visual resources;
9. Pollution prevention and waste management practices and activities;
10. Unavoidable adverse impacts and irreversible and irretrievable commitments of resources;
11. Cumulative environmental effects of past, present, and reasonably foreseeable future actions;
12. Status of compliance with all applicable Federal, state and local statutes and regulations, international agreements, and required Federal and State environmental permits, consultations, and notifications; and
13. Impacts of intentional destructive acts, including sabotage and terrorism.

Since the proposed site is adjacent to a currently operating accelerator facility and would involve digging and construction in previously disturbed areas now occupied primarily by parking lots and roads, impacts in several areas are expected to be minor. These impact areas will therefore not be evaluated in detail:

- Impacts on protected, threatened, endangered, or sensitive species of animals or plants, or their critical habitats;
- Impacts on cultural or historic resources; and
- Impacts on floodplains and wetlands.

**Scoping Process**

DOE invites Federal agencies, State, local and Tribal governments, the general public and international community to participate in the scoping process both to refine the environmental issues to be analyzed and to identify the reasonable range of alternatives. Both oral and written comments will be considered and given equal weight by DOE. The public scoping period starts with the publication of this Notice in the **Federal Register** and will continue until December 11, 2009. DOE will consider all comments received or postmarked by then in defining the scope of the EA. Comments received or postmarked after that date will be considered to the extent practicable.

The scoping meeting will be held at the location, date, and times indicated above under the **DATES** section. It will provide interested parties the opportunity to ask questions about the project and comment on the EA scope. A facilitator will establish procedures needed to ensure that everyone who wishes to speak has the opportunity to do so. Should any speaker desire to provide further information that cannot be presented within the designated time, such additional information may be submitted in writing by the date listed in the **DATES** section. Both oral and written comments will be considered and given equal weight by DOE.

The scoping meeting will be preceded by an educational open house, to be held at the location, date, and times indicated above under the **DATES** section. During the open house, members of the public can register to provide oral comments at the scoping meeting, provide written comments, view FRIB informational materials, engage project staff, and tour the existing NSCL.

The Pre-approval Draft EA is planned to be issued for state and public review by the Spring of 2010. Persons submitting comments during the scoping process will receive a copy. Others who would like to receive a copy of the draft EA when it is issued should notify DOE per the **ADDRESSES** section above.

If at any time during preparation of the EA DOE determines that potentially significant environmental impacts might occur with the implementation of the Proposed Action and that an EIS would be needed, DOE will issue a Notice of Intent to prepare an EIS in the **Federal**

**Register**. In that case, this scoping process will serve as the scoping process that normally would follow a Notice of Intent to prepare an EIS. Accordingly, DOE will consider any comments on the scope of the EA received during this scoping process in preparing such an EIS.

Issued in Washington, DC on October 20, 2009.

**Jehanne Gillo,**

*Director, Facilities and Project Management Division, Office of Nuclear Physics.*

[FR Doc. E9–25847 Filed 10–26–09; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Northern New Mexico

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Wednesday, November 18, 2009, 1 p.m.–8 p.m.

**ADDRESSES:** Holiday Inn Santa Fe, 4048 Cerillos Road, Santa Fe, New Mexico.

**FOR FURTHER INFORMATION CONTACT:** Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; Fax (505) 989–1752 or e-mail: *msantistevan@doeal.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

**Tentative Agenda**

1 p.m. Call to Order by Co-Deputy Designated Federal Officers, Ed Worth and Lee Bishop.

Establishment of a Quorum, Lorelei Novak:

- Roll Call;
- Excused Absences.

Welcome and Introductions, Ralph Phelps.

Approval of Agenda.

Approval of September 30, 2009 Meeting Minutes.

1:15 p.m. Old Business:

- Written reports;
- Other items.

1:30 p.m. New Business.

1:45 p.m. Co-Deputy Designated Federal Officers' Report, Ed Worth and Lee Bishop.

2:15 p.m. NNMCAB Annual Evaluation Report, Pam Henline.

2:45 p.m. Break.

3 p.m. Matters From Board Members.

3:30 p.m. Presentation on Los Alamos National Laboratory Groundwater Monitoring System (Existing and New Wells), Danny Katzman.

5 p.m. Dinner Break.

6 p.m. Public Comment Period.

6:15 p.m. Consideration and Action on Recommendation(s).

7:00 p.m. End of Year Report, Michael Graham.

7:45 p.m. Meeting Feedback.

8 p.m. Adjourn, Ed Worth and Lee Bishop.

*Public Participation:* The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org/.*

Issued at Washington, DC on October 20, 2009.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E9–25842 Filed 10–26–09; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Wednesday, November18, 2009, 6 p.m.

**ADDRESSES:** DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee.

**FOR FURTHER INFORMATION CONTACT:** Patricia J. Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–2347 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *http://www.oakridge.doe.gov/em/ssab.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

*Tentative Agenda:* The main meeting presentation will be on Mercury Remediation Strategy and Activities.

*Public Participation:* The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Pat Halsey at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Pat Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Patricia J. Halsey at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/minutes.htm.*

Issued at Washington, DC on October 20, 2009.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E9–25843 Filed 10–26–09; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### DOE/NSF Nuclear Science Advisory Committee

**AGENCY:** Department of Energy, Office of Science.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the DOE/NSF Nuclear Science Advisory Committee (NSAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Thursday, November 5, 2009, 8:30 a.m. to 5 p.m.

**ADDRESSES:** Marriott Crystal Gateway Hotel, 1700 Jefferson Davis Highway, Arlington, Virginia 22202.

**FOR FURTHER INFORMATION CONTACT:** Brenda L. May, U.S. Department of Energy; SC–26/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone: 301–903–0536.

**SUPPLEMENTARY INFORMATION:**

*Purpose of Meeting:* To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of basic nuclear science research.

*Tentative Agenda:* Agenda will include discussions of the following:

Thursday, November 5, 2009

- Perspectives from Department of Energy and National Science Foundation.
- Presentation and Discussion of the Interim Report II from the Isotope Subcommittee.
- Discussion of the Committee of Visitors Charge.
- Public Comment (10-minute rule).

*Public Participation:* The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Brenda L. May, 301–903–0536 or *Brenda.May@science.doe.gov* (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

*Minutes:* The minutes of the meeting will be available on the U.S. Department of Energy's *Office of Nuclear Physics* Web site for viewing.

Issues at Washington, DC on October 20, 2009.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E9–25846 Filed 10–26–09; 8:45 am]

**BILLING CODE 6450–01–P**

## FEDERAL COMMUNICATIONS COMMISSION.

### Notice of Public Information Collections Being Submitted to the Office of Management and Budget for Review and Approval, Comments Requested

10/21/2009.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Persons wishing to comment on this information collection should submit comments on November 27, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to Cathy Williams, Federal Communications Commission (FCC), 445 12th Street SW, Room 1–C823, Washington, DC 20554. To submit your comments by e–mail send then to: PRA@fcc.gov and to Cathy.Williams@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to web page: http://www.reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called ''Currently Under Review'', (3) click on the downward–pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the FCC list appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collections send an e–mail to PRA@fcc.gov or contact Cathy Williams on (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

OMB Control No.: 3060–1106.

Title: Licensing and Service Rules for Vehicle Mounted Earth Stations (VMES).

Form No.: Not Applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for–profit entities.

Number of Respondents: 10 respondents; 10 responses.

Estimated Time per Response: 0.25 hours – 24 hours.

Frequency of Response: On occasion reporting requirement; Recordkeeping requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The Commission has statutory approval for the information collection requirements under Sections 1, 4(i), 4(j), 7(a), 301,

303(c), 303(f), 303(g), 303(r), 303(y) and 308 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 157(a), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 308.

Total Annual Burden: 322 hours.

Total Annual Cost: $104,300 annual costs.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality pertaining to the information collection requirements in this collection.

Needs and Uses: On July 31, 2009, the Federal Communications Commission (''Commission'') released a Report and Order titled, ''In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Allocate Spectrum and Adopt Service Rules and Procedures to Govern the Use of Vehicle–Mounted Earth Stations in Certain Frequency Bands Allocated to the Fixed–Satellite Service,'' IB Docket No. 07–101, FCC 09–64 (hereinafter referred to as ''VMES Report and Order'').

The VMES Report and Order adopts part 2 allocation rules and part 25 technical and licensing rules for a new domestic Ku–band VMES service. VMES service has the potential to deliver advanced mobile applications through satellite technology, including broadband, which will be beneficial for public safety and commercial purposes.

The PRA information collection requirements contained in the VMES Report and Order are as follows:

1. 47 CFR 25.226(b)(1)(i) OR 47 CFR 25.226(b)(1)(ii)

(i) Any VMES applicant filing an application pursuant to paragraph (a)(1) of this section shall file three tables showing the off–axis EIRP level of the proposed earth station antenna in the direction of the plane of the GSO; the co–polarized EIRP in the elevation plane, that is, the plane perpendicular to the plane of the GSO; and cross–polarized EIRP. Each table shall provide the EIRP level at increments of 0.1° for angles between 0° and 10° off–axis, and at increments of 5° for angles between 10° and 180° off–axis.

OR

2. (ii) A VMES applicant shall include a certification, in Schedule B, that the VMES antenna conforms to the gain pattern criteria of § 25.209(a) and (b), that, combined with the maximum input power density calculated from the EIRP density less the antenna gain, which is entered in Schedule B, demonstrates that the off–axis EIRP spectral density envelope set forth in paragraphs (a)(1)(i)(A) through (a)(1)(i)(C) of this section will be met under the assumption that the antenna is pointed at the target satellite.

3. 47 CFR 25.226(b)(1)(iii)

(iii) A VMES applicant proposing to implement a transmitter under paragraph (a)(1)(ii)(A) of this section shall provide a certification from the equipment manufacturer stating that the antenna tracking system will maintain a pointing error of less than or equal to 0.2° between the orbital location of the target satellite and the axis of the main lobe of the VMES antenna and that the antenna tracking system is capable of ceasing emissions within 100 milliseconds if the angle between the orbital location of the target satellite and the axis of the main lobe of the VMES antenna exceeds 0.5°.

4. 47 CFR 25.226(b)(1)(iv)(A), (B)

A VMES applicant proposing to implement a transmitter under paragraph (a)(1)(ii)(B) of this section shall:

(A) declare, in its application, a maximum antenna pointing error and demonstrate that the maximum antenna pointing error can be achieved without exceeding the off–axis EIRP spectral–density limits in paragraph (a)(1)(i) of this section; and (B) demonstrate that the VMES transmitter can detect if the transmitter exceeds the declared maximum antenna pointing error and can cease transmission within 100 milliseconds if the angle between the orbital location of the target satellite and the axis of the main lobe of the VMES antenna exceeds the declared maximum antenna pointing error, and will not resume transmissions until the angle between the orbital location of the target satellite and the axis of the main lobe of the VMES antenna is less than or equal to the declared maximum antenna pointing error.

5. 47 CFR 25.226(b)(2)(i), (ii), (iii), (iv)

A VMES applicant proposing to implement a transmitter under paragraph (a)(2) of this section and using off–axis EIRP spectral–densities in excess of the levels in paragraph (a)(1)(i) of this section shall provide the following certifications and demonstration as exhibits to its earth station application:

(i) A statement from the target satellite operator certifying that the proposed operation of the VMES has the potential to create harmful interference to satellite networks adjacent to the target satellite(s) that may be unacceptable.

(ii) A statement from the target satellite operator certifying that the power–density levels that the VMES applicant provided to the target satellite operator are consistent with the existing coordination agreements between its satellite(s) and the adjacent satellite systems within 6° of orbital separation from its satellite(s).

(iii) A statement from the target satellite operator certifying that it will include the power–density levels of the VMES applicant in all future coordination agreements.

(iv) A demonstration from the VMES operator that the VMES system is capable of detecting and automatically ceasing emissions within 100 milliseconds when the transmitter exceeds the off–axis EIRP spectral–densities supplied to the target satellite operator.

6. 47 CFR 25.226(b)(3)

A VMES applicant proposing to implement a VMES system under paragraph (a)(3) of this section and using variable power–density control of individual simultaneously transmitting co–frequency VMES earth stations in the same satellite receiving beam shall provide the following certifications and demonstration as exhibits to its earth station application:

(i) The applicant shall make a detailed showing of the measures it intends to employ to maintain the effective aggregate EIRP–density from all simultaneously transmitting co–frequency terminals operating with the same satellite transponder at least 1 dB below the EIRP–density limits defined in paragraphs (a)(1)(i)(A)–(C) of this section. In this context the term ''effective'' means that the resultant co–polarized and cross–polarized EIRP–density experienced by any GSO or non–GSO satellite shall not exceed that produced by a single VMES transmitter operating at 1 dB below the limits defined in paragraphs (a)(1)(i)(A)–(C) of this section. The International Bureau will place this showing on Public Notice along with the application.

(ii) An applicant proposing to implement a VMES under (a)(3)(ii) of this section that uses off–axis EIRP spectral–densities in excess of the levels in paragraph (a)(3)(i) of this section shall provide the following certifications, demonstration and list of satellites as exhibits to its earth station application:

(A) A detailed showing of the measures the applicant intends to employ to maintain the effective aggregate EIRP–density from all simultaneously transmitting co–frequency terminals operating with the same satellite transponder at the EIRP–density limits supplied to the target satellite operator. The International Bureau will place this showing on Public Notice along with the application.

(B) A statement from the target satellite operator certifying that the

proposed operation of the VMES has the potential to create harmful interference to satellite networks adjacent to the target satellite(s) that may be unacceptable.

(C) A statement from the target satellite operator certifying that the aggregate power density levels that the VMES applicant provided to the target satellite operator are consistent with the existing coordination agreements between its satellite(s) and the adjacent satellite systems within 6° of orbital separation from its satellite(s).

(D) A statement from the target satellite operator certifying that it will include the aggregate power–density levels of the VMES applicant in all future coordination agreements.

(E) A demonstration from the VMES operator that the VMES system is capable of detecting and automatically ceasing emissions within 100 milliseconds when an individual transmitter exceeds the off–axis EIRP spectral–densities supplied to the target satellite operator and that the overall system is capable of shutting off an individual transmitter or the entire system if the aggregate off–axis EIRP spectral–densities exceed those supplied to the target satellite operator.

(F) An identification of the specific satellite or satellites with which the VMES system will operate.

(iii) The applicant shall acknowledge that it will maintain sufficient statistical and technical information on the individual terminals and overall system operation to file a detailed report, one year after license issuance, describing the effective aggregate EIRP–density levels resulting from the operation of the VMES system.

7. 47 CFR 25.226(b)(4)

Application shall include an exhibit describing the geographic area(s) in which the VMESs will operate.

8. 47 CFR 25.226(b)(5)

VMES applicant filing for a VMES terminal or system and planning to use a contention protocol shall include in its application a certification that will comply with the requirements of paragraph (a)(4) of this section.

9. 47 CFR 25.226(b)(6)

Application shall include the point of contact with authority and ability to cease all emissions from VMES terminals, as required in paragraph (a)(5) of this section.

10. 47 CFR 25.226(a)(6)

VMES licensee shall maintain and provide data (record of vehicle location, transmit frequency, channel bandwidth and satellite used for each relevant VMES transmitter) to Commission, NTIA, FSS operator, FS operator, or frequency coordinator within 24 hours upon request.

11. 47 CFR 25.226(b)(7)

Application shall include certification complying with requirements of paragraph (a)(6) of this section.

12. 47 CFR 25.226(b)(8)

Applicant must submit a radio frequency hazard analysis to determine whether VMES terminals will produce power densities that will exceed the Commission's radio frequency exposure criteria; applicant with terminals that exceed the guidelines in section 1.1310 for radio frequency radiation exposure shall provide a plan for mitigation.

13. 47 CFR 25.226(c)(1)

Licensee shall notify the Commission after completing coordination with NASA and NTIA on current TDRSS sites.

14. 47 CFR 25.226(c)(2)

Licensee shall notify the Commission after completing coordination with NASA and NTIA on future TDRSS site.

15. 47 CFR 25.226(d)(1)

Operations of VMES licensees in the 14.47–14.5 frequency band are subject to coordination with the National Science Foundation (NSF) and licensee shall notify the Commission's International Bureau and shall submit the coordination agreement once it has completed coordination with NSF for RAS sites listed in paragraph (d)(2) of this section.

16. 47 CFR 25.226(d)(3)

Licensee shall notify the International Bureau once it has completed coordination for any future RAS site and shall submit the coordination agreement once it has completed coordination with NSF.

17. 47 CFR 25.132(b)(3)

VMES applicant seeking to use antenna that does not meet standards of section 25.209(a) and (b), pursuant to procedures set out in section 25.226, shall submit manufacturer's range test plots of antenna gain patterns.

The information collection requirements accounted for in this collection are necessary to prevent regulatory uncertainty with respect to VMES and other satellite services that operate in the Ku–band within the United States. Prior to this rulemaking, the lack of rules for VMES posed an administrative burden on those entities attempting to provide VMES–type services and on Commission staff because such services could be granted only through the use of waivers and Special Temporary Authority (STA) authorizations for a six–month period of time. The approval of fifteen–year licenses for VMES operators significantly reduces the burden imposed upon both licensees and Commission staff who review and approve the waivers and STAs. Furthermore, without such information the Commission would not be able to take the necessary measures to prevent harmful interference to satellite services from VMES. Finally, the Commission would not be able to advance its goals of managing spectrum efficiently and promoting broadband technologies to benefit American consumers throughout the United States.

OMB Control Number: 3060–0349.

Title: Equal Employment Opportunity (''EEO'') Policy, 47 CFR Sections 73.2080, 76.73, 76.75, 76.79 and 76.1702.

Form Number: Not Applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit entities; Not–for–profit institutions.

Number of Respondents and Responses: 14,178 respondents; 14,178 responses.

Estimated Time per Response: 42 hours.

Frequency of Response: Recordkeeping requirement; Annual and five–year reporting requirements.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Total Annual Burden: 595,476 hours

Total Annual Costs: None.

Privacy Impact Assessment(s): No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality and respondents are not being asked to submit confidential information to the Commission.

Needs and Uses: Section 73.2080 provides that equal opportunity in employment shall be afforded by all broadcast stations to all qualified persons and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin or sex. Therefore, Section 73.2080 requires that each broadcast station employment unit with 5 or more full–time employees shall establish, maintain and carry out a program to assure equal opportunity in every aspect of a broadcast station's policy and practice.

Section 76.73 provides that equal opportunity in employment shall be afforded by all multichannel video program distributors (''MVPD'') to all qualified persons and no person shall be discriminated against in employment by such entities because of race, color, religion, national origin, age or sex.

Section 76.75 requires that each MVPD employment unit shall establish, maintain and carry out a program to assure equal opportunity in every aspect of a cable entity's policy and practice.

Section 76.79 requires that every MVPD employment unit maintain, for public inspection, a file containing copies of all annual employment reports and related documents.

Section 76.1702 requires that every MVPD place certain information concerning its EEO program in the public inspection file.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E9–25814 Filed 10–26–09; 8:45 am]

BILLING CODE: 6712–01–S

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 20, 2009.

**A. Federal Reserve Bank of Atlanta** (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

*1. TWO ROA, LLC*, Huntsville, Alabama; to become a bank holding company by acquiring 51 percent of the voting shares of RB Bancorporation, and Reliance Bank, both of Athens, Alabama.

Board of Governors of the Federal Reserve System, October 22, 2009.

**Margaret McCloskey Shanks,**

*Associate Secretary of the Board.*

[FR Doc. E9–25771 Filed 10–26–09; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**TIME AND DATE:** 12 p.m., Monday, November 2, 2009.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

**FOR FURTHER INFORMATION CONTACT:** Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

**SUPPLEMENTARY INFORMATION:** You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, October 23, 2009.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E9–25946 Filed 10–23–09; 4:15 pm]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

**[Docket No. OP–1374]**

### Proposed Guidance on Sound Incentive Compensation Policies

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

**ACTION:** Proposed guidance with request for public comment.

**SUMMARY:** The Board is requesting comment on proposed guidance (the ''guidance'') designed to help ensure that incentive compensation policies at banking organizations do not encourage excessive risk-taking and are consistent with the safety and soundness of the organization. The Federal Reserve also is commencing two supervisory initiatives to spur progress by the banking industry in the development and implementation of sound incentive compensation arrangements, identify emerging best practices, and advance the state of practice more generally in the banking industry. The Federal Reserve expects all banking organizations to evaluate their incentive compensation arrangements and related risk management, control, and corporate governance processes and immediately address deficiencies in these arrangements or processes that are inconsistent with safety and soundness.

**DATES:** Comments must be submitted on or before November 27, 2009.

**ADDRESSES:** The Board will review all of the comments submitted. Please consider submitting your comments by e-mail or fax since paper mail in the Washington DC area and at the Board is subject to delay. You may submit comments, identified by Docket No. OP–1374, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov*. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov*. Include the docket number in the subject line of the message.
- *FAX:* 202/452–3819 or 202/452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/*

*foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed in electronic or paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.,) between 9 a.m. and 5 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** Barbara J. Bouchard, Associate Director, (202) 452–3072, William F. Treacy, Adviser, (202) 452–3859, Robert Motyka, Senior Project Manager, (202) 452–5231, Division of Banking Supervision and Regulation; Mark S. Carey, Adviser, (202) 452–2784, Division of International Finance; or Kieran J. Fallon, Assistant General Counsel, (202) 452–5270, or Michael W. Waldron, Counsel, (202) 452–2798, Legal Division. For users of Telecommunications Device for the Deaf (''TDD'') only, contact (202) 263–4869.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Incentive compensation practices in the financial services industry were one of many factors contributing to the financial crisis that began in 2007. Banking organizations too often rewarded employees for increasing the firm's short-term revenue or profit without adequate recognition of the risks the employees' activities posed for the firm. Importantly, problematic compensation practices were not limited to the most senior executives at financial firms. Compensation practices can incent employees at various levels of a banking organization, either individually or as a group, to undertake imprudent risks that can significantly and adversely affect the risk profile of the firm.

Supervisory attention and action is necessary to address the potential for incentive compensation arrangements to encourage employees to take excessive risks on behalf of their organization. Shareholders of a banking organization cannot directly control the day-to-day operations of the firm—especially a large and complex firm—and must rely on the firm's management to do so, subject to direction and oversight by shareholder-elected boards of directors. Incentive compensation arrangements are one way that firms can encourage managers and other employees to take actions that are consistent with the interests of shareholders by appropriately rewarding behavior that increases the organization's revenue, profits, or other measures of performance. However, flawed compensation programs can incentivize employees to take additional risk beyond the firm's tolerance for, or ability to manage, risk in order to increase the employees' personal compensation. Shareholders have an interest in ensuring that incentive compensation arrangements do not encourage employees to take risks beyond the risk tolerance of shareholders.

Aligning the interests of shareholders and employees, however, is not always sufficient to protect the safety and soundness of a banking organization. Because of the protections offered by the federal safety net, shareholders of a banking organization in some cases may be willing to tolerate a degree of risk that is inconsistent with the organization's safety and soundness. Thus, a review of incentive compensation arrangements and related corporate governance practices to ensure that they are effective from the standpoint of shareholders is not sufficient to ensure they adequately protect the safety and soundness of the organization.

In addition, supervisors can provide a common prudential foundation for incentive compensation arrangements across banking organizations and promote the overall movement of the industry toward better practices. Even if the owners or managers of an individual firm do not like the way compensation is structured at their firm, they may be unwilling to make unilateral changes because doing so might mean losing valuable employees and business to other firms. Supervisory action can play a critical role in addressing this ''first mover'' problem that may make it difficult for individual firms to act alone in addressing misaligned incentives. Through their actions, supervisors can help to better align the interests of managers and other employees with the long-term health of the organization, and also reduce firms' concerns that making prudent modifications to their incentive compensation arrangements might have adverse competitive consequences.

## II. Federal Reserve Guidance

The Federal Reserve has developed the attached guidance to help protect the safety and soundness of banking organizations and promote the prompt improvement of incentive compensation practices throughout the banking industry.[1] The guidance is based on three key principles that are designed to ensure that incentive compensation arrangements at a banking organization do not encourage employees to take excessive risks. These principles provide that incentive compensation arrangements at a banking organization should—

- Provide employees incentives that do not encourage excessive risk-taking beyond the organization's ability to effectively identify and manage risk;
- Be compatible with effective controls and risk management; and
- Be supported by strong corporate governance, including active and effective oversight by the organization's board of directors.

These principles, and the types of policies, procedures, and systems that banking organizations should have to help ensure compliance with these principles, are discussed in more detail in the attached proposed guidance. These principles and the guidance are consistent with the Principles for Sound Compensation Practices adopted by the Financial Stability Board (FSB) in April 2009, as well as the Implementation Standards for those principles issued by the FSB in September 2009.

Because incentive compensation arrangements for executive and non-executive employees may pose safety and soundness risks if not properly structured, the proposed guidance applies to senior executives as well as other employees who, either individually or as part of a group, may expose the relevant banking organization to material amounts of risk. In addition, implementation of the guidance by a banking organization should be appropriate in light of the scope and complexity of the organization's activities, as well as the prevalence and scope of its incentive compensation arrangements. Thus, for example, the reviews, policies, procedures, and systems implemented by a small banking organization that uses incentive compensation arrangements on a limited basis will be substantially less extensive, formalized, and detailed than those at large, complex banking organization that uses incentive compensation arrangements extensively.

The Board invites comment on all aspects of the guidance. In particular, are the three core principles described in the guidance appropriate and sufficient to help ensure that incentive compensation arrangements do not threaten the safety and soundness of banking organizations? Should

[1] As used in the guidance, the term ''banking organization'' includes U.S. bank holding companies, state member banks, Edge and agreement corporations, and the U.S. operations of foreign banks with a branch, agency, or commercial lending company subsidiary in the United States.

additional or different principles be included to achieve this goal? To what extent are the current incentive compensation arrangements of banking organizations consistent with the principles set forth in the guidance and are there material legal, regulatory, or other impediments to the prompt implementation of incentive compensation arrangements and related processes that would be consistent with these principles?

In addition, some have suggested that one or more formulaic limits be adopted for some or all banking organizations, and, in particular, have suggested consideration of an approach in which at least 60 percent of all incentive compensation received by senior executives of all large, complex banking organizations be deferred and at least 50 percent of incentive compensation be paid in the form of stock, options, or other equity-linked instruments. Would such formulaic limits on determining and paying incentive compensation likely promote the long-term safety and soundness of banking organizations generally if applied to certain types or classes of executive or non-executive employees across all or certain types of banking organizations? If so, what are those classes of executives, employees and institutions, and what formulaic limits would be most effective? Moreover, would market forces or practices in the broader financial services industry, such as the use of ''golden parachute'' or ''golden handshake'' arrangements to retain or attract employees, present challenges for banking organizations in developing and maintaining balanced incentive compensation arrangements? If so, what types of statutory, regulatory, or private-sector actions might help mitigate these challenges?

Further, the Board seeks comment on whether the proposed guidance would impose undue burdens on, or have unintended consequences for, banking organizations and, particularly, regional and small organizations, and whether there are ways such potential burdens or consequences could be addressed in a manner consistent with safety and soundness. Also, are there types of incentive compensation plans, such as firm-wide profit sharing plans that provide for distributions in a manner that is not materially linked to the performance of specific employees or groups of employees, that could and should be exempted from, or treated differently under, the guidance because they are unlikely to affect the risk-taking incentives of all, or a significant number of, employees? If so, what are the features of these plans and the types of employees for which they are unlikely to affect risk-taking behavior?

## III. Federal Reserve Supervisory Initiatives

The Federal Reserve expects all banking organizations to evaluate their incentive compensation arrangements and related risk management, control, and corporate governance processes and immediately address deficiencies in these arrangements or processes that are inconsistent with safety and soundness. Banking organizations are responsible for ensuring that their incentive compensation arrangements are consistent with the principles described in the guidance, do not encourage excessive risk-taking, and do not pose a threat to the safety and soundness of the organization.

The Federal Reserve is committed to moving the banking industry forward to incorporate the principles described in the guidance into incentive compensation practices. Accordingly, in addition to proposing guidance, the Federal Reserve is commencing the following two supervisory initiatives to spur and monitor the industry's progress towards the implementation of safe and sound incentive compensation arrangements, identify emerging best practices, and advance the state of practice more generally in the industry:

- A special horizontal review of incentive compensation practices at large complex banking organizations (LCBOs); and
- A review of incentive compensation practices at other banking organizations as part of the risk-focused examination process for these organizations.

LCBOs warrant special supervisory attention because they are significant users of incentive compensation arrangements and because the adverse effects of flawed approaches at these institutions are more likely to have adverse effects on the broader financial system.[2] As part of the horizontal review of these firms, each LCBO will be expected to provide the Federal Reserve information and documentation that clearly describes the organization's current incentive compensation practices and its plans (including timetables) for improving these practices.

The horizontal review of LCBOs will be led by Board staff, working with relevant Reserve Bank supervisors, and will draw on a multidisciplinary group comprised of staff with expertise in banking supervision, risk management, economics, finance, law, accounting, and other areas as appropriate. This multidisciplinary team also will have access to information and analysis developed as part of the reviews of other banking organizations, and will serve as a resource for supervisory staff across the System on incentive compensation matters.

The Federal Reserve will work closely with each LCBO to ensure that its plans are likely to result in the establishment and maintenance of incentive compensation arrangements that do not encourage excessive risk-taking. The Federal Reserve also will supervise these organizations to ensure that these plans are fully implemented in a timely manner.

In the second initiative, the Federal Reserve will review incentive compensation arrangements at non-LCBO banking organizations as part of risk management reviews during the regular, risk-focused examination process. As with other aspects of the examination process, these reviews will be tailored to reflect the scope and complexity of the organization's activities, as well as the prevalence and scope of the organization's incentive compensation arrangements.[3]

For LCBOs and other organizations, supervisory findings will be included in the relevant report of examination or inspection, communicated to the organization, and incorporated, as appropriate, into the organization's supervisory ratings. The Federal Reserve in appropriate circumstances may take enforcement action against a banking organization if its incentive compensation arrangements or related risk management, control, or governance processes pose a risk to the safety and soundness of the organization and the organization is not taking prompt and

[2] An important aspect of the Federal Reserve's consolidated supervision programs for bank holding companies and the combined U.S. operations of foreign banking organizations is the assessment and evaluation of practices across groups of organizations with similar characteristics and risk profiles. LCBOs are characterized by the scope and complexity of their domestic and international operations; their participation in large volume payment and settlement systems; the extent of their custody operations and fiduciary activities; and the complexity of their regulatory structures, both domestically and in foreign jurisdictions. To be designated as an LCBO, a banking organization must meet specified criteria to be considered a significant participant in at least one key financial market. *See* SR letter 08–9, Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organization (Oct. 16, 2008).

[3] Similarly, for foreign banking organizations, the management of U.S. operations will be assessed with regard to the consistency of incentive compensation arrangements and related processes with the principles set forth in this guidance, taking into account the size and complexity of U.S. operations. *See* SR letter 08–9, Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations (Oct. 16, 2008).

effective measures to correct the deficiencies. Where appropriate, such an action may require an organization to develop a corrective action plan that is acceptable to the Federal Reserve to rectify deficiencies in its incentive compensation arrangements or related processes.

Additional information concerning these supervisory initiatives is provided in the guidance. Effective and balanced incentive compensation practices are likely to evolve significantly in the coming years, spurred by the efforts of banking organizations, supervisors, and other stakeholders. The Federal Reserve will review and update the guidance as appropriate to incorporate best practices that emerge from these efforts. In addition, in order to monitor and encourage improvements, Federal Reserve staff will prepare a report on trends and developments in compensation practices at banking organizations after the conclusion of 2010.

**IV. Other Matters**

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1), the Board reviewed the proposed guidance under the authority delegated to the Board by the Office of Management and Budget (OMB). The Board has determined that certain aspects of the proposed guidance may constitute a collection of information. In particular, these aspects are the provisions that state a banking organization should (i) have policies and procedures that identify and describe the role(s) of the personnel and units authorized to be involved in incentive compensation arrangements, identify the source of significant risk-related inputs, establish appropriate controls governing these inputs to help ensure their integrity, and identify the individual(s) and unit(s) whose approval is necessary for the establishment or modification of incentive compensation arrangements; (ii) create and maintain sufficient documentation to permit an audit of the organization's processes for incentive compensation arrangements; (iii) have any material exceptions or adjustments to the incentive compensation arrangements established for senior executives approved and documented by its board of directors; and (iv) have its board of directors receive and review, on an annual or more frequent basis, an assessment by management of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness. The Federal Reserve estimates that the above-described information collections included in the proposed guidance would take respondents, on average, 40 hours each year. Any changes to the Federal Reserve's regulatory reporting forms that may be made in the future to collect information related to incentive compensation arrangements would be addressed in a separate Federal Register notice. The Board may not conduct or sponsor, and an organization is not required to respond to, an information collection unless the information collection displays a currently valid OMB control number.

For purposes of the PRA, this information collection will be titled Recordkeeping Provisions Associated with the Incentive Compensation Guidance. The agency form number for the collection is FR 4027. The agency control number for this new collection will be assigned by OMB.

This information collection is authorized pursuant to sections 11(a), 11(i), 25, and 25A of the Federal Reserve Act (12 U.S.C. 248(a), 248(i), 602, and 611), section 5 of the Bank Holding Company Act (12 U.S.C. 1844), and section 7(c) of the International Banking Act (12 U.S.C. 3105(c)). The Board expects to review the policies and procedures for incentive compensation arrangements as part of the Board's supervisory process. To the extent the Board collects information during an examination of a banking organization, confidential treatment may be afforded to the records under exemption 8 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(8).

The frequency of information collection is estimated to be annual. Respondents are banking organizations as defined in the guidance, which total 6,889. The estimated annual reporting hours are 275,560.

Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (Docket No. OP–1374), Washington, DC 20503.

Comments are invited on:

(1) Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

(2) The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

While the guidance is not being adopted as a rule, the Board also has considered the potential impact of the proposed guidance on small banking organizations in accordance with the Regulatory Flexibility Act (5 U.S.C. 603(b)). For the reasons discussed in the ''Supplementary Information'' above, the Board believes that issuance of the proposed guidance is needed to help ensure that incentive compensation arrangements do not pose a threat to the safety and soundness of banking organizations, including small banking organizations.

It is estimated that the proposed guidance, if adopted in final form, would apply to 3002 small banking organizations (defined as banking organizations with $175 million or less in total assets). *See* 13 CFR 121.201. The Board has focused the guidance on those employees who have the ability, either individually or as part of a group, to expose a banking organization to material amounts of risk. In addition, the Board has sought to tailor the guidance and its supervisory initiatives to account for the differences between large and small banking organizations and has provided that, in conducting reviews of small banking organizations as part of the regular examination process, the Federal Reserve will take into account the scope and complexity of the organization's activities, as well as the prevalence and scope of its incentive compensation arrangements. In light of the foregoing, the Board does not believe that the proposed guidance, if adopted in final form, would have a significant economic impact on a substantial number of small entities. As noted above, the Board specifically seeks comment on whether the proposed guidance would impose undue burdens on, or have unintended consequences for, small organizations and whether there are ways such potential burdens or consequences could be addressed in a manner consistent with safety and soundness.

**V. Proposed Guidance**

The text of the proposed guidance is as follows:

*I. Introduction*

Incentive compensation practices in the financial industry were one of many factors contributing to the financial crisis. Banking organizations too often rewarded employees for increasing the firm's revenue or short-term profit without adequate recognition of the risks the employees' activities posed to the firm. These practices exacerbated the risks and losses at a number of banking organizations and resulted in the misalignment of the interests of employees with the long-term well being and safety and soundness of their organizations.

This document provides guidance on sound compensation practices to banking organizations supervised by the Federal Reserve.[1] Alignment of the incentives provided to employees with the interests of shareholders of the organization often also furthers safety and soundness. However, aligning those interests is not always sufficient to address safety and soundness concerns. Because of the presence of the federal safety net, shareholders of a banking organization in some cases may be willing to tolerate a degree of risk that is inconsistent with the organization's safety and soundness. Accordingly, the Federal Reserve expects banking organizations to maintain incentive compensation practices that are consistent with safety and soundness, even when these practices go beyond those needed to align shareholder and employee interests.

To be consistent with safety and soundness, incentive compensation arrangements at a banking organization should:

- Provide employees incentives that do not encourage excessive risk-taking beyond the organization's ability to effectively identify and manage risk;
- Be compatible with effective controls and risk management; and
- Be supported by strong corporate governance, including active and effective oversight by the organization's board of directors.

These principles, and the types of policies, procedures, and systems that banking organizations should have to help ensure compliance with these principles, are discussed in Part II of this guidance.

The Federal Reserve expects all banking organizations to evaluate their incentive compensation arrangements for executive and non-executive employees who, either individually or as part of a group, have the ability to expose the firm to material amounts of risk and the risk management, control, and corporate governance processes related to these arrangements. Banking organizations should immediately address deficiencies in these arrangements or processes that are inconsistent with safety and soundness. Banking organizations are responsible for ensuring that their incentive compensation arrangements are consistent with the principles described in this guidance and do not encourage excessive risk-taking or pose a threat to the safety and soundness of the organization.[2]

Designing and implementing compensation arrangements that properly incent employees to pursue the organization's long-term well being and that do not encourage excessive risk-taking is a complex task and one that requires the commitment of adequate resources. The Federal Reserve recognizes that incentive compensation arrangements often seek to serve several important and worthy objectives.[3] It is important that incentive compensation arrangements be properly structured for all employees at a banking organization, including non-executive employees, who have the ability, either individually or as a group, to take material risks. The analysis and methods for making incentive compensation arrangements take appropriate account of risk also should be tailored to the business model, risk tolerance, size, and complexity of each firm. Thus, achieving and sustaining adherence to sound practices will present challenges.

While the issues are complex, the Federal Reserve is committed to moving banking organizations forward to incorporate the principles described in this guidance into incentive compensation practices. To help accomplish this, the Federal Reserve is commencing two supervisory initiatives:

- A special horizontal review of incentive compensation practices at large, complex banking organizations; and
- A review of incentive compensation practices at other banking organizations as part of the regular risk-focused examination process for these organizations.

These initiatives, which are described in greater detail in Part III of this guidance, are designed to spur and monitor progress toward safe and sound incentive compensation arrangements, identify emerging best practices, and advance the state of practice more generally in the industry.

The Federal Reserve expects to commence promptly the horizontal review of large, complex banking organizations (LCBOs). As part of this review, each LCBO will be expected to provide the Federal Reserve with, among other things, the organization's plans, including relevant timetables, for improving the risk-sensitivity of its incentive compensation arrangements and related risk management, controls, and corporate governance practices. The Federal Reserve will work with these organizations as necessary through the supervisory process to ensure that they produce plans that will promptly result in incentive compensation arrangements that are consistent with safety and soundness, and will supervise the organizations to ensure that these plans are fully implemented in an expeditious manner.

To promote consistency and to leverage the resources available at the Federal Reserve, the horizontal review of LCBOs will be led by Board staff, working with Reserve Bank supervisors responsible for LCBOs. This coordinating group will be comprised of staff with expertise in banking supervision, risk management, economics, finance, law, accounting, and other areas as appropriate. This multidisciplinary team also will have access to information and analysis developed as part of the reviews of other banking organizations and will serve as a resource for supervisory staff across the System on incentive compensation matters.

As part of the supervisory process for all banking organizations, the Federal Reserve will assess the potential for incentive compensation arrangements to encourage excessive risk-taking, the actions an organization has taken or proposes to take to correct deficiencies, and the adequacy of the organization's compensation-related risk management, control, and corporate governance processes. Reviews at regional and community banking organizations will be conducted as part of the evaluation

[1] As used in this guidance, the term ''banking organizations'' includes U.S. bank holding companies, state member banks, Edge and agreement corporations, and the U.S. operations of foreign banks with a branch, agency, or commercial lending company in the United States.

[2] In this guidance, the term ''incentive compensation'' refers to that portion of an employee's current or potential compensation that is tied to achievement of one or more specific metrics (*e.g.,* a level of sales, revenue, or income). Incentive compensation does not include compensation that is awarded solely for, and the payment of which is tied to, continued employment (*e.g.,* salary).

[3] For example, incentive compensation arrangements may be used to help attract skilled staff, promote better firm and employee performance, promote employee retention, provide retirement security to employees, or provide a closer tie between compensation expenses and revenue on a firm-wide basis.

the firm's risk management, internal controls, and corporate governance during the regular examination process.[4] These reviews will be tailored to reflect the scope and complexity of the organization's activities, as well as the prevalence and scope of its incentive compensation arrangements. In this regard, the compensation-related policies, procedures, and systems at a small banking organization that uses incentive compensation arrangements on a limited basis will be substantially less extensive, formalized, and detailed than those of an LCBO that uses incentive compensation arrangements extensively.

Supervisory findings for all types of organizations will be included in the relevant report of examination or inspection and communicated to the organization.[5] In addition, these findings will be incorporated, as appropriate, into the organization's rating component(s) and subcomponent(s) relating to risk management, internal controls, and corporate governance under the relevant supervisory rating system, as well as the organization's overall supervisory rating.[6]

In appropriate circumstances, the Federal Reserve may take enforcement action against a banking organization if its incentive compensation arrangements or related risk management, control, or governance processes pose a risk to the safety and soundness of the organization and the organization is not taking prompt and effective measures to correct the deficiencies. For example, the Federal Reserve may take an enforcement action it considers appropriate against an LCBO if the organization fails to develop, submit, or adhere to an effective plan designed to ensure that the organization's incentive compensation arrangements do not encourage excessive risk-taking and are consistent with principles of safety and soundness. As provided under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), an enforcement action may, among other things, require an organization to develop a corrective action plan that is acceptable to the Federal Reserve to rectify deficiencies in its incentive compensation arrangements or related processes. Where warranted, the Federal Reserve may require the organization to take affirmative action to correct or remedy deficiencies related to the organization's incentive compensation practices until its corrective action plan is implemented.

Effective and balanced incentive compensation practices are likely to evolve significantly in the coming years, spurred by the efforts of banking organizations, supervisors, and other stakeholders. The Federal Reserve will review and update this guidance as appropriate to incorporate best practices that emerge from these efforts.

*II. Principles of a Sound Incentive Compensation System*

The incentive compensation arrangements and related policies and procedures of banking organizations should be consistent with principles of safety and soundness.[7] This guidance is intended to assist banking organizations in designing and implementing incentive compensation arrangements and related policies and procedures that effectively take account of potential risks and risk outcomes.[8] Because incentive compensation arrangements for executive and non-executive personnel who have the ability to expose a banking organization to material amounts of risk may, if not properly structured, pose a threat to the organization's safety and soundness, this guidance applies to incentive compensation arrangements for:

- Senior executives and others who are responsible for oversight of the organization's firm-wide activities or material business lines;
- Individual employees, including non-executive employees, whose activities may expose the firm to material amounts of risk (*e.g.,* traders with large position limits relative to the firm's overall risk tolerance); and
- Groups of employees who are subject to the same or similar incentive compensation arrangements and who, in the aggregate, may expose the firm to material amounts of risk, even if no individual employee is likely to expose the firm to material risk (*e.g.,* loan officers who, as a group, originate loans that account for a material amount of the organization's credit risk).

For ease of reference, these executive and non-executive employees are collectively referred to as ''employees.'' Depending on the facts and circumstances of the individual organization, jobs and job families that are outside the scope of this guidance because they do not have the ability to expose the organization to material risks may include, for example, tellers, bookkeepers, couriers, or data processing personnel.

Principle 1: Balanced Risk-Taking Incentives

Incentive compensation arrangements should balance risk and financial results in a manner that does not provide employees incentives to take excessive risks on behalf of the banking organization.

Incentive compensation arrangements typically attempt to encourage actions that result in greater revenue or profit for the firm. However, short-run revenue or profit can often diverge sharply from actual long-run profit because risk outcomes may become clear only over time. Activities that carry higher risk typically yield higher short-term revenue, and an employee who is given incentives to increase short-term revenue or profit, without regard to risk, will naturally be attracted to opportunities to take more risk.

An incentive compensation arrangement is balanced when the amounts paid to an employee appropriately take into account the risks, as well as the financial benefits, from the employee's activities and the impact of those activities on the organization's safety and soundness. As an example, under a balanced incentive compensation arrangement, two employees who generate the same amount of short-term revenue or profit for an organization should not receive the same amount of incentive compensation if the risks taken by the employees in generating that revenue or profit differ materially. The employee whose activities create materially larger risks for the organization should receive less than the other employee, all else being equal.

[4] Thus, for example, reviews at bank holding companies with total consolidated assets of $5 billion or less will be conducted in accordance with the risk-focused supervision program for these organizations. *See* SR letter 02–1, Revisions to Bank Holding Company Supervision Procedures for Organizations with Total Consolidated Assets of $5 Billion or Less (Jan. 9, 2002).

[5] *See* SR letter 08–1, Communication of Examination/Inspection Findings (Jan. 24, 2008).

[6] For example, supervisory findings for bank holding companies in the areas discussed in this guidance should be incorporated into the assessment of the appropriate subcomponent(s) for the BHC's ''Risk Management'' rating component in the RFI (Risk Management, Financial Condition, and Impact) rating. *See* SR letter 04–18, Bank Holding Company Rating System (Dec. 6, 2004).

[7] In the case of the U.S. operations of foreign banks, the organization's policies, including management, review, and approval requirements, should be coordinated with the foreign bank's group-wide policies developed in accordance with the rules of the foreign bank's home country supervisor and should be consistent with the foreign bank's overall corporate and management structure as well as its framework for risk management and internal controls.

[8] This guidance and the principles reflected herein are consistent with the Principles for Sound Compensation Practices issued by the Financial Stability Board (FSB) in April 2009, and with the FSB's Implementation Standards for those principles, issued in September 2009.

The performance measures used in an incentive compensation arrangement have an important effect on the incentives provided employees and, thus, the potential for the arrangement to encourage excessive risk-taking. For example, if an employee's incentive compensation payments are closely tied to short-term revenue or profit of business generated by the employee, without any adjustments for the risks associated with the associated business, the potential for the arrangement to encourage excessive risk-taking may be quite strong. On the other hand, if an employee's incentive compensation payments are determined based on performance measures that are only distantly linked to the employee's activities (*e.g.,* for most employees, firm-wide profit), the potential for the arrangement to encourage the employee to take excessive risks on behalf of the organization may be weak.[9]

Incentive compensation arrangements should not only be balanced in design, they also should be implemented so that actual payments vary based on risks or risk outcomes. If, for example, employees are paid substantially all of their potential incentive compensation even when risk or risk outcomes are materially worse than expected, employees have less incentive to avoid excessively risky activities.

• Banking organizations should consider the full range of risks associated with an employee's activities, as well as the time horizon over which those risks may be realized, in assessing whether incentive compensation arrangements are balanced.

The activities of employees may create a wide range of risks for a banking organization, including credit, market, liquidity, operational, legal, compliance, and reputational risks. Some of these risks may be realized in the short term, while others may become apparent only over the long term. For example, future revenues that are booked as current income may not materialize, and short-term profit-and-loss measures may not appropriately reflect differences in the risks associated with the revenue derived from different activities (*e.g.,* the higher credit or compliance risk associated with subprime loans versus prime loans).[10] In addition, some risks may have a low probability of being realized, but would have highly adverse effects on the organization if they were to be realized (''bad-tail risks''). While shareholders may have less incentive to guard against bad-tail risks because of their infrequency and the existence of the federal safety net, these risks warrant special attention from a safety-and-soundness perspective given the threat they pose to the organization's solvency and the federal safety net.

Banking organizations should consider the full range of current and potential risks associated with the activities of employees, including the cost and amount of capital and liquidity needed to support those risks, in developing balanced incentive compensation arrangements. Reliable quantitative measures of risk and risk outcomes (''quantitative measures''), where available, may be particularly useful in developing balanced compensation arrangements and in assessing the extent to which arrangements are properly balanced. However, reliable quantitative measures may not be available for all types of risk or for all activities, and their utility for use in compensation arrangements varies across business lines and employees. The absence of reliable quantitative measures for certain types of risks or outcomes does not mean that banking organizations should ignore such risks or outcomes for purposes of assessing whether an incentive compensation arrangement achieves balance. For example, while reliable quantitative measures may not exist for many bad-tail risks, it is important that such risks be considered given their potential effect on safety and soundness. As in other risk-management areas, banking organizations should rely on informed judgments to estimate risks and risk outcomes in the absence of reliable quantitative risk measures.[11]

Banking organizations, and particularly large, complex organizations, should consider using scenario analysis to help assess whether the features included in incentive compensation arrangements are likely to achieve balance over time. Scenario analysis of incentive compensation arrangements involves the evaluation of payments on a forward-looking basis based on a range of performance levels, risk outcomes, and the levels of risks taken. This type of analysis can help an organization assess whether incentive compensation payments to an employee are likely to be reduced appropriately as the risks to the organization from the employee's activities increase.

• An unbalanced arrangement can be moved toward balance by adding or modifying features that cause the amounts ultimately received by employees to appropriately reflect risk and risk outcomes.

If an incentive compensation arrangement may encourage employees to take excessive risks, the banking organization should modify the arrangement as needed to ensure that it is consistent with safety and soundness. Four methods currently are often used to make compensation more sensitive to risk. These methods are:

○ Risk Adjustment of Awards: The amount of an incentive compensation award for an employee is adjusted based on measures that take into account the risk the employee's activities pose to the organization. Such measures may be quantitative, or the size of a risk adjustment may be set judgmentally, subject to appropriate oversight.

○ Deferral of Payment: The actual payout of an award to an employee is delayed significantly beyond the end of the performance period, and the amounts paid are adjusted for actual losses or other aspects of performance that become clear only during the deferral period.[12] Deferred payouts may be altered according to risk outcomes either formulaically or judgmentally, though extensive use of judgment might make it more difficult to execute deferral arrangements in a sufficiently predictable fashion to influence employee behavior. To be most effective, the deferral period should be

[9] Similarly, the size of an employee's incentive compensation payments in relation to the employee's total compensation package may affect the likelihood that the incentive compensation arrangement may induce the employee to take excessive risks. For example, where incentive compensation is a small portion of employees' total compensation—as is the case for many employees at regional and community banking organizations—such compensation is less likely to affect the employees' risk-taking behavior than when incentive compensation represents a large percentage, or even a majority, of the employees' total compensation.

[10] Importantly, the time horizon over which a risk outcome may be realized is not necessarily the same as the stated maturity of an exposure. For example, the ongoing reinvestment of funds by a cash management unit in commercial paper with a one-day maturity not only exposes the organization to one-day credit risk, but also exposes the organization to liquidity risk that may be realized only infrequently.

[11] Where judgment plays a significant role in the design or operation of an incentive compensation arrangement, strong internal controls and ex post monitoring of incentive compensation payments relative to actual risk outcomes are particularly important to help ensure that the arrangements as implemented do not encourage excessive risk-taking.

[12] The deferral of payment method is sometimes referred to in the industry as a ''clawback.'' The term ''clawback'' also may refer specifically to an arrangement under which an employee must return incentive compensation payments previously received by the employee (and not just deferred) if certain risk outcomes occur. Section 304 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7243), which applies to chief executive officers and chief financial officers of public banking organizations, is an example of this more specific type of ''clawback'' requirement.

sufficiently long to allow for the realization of a substantial portion of the risks from employee activities, and the measures of loss should be clearly explained to employees and closely tied to their activities during the relevant performance period.

○ Longer Performance Periods: The time period covered by the performance measures used in determining an employee's award is extended (for example, from one year to two years). Longer performance periods and deferral of payment are related in that both methods allow awards or payments to be made after some or all risk outcomes are realized or better known.

○ Reduced Sensitivity to Short-Term Performance: The banking organization reduces the rate at which awards increase as an employee achieves higher levels of the relevant performance measure(s). Rather than offsetting risk-taking incentives associated with the use of short-term performance measures, this method reduces the magnitude of such incentives.[13]

These methods for achieving balance are not exclusive, and additional methods or variations may exist or be developed. Moreover, each method has its own advantages and disadvantages. For example, where reliable risk measures exist, risk adjustment of awards may be more effective than deferral of payment in reducing incentives for excessive risk-taking. This is because risk adjustment potentially can take account of the full range and time horizon of risks, rather than just those risk outcomes that occur or become evident during the deferral period. On the other hand, deferral of payment may be more effective than risk adjustment in mitigating incentives to take hard-to-measure risks (such as the risks of new activities or products), particularly if such risks are likely to be realized during the deferral period. Accordingly, in some cases two or more methods may be needed in combination for an incentive compensation arrangement to be balanced. The greater the potential incentives an arrangement creates for an employee to increase the risks borne by the organization, the stronger the effect should be of the methods applied to achieve balance.

Methods and practices for making compensation sensitive to risk-taking are likely to evolve rapidly during the next few years, driven in part by the efforts of supervisors and other stakeholders. A banking organization should monitor developments in the field and should incorporate new or emerging methods or practices that are likely to improve the organization's safety and soundness into its incentive compensation systems.

• The manner in which a banking organization seeks to achieve balanced incentive compensation arrangements should be tailored to account for the differences between employees—including the substantial differences between senior executives and other employees—as well as between banking organizations.

Activities and risks may vary significantly both across banking organizations and across employees within a particular banking organization. For example, the risks associated with the activities of one group of non-executive employees (*e.g.,* loan originators) may differ significantly from those of another group of non-executive employees (*e.g.,* spot foreign exchange traders). In addition, reliable quantitative measures of risk and risk outcomes are unlikely to be available for a banking organization as a whole, particularly a large complex organization. This can make it difficult for banking organizations to achieve balanced compensation arrangements for senior executives who have responsibility for managing risks on a firm-wide basis through use of the risk adjustment of award method.

Moreover, the payment of deferred incentive compensation in equity (such as restricted stock of the organization) or equity-based instruments (such as options to acquire the organization's stock) may be effective in restraining the risk-taking incentives of senior executives and other employees whose activities may have a material effect on the overall financial performance of the firm. However, equity-related deferred compensation may not be as effective in restraining the incentives of lower-level employees (particularly at large organizations) to take risks because such employees are unlikely to believe that their actions will materially affect the organization's stock price.

Banking organizations should take account of these differences when constructing balanced compensation arrangements. For most banking organizations, the use of a single, formulaic approach to making employee incentive compensation arrangements appropriately risk-sensitive is likely to provide at least some employees with incentives to take excessive risks.[14]

Incentive compensation arrangements for senior executives at LCBOs are likely to be better balanced if they involve deferral of a substantial portion of the executives' incentive compensation over a multi-year period in a way that reduces the amount received in the event of poor performance, substantial use of multi-year performance periods, or both. Similarly, the compensation arrangements for senior executives at LCBOs are likely to be better balanced if a significant portion of the incentive compensation of these executives is paid in the form of equity-based instruments that vest over multiple years, with the number of instruments ultimately received dependent on the performance of the firm during the deferral period. The portion of the incentive compensation of other employees that is deferred or paid in the form of equity-based instruments should appropriately take into account the level, nature, and duration of the risks that the employees' activities create for the organization and the extent to which those activities may materially affect the overall performance of the firm and its stock price.

• Banking organizations should carefully consider the potential for ''golden parachutes'' and the vesting arrangements for deferred compensation to affect the risk-taking behavior of employees while at the organizations.

Arrangements that provide for an employee (typically a senior executive), upon departure from the organization or a change in control of the organization, to receive large additional payments or the accelerated payment of deferred amounts without regard to risk or risk outcomes, can provide the employee significant incentives to engage in undue risk-taking. Banking organizations should carefully review any such existing or proposed arrangements (sometimes called ''golden parachutes'') and the potential impact of such arrangements on the organization's safety and soundness. A banking organization should ensure that golden parachute arrangements do not encourage excessive risk-taking in light of the other features of the employee's incentive compensation arrangements.

Similarly, provisions that require an employee to forfeit deferred incentive compensation payments upon departure from the organization may weaken the

[13] Performance targets may have a material effect on risk-taking incentives. Such targets may offer employees greater rewards for increments of performance that are above the target or may provide that awards will be granted only if a target is met or exceeded. Employees may be particularly motivated to take excessive risk in order to reach performance targets that are aggressive, but potentially achievable.

[14] For example, spreading payouts of incentive compensation awards over a three-year period may not be sufficient by itself to balance the compensation arrangements of employees who may expose the organization to substantial longer-term risks.

effectiveness of the deferral arrangement in achieving balance by removing the employee's financial exposure to the risk outcomes of the employee's activities at the firm. This weakening effect can be particularly significant for senior executives or other skilled individuals whose services are in high demand within the market. In such circumstances, the departing employee often may be able to negotiate a ''golden handshake'' arrangement with the employee's new firm, which compensates the employee for some or all of the estimated, non-risk-adjusted value of the deferred incentive compensation forfeited by the employee upon departure from the organization. While a banking organization may not be able to control the hiring practices of other firms, it should consider whether golden handshake arrangements are materially weakening the organization's efforts to constrain the risk-taking incentives of employees and, if so, whether changes to the organization's deferred compensation vesting policies or other aspects of its incentive compensation arrangements should be made to ensure that they do not encourage employees to take excessive risks while employed by the organization.

• Banking organizations should effectively communicate to employees the ways in which incentive compensation awards and payments will be reduced as risks increase.

In order for the risk-sensitive provisions of incentive compensation arrangements to affect employee risk-taking behavior, the organization's employees must understand that the amount of incentive compensation that they may receive will vary based on the risk associated with their activities. Accordingly, banking organizations should ensure that the employees covered by an incentive compensation arrangement are informed about the key ways in which risks are taken into account in determining the amount of incentive compensation paid. Where feasible, an organization's communications with employees should include examples of how incentive compensation payments may be adjusted to reflect projected or actual risk-outcomes. An organization's communications should be tailored appropriately to reflect the sophistication of the relevant audience(s).

Principle 2: Compatibility With Effective Controls and Risk Management

A banking organization's risk-management processes and internal controls should reinforce and support the development and maintenance of balanced incentive compensation arrangements.

• Banking organizations should have appropriate controls to ensure that their processes for achieving balanced compensation arrangements are followed and to maintain the integrity of their risk management and other functions.

In order to increase their own compensation, employees may seek to evade the processes established by a banking organization to achieve balanced compensation arrangements. Similarly, an employee covered by an incentive compensation arrangement may seek to influence the risk measures or other information or judgments that are used to make the employee's pay sensitive to risk in ways designed to increase the employee's pay.

If successful, these actions may significantly weaken the effectiveness of an organization's incentive compensation arrangements in restricting excessive risk-taking. These actions can have a particularly damaging effect on the safety and soundness of the organization if they result in the weakening of risk measures, information, or judgments that the organization uses for other risk management, internal control, or financial purposes. In such cases, the employee's actions may weaken not only the balance of the organization's incentive compensation arrangements, but also the risk management, internal controls, and other functions that are supposed to act as a separate check on risk-taking.

To help prevent this damage from occurring, a banking organization should have strong controls governing its process for designing, implementing, and monitoring incentive compensation arrangements. For example, an organization's policies and procedures should (i) identify and describe the role(s) of the personnel, business units, and control units authorized to be involved in the design, implementation, and monitoring of incentive compensation arrangements; (ii) identify the source of significant risk-related inputs into these processes and establish appropriate controls governing the development and approval of these inputs to help ensure their integrity; and (iii) identify the individual(s) and control unit(s) whose approval is necessary for the establishment of new incentive compensation arrangements or modification of existing arrangements. Banking organizations also should create and maintain sufficient documentation to permit an audit of the organization's processes for establishing, modifying, and monitoring incentive compensation arrangements.

A banking organization should conduct regular internal reviews to ensure that its processes for achieving and maintaining balanced incentive compensation arrangements are consistently followed. Such reviews should be conducted by audit, compliance, or other personnel in a manner consistent with the organization's overall framework for compliance monitoring. An organization's internal audit department also should separately conduct regular audits of the organization's compliance with its established policies and controls relating to incentive compensation arrangements. The results should be reported to appropriate levels of management and, where appropriate, the organization's board of directors. Reviews conducted by regional or community banking organizations should be tailored to the management, internal control, compliance, and audit framework for the organization, as well as the scope and complexity of the organization's activities and its use of incentive compensation arrangements.

• Appropriate personnel, including risk-management personnel, should have input into the organization's processes for designing incentive compensation arrangements and assessing their effectiveness in restraining excessive risk-taking.

Developing balanced compensation arrangements and monitoring arrangements to ensure they achieve balance over time requires an understanding of the risks (including compliance risks) and potential risk outcomes associated with the activities of the relevant employees. Accordingly, banking organizations should have policies and procedures that ensure that risk-management personnel have an appropriate role in the organization's processes for designing incentive compensation arrangements and for assessing their effectiveness in restraining excessive risk-taking.[15] Ways that risk managers might assist in achieving balanced compensation arrangements include, but are not limited to (i) reviewing the types of risks associated with the activities of employees covered by an incentive compensation arrangement; (ii) approving the risk measures used in risk adjustments and performance measures, as well as measures of risk outcomes

[15] Involvement of risk-management personnel in the design and monitoring of these arrangements also should help ensure that the organization's risk-management functions can properly understand and address the full range of risks facing the organization.

used in deferred-payout arrangements; and (iii) analyzing risk-taking and risk outcomes relative to incentive compensation payments.

Other functions within an organization, such as its control, human resources, or finance functions, also play an important role in helping ensure that incentive compensation arrangements are balanced. For example, these functions may contribute to the design and review of performance measures used in compensation arrangements or may supply data used as part of these measures.

• Compensation for employees in risk management and control functions should be sufficient to attract and retain qualified personnel and should avoid conflicts of interest.

The risk management and control personnel involved in the design and oversight of incentive compensation arrangements should have appropriate skills and experience needed to effectively fulfill their roles, even when their efforts are challenged by employees seeking to increase their incentive compensation in ways that are inconsistent with sound risk management or internal controls. The compensation arrangements for employees in risk management and control functions thus should be sufficient to attract and retain qualified personnel with appropriate experience and expertise in these fields. In addition, to help preserve the independence of their perspectives, the incentive compensation received by risk management and control personnel staff should not be based predominately on the financial performance of the business units that they review. Rather, the performance measures used in the incentive compensation arrangements for these personnel should be based primarily on the achievement of the objectives of their functions (*e.g.,* risk-adjusted performance or adherence to internal controls).

• Banking organizations should monitor the performance of their incentive compensation arrangements and should revise the arrangements as needed if payments do not appropriately reflect risk.

Banking organizations should track incentive compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments to employees are reduced to reflect adverse risk outcomes. Results should be reported to appropriate levels of management, including where warranted, the board of directors. A banking organization should take the results of such monitoring into account in establishing or modifying incentive compensation arrangements and in overseeing associated controls. If, over time, incentive compensation paid by a banking organization does not appropriately reflect risk outcomes, the organization should review and revise its incentive compensation arrangements and related controls to ensure that the arrangements, as designed and implemented, are balanced and do not provide employees incentives to take excessive risks.

Principle 3: Strong Corporate Governance

Banking organizations should have strong and effective corporate governance to help ensure sound compensation practices.

• The board of directors of a banking organization should actively oversee incentive compensation arrangements.

The board of directors of an organization is ultimately responsible for ensuring that the organization's incentive compensation arrangements are appropriately balanced and do not jeopardize the safety and soundness of the organization. Accordingly, the board of directors should actively oversee the development and operation of a banking organization's incentive compensation systems and related control processes.[16] For example, the board of directors should review and approve the overall goals and purposes of the firm's incentive compensation system. The board should provide clear direction to management to ensure that its policies and procedures are carried out in a manner that achieves balance and is consistent with safety and soundness.

In addition, the board of directors should ensure that the compensation system—including performance measures and targets—for business units and individual employees that can expose the firm to large amounts of risk is designed and operated in a manner that will achieve balance. Given the key role of senior executives in managing the overall risk-taking activities of an organization, the board of directors should directly approve the incentive compensation arrangements for senior executives. The board should approve and document any material exceptions or adjustments to the incentive compensation arrangements established for senior executives and should carefully consider and monitor the effects of any approved exceptions or adjustments on the balance of the arrangement, the risk-taking incentives of the senior executive, and the safety and soundness of the organization.

• The board of directors should monitor the performance, and regularly review the design and function, of incentive compensation arrangements.

The board of directors should regularly review the design and monitor the performance of the organization's incentive compensation systems. To allow for informed reviews, the board should receive data and analysis from management or other sources that are sufficient to allow the board to assess whether the overall design and performance of the organization's incentive compensation arrangements are consistent with the organization's safety and soundness. For example, the board should receive and review, on an annual or more frequent basis, an assessment by management, with appropriate input from risk-management personnel, of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness. These reports should include an evaluation of whether or how incentive compensation practices may be encouraging excessive risk-taking. These reviews and reports should be appropriately scoped to reflect the size and complexity of the banking organization's activities and the prevalence and scope of its incentive compensation arrangements.

In addition, at banking organizations that are significant users of incentive compensation arrangements, the board should receive periodic reports that review incentive compensation awards and payments relative to risk outcomes on a backward-looking basis to determine whether the organization's incentive compensation arrangements may be promoting excessive risk-taking. Boards of directors of these organizations also should consider periodically obtaining and reviewing scenario analysis of compensation on a forward-looking basis based on a range of performance levels, risk outcomes, and the amount of risks taken.

The board should closely monitor incentive compensation payments to senior executives and their sensitivity to risk outcomes. This monitoring should include the review of both backward-looking and forward-looking scenario analysis for senior executives separate from other employees. In addition, if the

[16] As used in this guidance, the term ''board of directors'' is used to refer to the members of the board of directors who have primary responsibility for overseeing the incentive compensation system. Depending on the manner in which the board is organized, the term may refer to the entire board of directors, a compensation committee of the board, or another committee of the board that has primary responsibility for overseeing the incentive compensation system.

compensation arrangement for a senior executive includes a clawback provision, then the review should include sufficient information to determine if the provision has been triggered.

The board of directors should seek to stay abreast of significant emerging changes in compensation plan mechanisms and incentives in the marketplace. However, the board should recognize that institutions, activities, and practices within the industry are not identical. Incentive compensation arrangements at one firm may not be suitable for use at another firm because of differences in the risks, controls, structure, and management among firms. The board of directors of each organization is responsible for ensuring that the incentive compensation arrangements for its organization do not encourage employees to take risks that are beyond the firm's ability to manage effectively, regardless of the practices employed by other firms.

• The organization, composition, and resources of the board of directors should permit effective oversight of incentive compensation.

If a separate compensation committee is not already in place or required by other authorities,[17] the board of directors should consider establishing such a committee—reporting to the full board—that has primary responsibility for overseeing the organization's incentive compensation systems. A compensation committee should be composed solely or predominantly of non-executive directors. If the board does not have such a compensation committee, the board should take other steps to ensure that non-executive directors of the board are actively involved in the oversight of incentive compensation systems. At LCBOs and large regional banking organizations, and at other banking organizations where feasible, one or more of the board of directors should have a level of expertise and experience in risk management and compensation practices in the financial services industry that is appropriate for the nature, scope, and complexity of the organization's activities. The compensation committee should work closely with any board-level risk and audit committees where the substance of their activities overlap.

The board of directors should have the authority to, where appropriate, select, compensate, and use outside counsel, consultants, or other experts with expertise in incentive compensation and risk management.[18] In selecting and using outside parties, the board of directors should give due attention to potential conflicts of interest arising from other dealings of the parties with the firm or for other reasons. The board also should exercise caution to avoid allowing outside parties to obtain undue levels of influence. While the retention and use of outside parties may be helpful, the board retains ultimate responsibility for ensuring that the organization's incentive compensation arrangements are consistent with safety and soundness.

• A banking organization's disclosure practices should support safe and sound incentive compensation arrangements.

If a banking organization's incentive compensation arrangements provide employees incentives to take risks that are beyond the tolerance of the organization's shareholders, these risks are likely to also present a risk to the safety and soundness of the organization.[19] To help promote safety and soundness, a banking organization should provide an appropriate amount of information concerning its incentive compensation arrangements and related risk management, control, and governance processes to shareholders to allow them to monitor and, where appropriate, take actions to restrain the potential for such arrangements and processes to encourage employees to take excessive risks.

The scope and level of the information disclosed by the organization should be tailored to the nature and complexity of the organization and its incentive compensation arrangements. The Securities and Exchange Commission (SEC), for example, has proposed to adopt certain disclosure requirements relating to incentive compensation practices for public companies.[20] The Federal Reserve will work with the SEC to improve the disclosures provided by public banking organizations in ways that promote the safety and soundness of these organizations. In addition, in connection with the special horizontal review process, the Federal Reserve will conduct a review of its regulatory reporting forms to determine what type(s) of summary-level quantitative information concerning incentive compensation arrangements, awards, and payments would be appropriate for the Federal Reserve to collect and make publicly available to help promote balanced incentive compensation arrangements.

• Large, complex banking organizations should follow a systematic approach to developing a compensation system that has balanced incentive compensation arrangements.

At banking organizations with large numbers of risk-taking employees engaged in diverse activities, an ad hoc approach to developing balanced arrangements is unlikely to be reliable. Thus, an LCBO should use a systematic approach—supported by robust and formalized policies, procedures, and systems—to ensure that those arrangements are appropriately balanced and consistent with safety and soundness. Such an approach should provide for the organization effectively to:

• Identify employees who are eligible to receive incentive compensation and whose activities may expose the organization to material risks. These employees should include (i) senior executives and others who are responsible for oversight of the organization's firm-wide activities or material business lines; (ii) individual employees, including non-executive employees, whose activities may expose the firm to material amounts of risk; and (iii) groups of employees who are subject to the same or similar incentive compensation arrangements and who, in the aggregate, may expose the firm to material amounts of risk;

• Identify the types and time horizons of risks to the organization from the activities of these employees;

• Assess the potential for the performance measures included in the incentive compensation arrangements for these employees to encourage the employees to take excessive risks;

• Include measures, such as risk adjustments or deferral periods, within the incentive compensation arrangements for these employees that are reasonably designed to ensure that the arrangement will be balanced;

• Communicate to the employees the ways in which their incentive compensation awards or payments will be adjusted to reflect the risks of their activities to the organization; and

• Monitor incentive compensation awards, payments, risks taken, and risk

[17] *See* NYSE Listed Company Manual Section 303A.05(a); Nasdaq Listing Rule 5605(d); Internal Revenue Code section 162(m) (26 U.S.C. 162(m)).

[18] It is recognized that the board of directors of an organization with less complex and extensive incentive compensation arrangements, such as many smaller regional and community banking organizations, may not find it necessary or appropriate to retain and use outside experts in this area.

[19] On the other hand, as noted previously, compensation arrangements that are in the interests of the shareholders of a banking organization are not necessarily consistent with safety and soundness. This is because the federal safety net bears some of the downside of risks taken by organizations with access, directly or through a subsidiary, to the safety net.

[20] *See* 74 FR 35076, July 17, 2009.

outcomes for these employees and modify the relevant arrangements if payments made are not appropriately sensitive to risk and risk outcomes.

Regional and community banking organizations should develop and implement appropriate policies, procedures, and systems in a manner that is tailored to the size and complexity of the organization's activities, as well as the prevalence and scope of its incentive compensation arrangements.

*III. Supervisory Initiatives*

As noted earlier, the Federal Reserve is commencing two supervisory initiatives in order to spur and monitor the industry's progress toward the implementation of safe and sound incentive compensation arrangements, identify emerging best practices, and advance the state of practice more generally in the industry. In addition, the Federal Reserve will, on an on-going basis, assess banking organizations' incentive compensation arrangements for conformity with the principles of safety and soundness outlined in this guidance.

*Large, complex banking organizations.* LCBOs warrant the most intensive supervisory attention in the short run because they are significant users of incentive compensation arrangements and because the adverse effects of flawed approaches at these institutions are more likely to have adverse effects on the broader financial system. Accordingly, the Federal Reserve will conduct a formal horizontal review of incentive compensation arrangements at these organizations. The review is designed to achieve the following objectives:

1. Enhance supervisory understanding of the details of current practices, as well as the steps taken or proposed to be taken by organizations to improve the balance of incentive compensation arrangements;
2. Assess the strength of controls and whether actual payouts under incentive compensation arrangements are effectively monitored relative to actual risk outcomes;
3. Understand the role played by boards of directors, compensation committees, and risk-management functions in designing, approving, and monitoring incentive compensation systems; and
4. Identify emerging best practices through comparison of practices across organizations and business lines.

As part of this review, each LCBO will be expected to provide the Federal Reserve information and documentation that clearly describes (i) the structure of the organization's current incentive compensation arrangements, (ii) the existing processes used by the organization to oversee these arrangements and help ensure that they do not encourage employees to take excessive risks, and (iii) the organization's plans, including relevant timetables, for improving the risk-sensitivity of incentive compensation arrangements and related risk management, controls, and corporate governance practices.

The Federal Reserve will work closely with each LCBO to ensure that its plans are likely to result in the establishment and maintenance of incentive compensation arrangements that are consistent with safety and soundness and do not encourage excessive risk-taking. In addition, the Federal Reserve will closely monitor actions taken by the organization under the plan, including the organization's adherence to timetables set forth in its plan for improvements to be developed and implemented. As noted earlier, the Federal Reserve may take supervisory action as appropriate if the organization fails to develop, submit, or adhere to an effective plan designed to ensure that the organization's incentive compensation arrangements do not encourage excessive risk-taking and are consistent with principles of safety and soundness. Such action may include the establishment of appropriate limitations on the organization's incentive compensation awards or payments to help ensure that the organization's incentive compensation arrangements do not pose a threat to the safety and soundness of the organization.

*Community and regional banking organizations with incentive compensation arrangements.* Supervisory staff should review incentive compensation arrangements at non-LCBO banking organizations as part of the regular, risk-focused supervisory process.[21] These reviews should be conducted in connection with the review of the organization's risk management, internal controls and corporate governance, and should be tailored to reflect the scope and complexity of the organization's activities and prevalence and scope of its incentive compensation arrangements. Thus, for example, a small banking organization that uses incentive compensation arrangements on a limited basis is not expected to have as formalized, extensive, and detailed policies, procedures, and systems governing its incentive compensation arrangements as a LCBO that uses incentive compensation arrangements extensively. In addition, in considering the potential for incentive compensation arrangements, including commission-based programs, to encourage excessive risk-taking, examiners should take into account the strength of the organization's risk management and internal control framework in managing and controlling risks.

If examiners find incentive compensation practices that may be of concern, examiners should consult with the multidisciplinary group described previously. The Federal Reserve will incorporate the findings of these reviews into the organization's supervisory ratings and, where warranted, may take supervisory action against the organization to address deficiencies.

*IV. Conclusion*

Banking organizations are responsible for ensuring that their incentive compensation arrangements do not encourage excessive risk-taking and do not pose a threat to the safety and soundness of the organization. The Federal Reserve expects banking organizations to take prompt action to address deficiencies in their incentive compensation arrangements or related risk management, control, and governance processes.

The Federal Reserve expects to actively monitor the actions taken by banking organizations in this area and will promote further advances in designing and implementing balanced incentive compensation arrangements. Where appropriate, the Federal Reserve will take supervisory or enforcement action to ensure that material deficiencies that pose a threat to the safety and soundness of the organization are promptly addressed. The Federal Reserve also will update this guidance as appropriate to incorporate best practices as they develop over time.

This concludes the text of the proposed guidance.

By order of the Board of Governors of the Federal Reserve System, October 22, 2009.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E9–25766 Filed 10–26–09; 8:45 am]

**BILLING CODE 6210–01–P**

[21] Thus, for example, reviews at bank holding companies with total consolidated assets of $5 billion or less will be conducted in accordance with the risk-focused supervision program for these organizations. *See* SR letter 02–1, Revisions to Bank Holding Company Supervision Procedures for Organizations with Total Consolidated Assets of $5 Billion or Less (Jan. 9, 2002).

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* April 2010 Current Population Survey Supplement on Child Support.

*OMB No.:* 0992–0003.

*Description:* Collection of these data will assist legislators and policymakers in determining how effective their policymaking efforts have been over time in applying the various child support legislation to the overall child support enforcement picture. This information will help policymakers determine to what extent individuals on welfare would be removed from the welfare rolls as a result of more stringent child support enforcement efforts.

*Respondents:* Individuals and households.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Child Support Survey | 41,300 | 1 | 0.03 | 1,239 |

*Estimated Total Annual Burden Hours:* 1,239.

*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: 202–395–7245, Attn: Desk Officer for the Administration for Children and Families.

Dated: October 21, 2009.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. E9–25751 Filed 10–26–09; 8:45 am]

BILLING CODE 4184–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Head Start Grant Application and Budget Instruments.

*OMB No.:* 0970–0207.

*Description:* The Office of Head Start is proposing to renew, without changes, the Head Start Grant Application and Budget Instrument, which standardizes the grant application information that is requested from all Head Start and Early Head Start grantees applying for continuation grants. The application and budget forms are available in a password-protected, web-based system. Completed applications can be transmitted electronically to Regional and Central Offices. The Administration for Children and Families believes that this application form makes the process of applying for Head Start program grants more efficient for applicants.

*Respondents:* Head Start and Early Head Start grantees.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| HS grant and budget instrument | 1,600 | 1 | 33 | 52,800 |
| Estimated Total Annual Burden Hours: | | | | 52,800 |

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: 202–395–7245, Attn: Desk Officer for the Administration for Children and Families.

Dated: October 22, 2009.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. E9–25768 Filed 10–26–09; 8:45 am]

BILLING CODE 4184–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

**Proposed Projects**

*Title:* State Self-Assessment Review and Report.

*OMB No.:* 0970–0223.

*Description:* Section 454(15)(A) of the Social Security Act, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, requires each State to annually assess the performance of its child support enforcement program in accordance with standards specified by the Secretary of the Department of Health and Human Services, and to provide a report of the findings to the Secretary. This information is required to determine if States are complying with Federal child support mandates and providing the best services possible. The report is also intended to be used as a management tool to help States evaluate their programs and assess performance.

*Respondents:* State Child Support Enforcement Agencies or the Department/Agency/Bureau responsible for Child Support Enforcement in each State.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Self-assessment report | 54 | 1 | 4 | 216 |
| Estimated Total Annual Burden Hours: | 216 | | | |

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: October 21, 2009.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. E9–25734 Filed 10–26–09; 8:45 am]

BILLING CODE 4184–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Toxic Substances and Disease Registry

**[ATSDR–255]**

### Announcement of Final Priority Data Needs for Six Priority Hazardous Substances

**AGENCY:** Agency for Toxic Substances and Disease Registry (ATSDR), U.S. Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** This notice announces the final priority data needs for six priority hazardous substances (see Table 1) as part of the continuing development and implementation of the ATSDR Substance-Specific Applied Research Program (SSARP). This notice also serves as a continuous call for voluntary research proposals.

The exposure and toxicity priority data needs in this notice were distilled from the data needs identified in ATSDR's toxicological profiles by the logical scientific approach described in a decision guide published in the **Federal Register** on September 11, 1989 (54 FR 37618). The priority data needs represent information essential to improving the database for conducting public health assessments. Research to address these priority data needs will help to determine the types or levels of exposure that may present significant risks of adverse health effects in people exposed to the six hazardous substances.

The priority data needs announced in this notice reflect the opinion of ATSDR, in consultation with other federal programs, about the research needed pursuant to ATSDR's authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), or CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9604(i)]. The needs identified here do not represent the priority data needs for any other agency or program.

Consistent with Section 104(i)(12) of CERCLA as amended [42 U.S.C. 9604(i)(12)], nothing in this research program shall be construed to delay or otherwise affect or impair the President, the Administrator of ATSDR, or the Administrator of the Environmental Protection Agency (EPA) from exercising any authority regarding any other provision of law, including the Toxic Substances Control Act of 1976 (TSCA), the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (FIFRA), or the response and abatement authorities of CERCLA.

ATSDR worked with other federal programs to determine common substance-specific data needs and mechanisms to implement research that may include authorities under TSCA and FIFRA, private-sector voluntarism, or the direct use of CERCLA funds.

Table 1 presents the priority data needs for six priority substances included in the ATSDR Priority List of Hazardous Substances (73 FR 12178, March 6, 2008). ATSDR initially announced these priority data needs in the **Federal Register** on December 28, 2007 (72 FR 73828), and the public had 90 days to comment on them. EPA, the National Institute of Environmental Health Sciences (NIEHS)/National Toxicology Program (NTP), the National Institute for Occupational Safety and Health (NIOSH), and the U.S. Food and

Drug Administration/National Center for Toxicological Research (FDA/NCTR) reviewed the six priority data needs and accompanying documents. The mechanisms described in the ''Implementation of Substance-Specific Applied Research Program'' section of this Federal Register Notice will address these data needs.

TABLE 1—SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR SIX PRIORITY HAZARDOUS SUBSTANCES

| Substance | Priority data needs |
|---|---|
| Aluminum | Exposure levels in humans living near hazardous waste sites. |
| | Exposure levels in children. |
| | Exposure levels for adults and children who do not live near hazardous waste sites (as controls). |
| | Dose-response data for acute-duration [1] oral exposure. |
| Cresol | Exposure levels in humans living near hazardous waste sites. |
| | Exposure levels in children. |
| | Dose-response data for acute-duration [1] oral exposure. |
| Diazinon | Developmental toxicity data for oral exposure. |
| Dichloropropenes | Dose-response data for acute-duration [1] inhalation exposure. |
| | Immunotoxicity battery via inhalation exposure. |
| Guthion | Studies of developmental toxicity via oral exposure, with emphasis on neurodevelopmental toxicity. |
| Phenol | Exposure levels in humans living near hazardous waste sites. |
| | Exposure levels in children. |

[1] 14 days or less.

The substance-specific priority data needs were based on and determined from information in corresponding ATSDR toxicological profiles. Background technical information and justification for the priority data needs in this notice are in the priority data needs documents, available on ATSDR's Web site at *http://www.atsdr.cdc.gov/pdns/*. Printed copies are also available by written request from ATSDR (see **ADDRESSES** section of this notice).

*Voluntary Research.* This notice also serves as a continuous call for voluntary research proposals. Private-sector organizations may volunteer to conduct research to address specific priority data needs in this notice by submitting a letter of intent to ATSDR (see **ADDRESSES** section of this notice). A Tri-Agency Superfund Applied Research Committee (TASARC), comprised of scientists from ATSDR, NTP, EPA, FDA, and NIOSH, will review all proposals.

**DATES:** The ATSDR voluntary research program is a continuous program, and private-sector organizations can volunteer to fill identified data needs until ATSDR announces that other research has been initiated for a specific data need.

**ADDRESSES:** The priority data needs are available on ATSDR's Web site at *http://www.atsdr.cdc.gov/pdns/*. Private-sector organizations interested in volunteering to conduct research to fill identified priority data needs should write to Nickolette Roney, Applied Toxicology Branch, Division of Toxicology and Environmental Medicine, ATSDR, 1600 Clifton Road, NE., Mailstop F–62, Atlanta, GA 30333; e-mail: *NRoney@cdc.gov*. Use the same address for sending information about pertinent ongoing or completed research that may fill priority data needs cited in this notice and for requesting printed copies of the priority data needs documents.

**FOR FURTHER INFORMATION CONTACT:** Nickolette Roney, Applied Toxicology Branch, Division of Toxicology and Environmental Medicine, ATSDR, 1600 Clifton Road, NE., Mailstop F–62, Atlanta, GA 30333; e-mail: *NRoney@cdc.gov*; telephone: (770) 488–3332; fax: (770) 488–4178.

**SUPPLEMENTARY INFORMATION:**

## Background

CERCLA, as amended by SARA [42 U.S.C. 9604(i)], requires that ATSDR (1) develop jointly with EPA a list of hazardous substances (in order of priority) found at National Priorities List (NPL) sites, (2) prepare toxicological profiles of these substances, and (3) ensure the initiation of a research program to address identified priority data needs associated with the substances.

The SSARP was initiated in 1991. On November 16, 1992 (57 FR 54150), priority data needs for 38 priority hazardous substances were published in the **Federal Register** in final form, after release for public comment. On July 30, 1997 (62 FR 40820), after releasing for public comment, ATSDR finalized the priority data needs for a second list of 12 substances. ATSDR identified priority data needs for a third list of 10 hazardous substances, published in its final form on April 29, 2003 (68 FR 22704), after release for public comment. On January 9, 2009 (74 FR 900), priority data needs for two hazardous substances were published in final form after release for public comment. On December 28, 2007 (72 FR 73828), ATSDR released for public comment the priority data needs for the six hazardous substances that are the subject of this final notice.

ATSDR SSARP supplies the necessary information to improve the database for conducting public health assessments. The link between research and public health assessments and the process for distilling priority data needs from the data needs identified in associated ATSDR toxicological profiles are described in the ATSDR ''Decision Guide for Identifying Substance-Specific Data Needs Related to Toxicological Profiles'' (54 FR 37618, September 11, 1989).

## Implementation of the Substance-Specific Applied Research Program

In Section 104(i)(5)(D), CERCLA states that Congress believes the costs for conducting this research program should be borne by the manufacturers and processors of the hazardous substances under the Toxic Substances Control Act of 1976 (TSCA); by registrants under the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (FIFRA); or by cost recovery from responsible parties under CERCLA. To execute this statutory intent, ATSDR developed a plan whereby parts of SSARP are being conducted through regulatory mechanisms (TSCA/FIFRA), private-sector voluntarism, and the direct use of CERCLA funds.

CERCLA also requires that ATSDR consider recommendations of the Interagency Testing Committee, established under Section 4(e) of TSCA, for the types of research to be done. ATSDR actively participates on this committee. Federally funded projects that collect information from 10 or more respondents and are funded by cooperative agreements are subject to

review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. If the proposed project is research involving human subjects, the applicants must comply with Department of Health and Human Services regulations (45 CFR part 46) and, if applicable, Food and Drug Administration regulations (21 CFR parts 50 and 56), regarding the protection of human subjects. The applicants must ensure that the project will be subject to initial and continuing review by the appropriate institutional review boards. Overall, by providing additional scientific information for the risk assessment process, data generated from this research will support other researchers conducting human health assessments involving these substances.

Below are the mechanisms for implementing SSARP. The status of SSARP in addressing priority data needs of the first 60 priority hazardous substances through these mechanisms was described in a **Federal Register** Notice on December 13, 2005 (70 FR 73749).

*A. TSCA/FIFRA*

In developing and implementing SSARP, ATSDR and EPA established procedures to identify priority data needs of common interest to multiple federal programs. Where practicable, these data needs will be addressed through a program of toxicologic testing under TSCA or FIFRA. This part of the research will be conducted according to established TSCA/FIFRA procedures and guidelines.

*B. Private-Sector Voluntarism*

As part of SSARP, on February 7, 1992, ATSDR announced a set of proposed procedures for conducting voluntary research (57 FR 4758). Revisions based on public comments were published on November 16, 1992 (57 FR 54160). ATSDR strongly encourages private-sector organizations to propose research to address priority data needs at any time until ATSDR announces that research has already been initiated for a specific priority data need. Private-sector organizations may volunteer to conduct research to address specific priority data needs identified in this notice by submitting a letter of intent.

The letter of intent should be a brief statement (1–2 pages) that identifies the priority data need(s) to be filled and the methods to be used. TASARC will review these proposals and recommend to ATSDR the voluntary research projects that should be pursued—and how they should be conducted—with the volunteer organizations. ATSDR will enter into only those voluntary research projects that lead to high-quality, peer-reviewed scientific work. Additional details regarding the process for voluntary research are in the **Federal Register** Notices cited in this section.

**C. CERCLA**

Those priority data needs not addressed by TSCA/FIFRA or initial voluntarism will be considered for funding by ATSDR through its CERCLA budget. Much of this research program is envisioned to be unique to CERCLA—for example, research on substances not regulated by other programs, or research needs specific to public health assessments.

Mechanisms to address these priority data needs may include a second call for voluntarism. Again, scientific peer review of study protocols and results is a requirement for all research conducted under this auspice.

ATSDR encourages private-sector organizations and other governmental programs to use ATSDR's priority data needs to plan their research activities.

Dated: October 21, 2009.

**Ken Rose,**

*Director, Office of Policy, Planning, and Evaluation, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry.*

[FR Doc. E9–25776 Filed 10–26–09; 8:45 am]

BILLING CODE 4163–70–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; AA–1 and AA–4 Study Sections Members Conflict.

*Date:* November 10, 2009.

*Time:* 3 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892. (Telephone Conference Call.)

*Contact Person:* Lorraine Gunzerath, PhD, MBA, Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, Office of Extramural Activities, Extramural Project Review Branch, 5635 Fishers Lane, Room 2121, Bethesda, MD 20892–9304, 301–443–2369, *Igunzera@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the securing of meeting attendees.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: October 19, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E9–25623 Filed 10–26–09; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflicts in Language and Cognition.

*Date:* November 12, 2009.

*Time:* 3:30 p.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

*Name of Committee:* AIDS and Related Research Integrated Review Group; HIV/AIDS Vaccines Study Section.

*Date:* November 20, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Mary Clare Walker, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5208, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; AMCB, AIP and NAED Member Conflicts.

*Date:* November 23, 2009.

*Time:* 1 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Eduardo A. Montalvo, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 19, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E9–25726 Filed 10–26–09; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0664]**

### Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee; Notice of Meeting

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

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee*: Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on FDA's regulatory issues.

*Date and Time*: The meeting will be held on December 15, 2009, from 8 a.m. to 5 p.m.

*Location*: Hilton Washington DC North/Gaithersburg, Montgomery Ballroom, 620 Perry Pkwy., Gaithersburg, MD. The hotel phone number is 301–977–8900.

*Contact Person*: Diem-Kieu Ngo, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, (for express delivery, 5630 Fishers Lane, rm. 1093) Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *diem.ngo@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512542. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda*: On December 15, 2009, the subcommittee will consider and discuss: (1) FDA expectations regarding the development of pediatric formulations for cancer drugs, and (2) the development of dosing regimens in infants and toddlers with cancer.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

*Procedure*: Interested persons may present data, information, or views, orally or in writing, on issues pending before the subcommittee. Written submissions may be made to the contact person on or before December 1, 2009. Oral presentations from the public will be scheduled between approximately 10:45 a.m. to 11:15 a.m., and 3:15 p.m. to 3:45 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before November 20, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by November 23, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Diem-Kieu Ngo at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 22, 2009.

**David Horowitz,**

*Assistant Commissioner for Policy.*

[FR Doc. E9–25806 Filed 10–26–09; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0664]**

### Endocrinologic and Metabolic Drugs Advisory Committee; Notice of Meeting

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

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee*: Endocrinologic and Metabolic Drugs Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on FDA's regulatory issues.

*Date and Time*: The meeting will be held on December 15, 2009, from 8 a.m. to 5 p.m.

*Location*: Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD. The hotel telephone number is 301–977–8900.

*Contact Person*: Paul Tran, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *paul.tran@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512536. Please call the Information Line for up-to-date information on this meeting. A notice in the Federal Register about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely

notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda*: On December 15, 2009, the committee will discuss supplemental new drug application (sNDA) 21–366, CRESTOR (rosuvastatin calcium) tablets, AstraZeneca Pharmaceuticals. CRESTOR is a member of the statin drug class which lowers lipids (fats that circulate in the bloodstream, including cholesterol) by inhibiting HMG-CoA reductase, an enzyme involved in producing lipids in the body. The proposed indication (use) of CRESTOR in this application is primary prevention of cardiovascular disease based on the results of JUPITER. JUPITER was a clinical trial that studied individuals who did not have obvious or overt cardiovascular disease, but did have the following characteristics: Low or normal levels of the variety of cholesterol known as low-density lipoprotein, or LDL; elevated levels of C-reactive protein (hsCRP), a marker of inflammation in the body, and at least one of the conventional risk factors for cardiovascular disease. (The ''conventional risk factors'' are smoking, age, high blood pressure, low levels of the good cholesterol, HDL, and family history of heart disease). In these individuals, JUPITER evaluated the reduction of risk with rosuvastatin therapy on the study's combined objectives (known as the study's ''composite endpoint'') which included: Death from heart disease (heart attack) or vascular disease (stroke), heart attack that did not result in death, stroke that did not result in death, unstable angina (when the heart does not get enough blood flow, often a warning of heart attack), and heart or blood vessel disease that necessitates arterial revascularization, commonly known as ''bypass surgery.''

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

*Procedure*: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before December 1, 2009. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before November 20, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by November 23, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Paul Tran at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/About AdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 22, 2009.

**David Horowitz,**

*Assistant Commissioner for Policy.*

[FR Doc. E9–25805 Filed 10–26–09; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0339]**

### Prescription Drug User Fee Rates for Fiscal Year 2010; Correction

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

**ACTION:** Notice; correction.

**SUMMARY:** The Food and Drug Administration is correcting a notice that appeared in the **Federal Register** of August 3, 2009 (74 FR 38451). The document announced the fiscal year 2010 fee rates for the Prescription Drug User Fee Act. The document was published with errors. This document corrects those errors.

**FOR FURTHER INFORMATION CONTACT:** David Miller, Office of Financial Management (HFA–100), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3917.

**SUPPLEMENTARY INFORMATION:** In FR Doc. E9–18457, appearing on page 38451, in the **Federal Register** of Monday, August 3, 2009, the following corrections are made:

1. On page 38451, in the first column, in the **SUMMARY** section, the fifth sentence ''This notice establishes fee rates for FY 2010 for application fees for an application requiring clinical data ($1,405,500), for an application not requiring clinical data or a supplement requiring clinical data ($702,750), for establishment fees ($457,200), and for product fees ($77,720).'' is corrected to read ''This notice establishes fee rates for FY 2010 for application fees for an application requiring clinical data ($1,405,500), for an application not requiring clinical data or a supplement requiring clinical data ($702,750), for establishment fees ($457,200), and for product fees ($79,720).''

2. On page 38452, the title of table 2 is corrected to read ''Table 2.—FDA Personnel Compensation and Benefits (PC&B) Each Year and Percent Change (Dollars in Thousands)''.

3. On page 38452, in table 2, in the fourth column that begins ''PC&B per FTE'', remove '','' everywhere it appears and replace it with ''.''.

4. On page 38454, footnote 1 to table 3 is corrected to read ''[1] Table 3 published in the **Federal Register** of August 1, 2008 (73 FR 45017), showed the average number of active INDs for the base years of 2002–2007 as 5,755.8. FDA discovered that a small subset of INDs had been double counted in the number reported last year. That error has been corrected in the revised number of 5,528.2 reflected in the table this year. Had the error not been made, the workload adjustment in FY 2009 would have been 3.76 percent rather than the 2.98 percent published in the **Federal Register** last year.''

Dated: October 22, 2009.

**David Horowitz,**

*Assistant Commissioner for Policy.*

[FR Doc. E9–25804 Filed 10–26–09; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0664]**

### Emerging Arboviruses: Risk Assessment for Blood, Cell, Tissue, and Organ Safety; Public Workshop

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

**ACTION:** Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled ''Emerging Arboviruses: Risk Assessment for Blood, Cell, Tissue and Organ Safety.'' The purpose of the public workshop is to assess the risk and discuss approaches to minimize the incidence of transmission of arboviruses

(arthropod-borne viruses), by transfusion, infusion, implantation, or transplantation in the United States. The public workshop will feature presentations and roundtable discussions led by experts from academic institutions, government, and industry.

*Date and Time*: The public workshop will be held on December 14, 2009, from 8:30 a.m. to 5:30 p.m. and December 15, 2009, from 8:30 a.m. to 5:30 p.m.

*Location*: The public workshop will be held at the Natcher Conference Center, Main Auditorium, Bldg. 45, National Institutes of Health, 8800 Rockville Pike, Bethesda, MD 20894.

*Contact Person*: Rhonda Dawson, Center for Biologics Evaluation and Research (HFM–302), Food and Drug Administration, 1401 Rockville Pike, suite 550N, Rockville, MD 20852–1448, 301–827–6129, FAX: 301–827–2843, e-mail: *rhonda.dawson@fda.hhs.gov*.

*Registration*: Mail, fax, or e-mail your registration information (including name, title, firm name, address, telephone and fax numbers) to the *Contact Person* by November 20, 2009. There is no registration fee for the public workshop. Early registration is recommended because seating is limited. Registration on the day of the public workshop will be provided on a space available basis beginning at 7:30 a.m.

If you need special accommodations due to a disability, please contact Rhonda Dawson (see *Contact Person*) at least 7 days in advance.

*Requests for Presentations of Data*: Interested persons are invited to present data related to technologies for the detection or inactivation of arboviruses in blood products, organs, or tissues. If you are interested in presenting, submit a brief statement of the general nature of the presentation to the *Contact Person* by November 20, 2009 (see section II of this document for additional information).

**SUPPLEMENTARY INFORMATION:**

## I. Background

Arboviruses are a large group of viruses that are spread by certain invertebrate animals, most commonly blood-sucking insects. Arboviruses are found throughout the world, including the United States. Arboviruses, such as Dengue virus, Japanese Encephalitis virus (JE), tick-borne encephalitis virus (TBE), and West Nile virus (WNV), are becoming increasingly widespread. Transmission of WNV and Dengue virus through blood transfusion has been well documented. Transfusion transmission of the Colorado tick fever (CTF) virus, a tick-borne agent present in the United States, also has been reported. Other arboviruses, including JE, TBE, and St. Louis Encephalitis are of concern to blood, cell, tissue, and organ safety because of the possibility of viremia in asymptomatic human infections. Dengue outbreaks have recently occurred in Texas, Hawaii, Puerto Rico, and the U.S. Virgin Islands. Dengue virus, as well as TBE, and JE, have the potential to become endemic in certain regions of the United States. Therefore, proactive discussions among the Department of Health and Human Services public health agencies, including the FDA, National Institutes of Health, and the Centers for Disease Control and Prevention, academia, industry, blood establishments, cell and tissue establishments, and other stakeholders are necessary to address blood, cell, tissue, and organ safety in response to the emerging arboviruses.

The public workshop will facilitate a scientific discussion on approaches to reduce the risk of transmission of arboviruses by transfusion, infusion, implantation, or transplantation in the United States. Topics to be discussed include: (1) Biology and pathogenesis of arboviruses; (2) epidemiology and prevention of arbovirus vectors and hosts in the United States; (3) laboratory detection and prevention of arbovirus infection in humans; (4) transfusion, infusion, implantation or transplantation transmission of arboviruses in the United States; and (5) potential approaches, including donor testing and pathogen inactivation, to reduce the risk of transfusion transmission of arboviruses.

## II. Requests for Presentations of Data

Interested persons are invited to present data related to technologies for the detection or inactivation of arboviruses in blood products, organs, or tissues. Those desiring to make presentations at the workshop should notify the *Contact Person* and submit a brief statement of the general nature of the presentation before November 20, 2009. Presentations will be scheduled on the afternoon of December 15, 2009. Time allotted for each presentation will be limited depending on the number of individuals requesting to speak.

*Transcripts*: Transcripts of the public workshop may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857, approximately 15 working days after the public workshop at a cost of 10 cents per page. A transcript of the public workshop will be available on the Internet at *http://www.fda.gov/BiologicsBloodVaccines/NewsEvents/WorkshopsMeetingsConferences/TranscriptsMinutes/default.htm.*

Dated: October 22, 2009.

**David Horowitz,**

*Assistant Commissioner for Policy.*

[FR Doc. E9–25802 Filed 10–26–09; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2004–N–0063] (formerly Docket No. 2004N–0346)**

## Saccharomyces boulardii Eligibility for Consideration To Be Added to the Over-the-Counter Drug Monograph for Antidiarrheal Drug Products; Request for Safety and Effectiveness Data; Withdrawal

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

**ACTION:** Withdrawal of notice of eligibility and request for data and information.

**SUMMARY:** We (Food and Drug Administration (FDA)) are withdrawing a notice of eligibility and call-for-data for safety and effectiveness information. The original notice published in the **Federal Register** of August 23, 2004 (69 FR 51852). In that notice, we announced that *Saccharomyces boulardii* (*S. boulardii*) was eligible for consideration to be added to the over-the-counter (OTC) monograph for antidiarrheal drug products.

**FOR FURTHER INFORMATION CONTACT:** Michael L. Koenig, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 5411, Silver Spring, MD 20993–0002, 301–796–2090.

**SUPPLEMENTARY INFORMATION:** In 2004, we published a notice of eligibility for consideration of the yeast *S. boulardii* in the OTC drug monograph system. We announced our intention to evaluate *S. boulardii* for inclusion in the monograph for OTC antidiarrheal drug products (21 CFR part 335). The notice also requested submission of data and information on the safety and effectiveness of *S. boulardii* for us to determine whether it could be generally recognized as safe and effective (GRAS/E) and not misbranded for its proposed OTC drug use.

*S. boulardii* for antidiarrheal use meets the definition of a drug in the Federal Food, Drug, and Cosmetic Act.

(See section 201(g)(1) (21 U.S.C. 321(g)(1).) *S. boulardii* is a yeast or unicellular fungus and, therefore, also meets the definition of a biological product in the Public Health Service Act for this use. (See section 351(i) (42 U.S.C. 262(i) and 21 CFR 600.3(h)(1).) We have determined that this yeast is more appropriately regulated as a biological product under the biologics license application system than as an OTC drug product under the monograph system. Because we have decided to regulate *S. boulardii* as a biological product, *S. boulardii* is not eligible for consideration to be included in an OTC drug monograph. Therefore, this document withdraws the 2004 notice of eligibility permitting consideration of *S. boulardii* for addition to the monograph for OTC antidiarrheal drug products. This document also withdraws our 2004 request for submission of safety and effectiveness data and information on *S. boulardii* for OTC antidiarrheal use. Any further consideration of the potential therapeutic use(s) of this yeast should be addressed under regulations and procedures governing biological products.

Dated: October 22, 2009.

**David Horowitz,**

*Assistant Commissioner for Policy.*

[FR Doc. E9–25803 Filed 10–26–09; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2009–0091]**

## Notice of Availability of Proposed Guidance for Protecting Responders' Health During the First Week Following a Wide-Area Anthrax Attack

**AGENCY:** Office of Health Affairs, DHS.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Homeland Security (DHS) is accepting comments on ''Proposed Guidance for Protecting Responders' Health During the First Week Following a Wide-Area Anthrax Attack.''

**DATES:** Comments must be received by November 27, 2009.

**ADDRESSES:** Comments must be identified by docket number DHS–2009–0091 and may be submitted by one of the following methods:

- Mail: David V. Adams, U.S. Department of Homeland Security, Office of Health Affairs, Mail Stop 0315, Washington, DC 20528; and
- Federal Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. Please note the Proposed Guidance is not a rulemaking and the Federal Rulemaking Portal is being utilized only as a mechanism for receiving comments.

**FOR FURTHER INFORMATION CONTACT:** David V. Adams, Director, Contingency Planning & Policy, Office of Health Affairs, Mail Stop 0315, Washington, DC 20528, e-mail address *david.v.adams@dhs.gov,* telephone number (202) 254–5756.

**SUPPLEMENTARY INFORMATION:**

### I. Public Participation

DHS invites interested persons to contribute suggestions and comments on the document entitled ''Proposed Guidance for Protecting Responders' Health During the First Week Following a Wide-Area Anthrax Attack'' (Proposed Guidance) by submitting written data or views. Comments that will provide the most assistance to DHS will explain the reason for any recommended changes to the Proposed Guidance and include data, information, or authority that supports such recommended changes. DHS requests that commenters identify any recommended changes by page and line number, and/or by Figure or Table number. The Proposed Guidance can be viewed or downloaded at *http://www.regulations.gov.*

*Instructions:* All submissions received must include the agency/organization name and docket number for this action. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *www.regulations.gov.*

You may submit your comments and material by the methods specified in the **ADDRESSES** section above. Please submit your comments and any supporting material by only one means to avoid the receipt and review of duplicate submissions. If you submit comments by mail, your submission should be an unbound document and no larger than 8.5 by 11 inches to enable copying and electronic document management.

*Docket:* The Guidance and any comments received can be viewed at *http://www.regulations.gov* by searching the docket number referenced above.

### II. Background

This document provides policy recommendations for protection of the health of personnel responding to a wide-area anthrax attack. At the request of the Homeland Security Council (HSC) a Federal interagency working group, consisting of subject matter experts in biodefense, infectious diseases, and occupational health and safety, has developed this consensus proposed guidance regarding appropriate protective measures for responders in the immediate post-attack environment of an aerosolized anthrax attack. This proposed guidance statement reflects the most current understanding of the unique environment that will exist after a wide-area anthrax release. These recommendations will evolve with stakeholder input, scientific developments, and availability of new environmental monitoring techniques.

The Proposed Guidance does not have the force or effect of law.

DHS seeks comment on the Proposed Guidance document, which is available online at *http://www.regulations.gov.* Based on the comments received, DHS may make appropriate revisions to the Proposed Guidance or may leave the Proposed Guidance as is. In any event, DHS will make available the Final Guidance at *http://www.regulations.gov.* The Final Guidance will not have the force or effect of law.

Dated: October 21, 2009.

**Alex Garza,**

*Assistant Secretary and Chief Medical Officer, Office of Health Affairs.*

[FR Doc. E9–25770 Filed 10–26–09; 8:45 am]

**BILLING CODE 9110–9K–P**

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

**[Docket No. TSA–2004–19147]**

## Intent To Request Renewal From OMB of One Current Public Collection of Information: Flight Training for Aliens and Other Designated Individuals; Security Awareness Training for Flight School Employees

**AGENCY:** Transportation Security Administration, DHS.

**ACTION:** 60-day notice.

**SUMMARY:** The Transportation Security Administration (TSA) invites public comment on an existing information collection requirement abstracted below that will be submitted to the Office of Management and Budget (OMB) for renewal in compliance with the Paperwork Reduction Act. The collection involves conducting background checks for all aliens and other designated individuals seeking

flight instruction (''candidates'') from Federal Aviation Administration (FAA)-certificated flight training providers. Through the information collected, TSA will determine whether a candidate is a threat to aviation or national security, and thus prohibited from receiving flight training or recurrent training. Additionally, flight training providers are required to conduct a security awareness program for their employees, and to maintain records associated with this training.

**DATES:** Send your comments by December 28, 2009.

**ADDRESSES:** Comments may be e-mailed to *TSAPRA@dhs.gov* or delivered to the TSA Paperwork Reduction Act (PRA) Officer, Office of Information Technology (OIT), TSA–40, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6040.

**FOR FURTHER INFORMATION CONTACT:** Ginger LeMay at the above address, or by telephone (571) 227–3616.

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The Information Collection Requirement (ICR) documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

## Information Collection Requirement

*OMB Number 1652–0021; Flight Training for Aliens and Other Designated Individuals; Security Awareness Training for Flight School Employees, 49 CFR Part 1552*

This is a renewal information collection request that includes background checks and fee changes for alien students requesting flight training in the United States.

Pursuant to 49 U.S.C. 44936 and 6 U.S.C. 469, TSA is required to conduct background checks for all aliens and other designated individuals seeking flight instruction with Federal Aviation Administration (FAA)-certificated flight training providers. In September 2004, TSA developed and implemented these requirements at 49 CFR part 1552, prescribing standards relating to the security threat assessment process that TSA conducts to determine whether candidates are a threat to aviation or national security and thus prohibited from receiving flight training. TSA published a notice prescribing the process to determine that an alien who takes recurrent flight training is not a risk to aviation or national security, and to impose reasonable fees for this process.[1]

The collection of information required under 49 CFR part 1552 and the Appropriations Act of 2009 permits TSA to gather candidates' biographic information, which is used to perform background checks. Flight training candidates also have to submit fingerprint information for background checks. Additionally, flight training providers are required to conduct security awareness training for their employees to increase awareness of suspicious circumstances and activities of individuals enrolling in, or attending, flight training. The flight training provider may use the initial security awareness training program offered by TSA or an alternative initial training program offered by a third party, or training designed by the flight training provider itself. Each flight training provider employee must receive recurrent security awareness training each year, and flight training providers must maintain records of the training completed throughout the course of the individual's employment, and for one year after the individual is no longer a flight training provider employee.

Based on the numbers of respondents to date, TSA estimates a total of 31,000 respondents annually: 26,500 candidates and 4,500 registered flight training providers. Respondents are required to provide the subject information every time an alien or other designated individual applies for pilot training as described in the regulation, which is estimated to be twice a year per candidate, for a total of 53,000 responses per year.

TSA estimates that it will take the 26,500 candidates 45 minutes per application (twice per year) to provide TSA with all of the information required, for a total approximate application burden of 39,750 hours per year. Flight training providers must keep records for five years from the time they are created, and it is estimated each of the 4,500 flight training providers will carry an annual recordkeeping burden of 104 hours, for a total of 468,000 hours. Thus, TSA estimates the combined hour burden associated with this collection to be 507,750 hours annually.

TSA estimates an annual cost burden of $223 per application (an increase of 3% per year when compared to the $205 per application cost burden that was estimated in 2004). The annual cost burden of $223 includes a security fee of $130, for a total annual burden of $5,575,000 (12,500 Category 1–3 paying candidates × $223 per application × twice per year application). Recurrent training candidates pay a fee of $70 for a total of $1,960,000 (14,000 recurrent training candidates × $70 per application × twice per year application).

TSA estimates the yearly recordkeeping costs per flight training provider for retaining records of candidates' applications and its employees' security awareness training files is estimated to remain the same per record as previously estimated at $1,500 for a total annual cost burden of 6,750,000 million ($1,500 × 4,500). TSA estimates the recordkeeping cost burden for flight training providers that do not register with TSA is negligible.

The current combined annual cost burden to all respondents associated with this collection is estimated to be $14,285,000 annually. The cost adjustments to TSA's original estimate are based on the added cost of 14,000 Category 4 recurrent training candidates estimated to apply for training twice per year; and the increase in the number of flight training providers from 3,000 to 4,500 who are subject to 49 CFR part 1552.

Issued in Arlington, VA, on October 21, 2009.

**Ginger LeMay,**

*TSA Paperwork Reduction Act Officer, Office of Information Technology.*

[FR Doc. E9–25758 Filed 10–26–09; 8:45 am]

BILLING CODE 9110–05–P

[1] In September 2008, Congress passed the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Appropriations Act of 2009), which amends 6 U.S.C. 469 and authorizes TSA to establish a process to determine that an alien who takes a recurrent flight training is not a risk to aviation or national security, and to impose reasonable fees for this process.

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

### Intent To Request Renewal From OMB of One Current Public Collection of Information: National Explosives Detection Canine Team Program (NEDCTP) Handler Training Assessment Survey (Formerly Named: Graduate Training Feedback Form)

**AGENCY:** Transportation Security Administration, DHS.

**ACTION:** 60-day Notice.

**SUMMARY:** The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), OMB control number 1652–0041, abstracted below, that we will submit to the Office of Management and Budget (OMB) for renewal in compliance with the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. The collection involves the electronic submission of numerical ratings and written comments about the quality of training instruction from students who graduate from the NEDCTP Explosives Detection Canine Handlers Course.

**DATES:** Send your comments by December 28, 2009.

**ADDRESSES:** Comments may be e-mailed to *TSAPRA@dhs.gov* or delivered to the TSA Paperwork Reduction Act (PRA) Officer, Office of Information Technology (OIT), TSA–40, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6040.

**FOR FURTHER INFORMATION CONTACT:** Ginger LeMay at the above address, or by telephone (571) 227–3616.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

#### Information Collection Requirement:

The NEDCTP training is given to State and local personnel as well as TSA personnel who are trained to be TSA NEDCTP canine handlers. The state and local personnel participate in the TSA Grant program which falls under the National Explosives Detection Canine Team Program. The Handler Training Assessment Survey captures from graduating students numerical ratings and written comments about the quality of training instruction at the NEDCTP Explosives Detection Canine Handlers Course. The data is collected electronically through the NEDCTP secure Canine Web site (accessible by authorized personnel only) and provides valuable feedback to the Chief of the National Explosives Detection Canine Team Program, instructional staff and supervisors on how the training material was presented and received. Once reviewed, the feedback is used to improve the course curriculum and course of instruction. The estimated burden is approximately one hour per participant, 180 hours per calendar year (average 180 students per calendar year) to read, answer, and submit the questions.

Issued in Arlington, VA, on October 21, 2009.

**Ginger LeMay,**

*Paperwork Reduction Act Officer, Business Improvements and Communications, Office of Information Technology.*

[FR Doc. E9–25759 Filed 10–26–09; 8:45 am]

BILLING CODE 9110–05–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Internal Agency Docket No. FEMA–1859–DR; Docket ID FEMA–2008–0018]**

### American Samoa; Amendment No. 2 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 Territory of American Samoa (FEMA–1859–DR), dated September 29, 2009, and related determinations.

**DATES:** *Effective Date:* October 16, 2009.

**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 Territory of American Samoa 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 September 29, 2009.

The Territory of American Samoa 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.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. E9–25859 Filed 10–26–09; 8:45 am]

BILLING CODE 9111–23–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5281–N–80]**

### Community Development Block Grant Recovery (CDBG–R) Program

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

For the Community Development Block Grant Recovery (CDBG–R) Program, grantees are required to keep records of activities, which include total amount of CDBG–R funds received that was expended or obligated, estimate of the number of jobs created/retained by activities assisted with CDBG–R funds, certifications of activities/plans and other items. This paperwork submission addresses the record keeping and reporting requirements for the CDBG–R program.

**DATES:** *Comments Due Date:* November 27, 2009.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–0184) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Community Development Block Grant Recovery (CDBG–R) Program

*OMB Approval Number:* 2506–0184

*Form Numbers:* SF–424.

*Description of the Need for the Information and its Proposed Use:* For the Community Development Block Grant Recovery (CDBG–R) Program, grantees are required to keep records of activities, which include total amount of CDBG–R funds received that was expended or obligated, estimate of the number of jobs created/retained by activities assisted with CDBG–R funds, certifications of activities/plans and other items. This paperwork submission addresses the record keeping and reporting requirements for the CDBG–R program.

*Frequency of Submission:* Quarterly.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 1,196 | 4 | | 32 | | 153,088 |

*Total Estimated Burden Hours:* 153,088.

*Status:* Extension of a currently approved collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 20, 2009.

**Lillian Deitzer,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. E9–25733 Filed 10–26–09; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5281–N–79]**

## Tax Credit Assistance Program (TCAP)

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information describes the reporting and recordkeeping requirements of the Tax Credit Assistance Program (TCAP). The data required includes program level, project level and beneficiary level information collected and reported on by TCAP grantees. The data identifies who benefits from the TCAP program and how statutory requirements are satisfied. The respondents are State housing credit agencies.

**DATES:** *Comments Due Date:* November 27, 2009.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–0181) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Tax Credit Assistance Program (TCAP).

*OMB Approval Number:* 2506–0181.

*Form Numbers:* None.

*Description of the Need for the Information and Its Proposed Use:* This information describes the reporting and recordkeeping requirements of the Tax Credit Assistance Program (TCAP). The data required includes program level, project level and beneficiary level information collected and reported on by TCAP grantees. The data identifies who benefits from the TCAP program and how statutory requirements are satisfied. The respondents are State housing credit agencies.

*Frequency of Submission:* On occasion, quarterly, annually.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 52 | 48 | | 4.52 | | 11,284 |

*Total Estimated Burden Hours:* 11,284.

*Status:* Revision of a currently approved collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 20, 2009.

**Lillian Deitzer,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. E9–25735 Filed 10–26–09; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5317–FA–01]**

## Announcement of Funding Awards for the Native American Housing Block Grant Recovery Act Competitive Program

**AGENCY:** Office of Native American Programs, Office of Public and Indian Housing, HUD.

**ACTION:** Announcement of funding awards.

**SUMMARY:** In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the American Recovery and Reinvestment Act of 2009 (''Recovery Act'') Notice of Funding Availability (NOFA) for the Native American Housing Block Grant (''NAHBG'') Program. This announcement contains the consolidated names and addresses of the award recipients under the NAHBG Recovery Act Program.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning the NAHBG Program awards, contact the Area Office of Native American Programs (ONAP) serving your area or Deborah M. Lalancette, Office of Native Programs, 1670 Broadway, 23rd Floor, Denver, CO 80202, telephone number 303–675–1600. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** The NAHBG program provides grants to Indian tribes or tribally designated housing entities authorized by one or more tribes pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 (''NAHASDA''). Funds can be used for NAHASDA-eligible activities including acquisition, new construction, rehabilitation of affordable housing, site improvement, development and rehabilitation of utilities and infrastructure, utility services, conversion, demolition, financing, administration and planning, improvements to achieve greater energy efficiency, mold remediation, investments that leverage private sector funding or financing for renovations, and energy retrofit investments.

The awards announced in this Notice were selected for funding in a competition announced in a NOFA posted on the Department's Recovery Act website on May 27, 2009, (*http://www.hud.gov/recovery*). Applications were scored and selected for funding based on the selection criteria in that notice. The amount appropriated in the Recovery Act to fund the NAHBG Recovery Act Competitive Program was $242,250,000.

In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat.1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of the 102 awards made under the national competition in Appendix A to this document.

Dated: October 16, 2009.

**Sandra B. Henriquez,**

*Assistant Secretary for Public and Indian Housing.*

### Appendix A—Recovery Act Native American Housing Block Grant Awards

| Name of applicant | Amount funded | Project description |
|---|---|---|
| **Alaska Region** | | |
| Akiachak Native Community, George Peter, President, P.O. Box 70, Akiachak, AK 99551, (907) 825–4626. | $2,000,000 | Construct 7 Homes. |
| Aleutian Housing Authority, Dan Duame, Executive Director, 520 E. 32nd Avenue, Anchorage, AK 99503, (907) 563–2146. | $1,052,033 | Construct 2 Homes in Sand Point and rehabilitation of 15 mutual help homes in Unalaska. |
| Arctic Village, Jonathan John, 1st Chief, PO Box 22069, Arctic Village, AK 99722, (907) 587–5523. | $2,000,000 | Construct 6 homes. |
| Asa'Carsarmiut, James C. Landlord, 1st Chief, PO Box 32249, Mountain Village, AK 99632–2249, (907) 591–2814. | $2,000,000 | Construct 2 homes and access road, rehabilitate 12 homes. |
| AVCP Regional Housing Authority, Ronald B. Hoffman, President, CEO, P.O. Box 767 Bethel, AK 99559, (907) 543–3121. | $5,000,000 | Construction of office building. |

| Name of applicant | Amount funded | Project description |
|---|---|---|
| Baranof Island Housing Authority, Bart Meyer, PO Box 517, Sitka, AK 99835, (907) 747–5088. | $2,000,000 | Construct 2 fourplexes. |
| Bristol Bay Housing Authority, Dave McClure, Executive Director, 111 West 16th Ave., Suite 400, P.O. Box 3310, Dillingham, AK 99510, (907) 842–5956. | $4,000,000 | Construct 5 homes each in Chignik Lake and Port Heiden. |
| Chilkoot Indian Association, Gregory Stuckey, Tribal Administrator, P.O. Box 490, Haines, AK 99827, (907) 766–2323. | $1,906,866 | Construct 1 four-plex and 3 single family homes. |
| Cook Inlet Housing Authority, Carol Gore, President/CEO, 3510 Spenard Road, Anchorage, AK 99503, (907) 793–3000. | $5,000,000 | Construct 55 homeownership units in Anchorage. |
| Ketchikan Indian Corporation, Norman Arriola, President, 2960 Tongass Avenue, Ketchikan, AK 99901, (907) 228–5233. | $2,000,000 | Construct 12-unit Senior Housing Project. |
| Metlakatla Indian Community Housing Authority, Karl Cook, Chairman, P.O. Box 8, Metlakatla, AK 99926, (907) 886–6500. | $2,000,000 | Install utilities and construct 4 duplexes. |
| Pribilof Island Aleut Community of St. Paul Island, Patrick Baker, Executive Director, 2050 Venia Minor Rd., St. Paul Island, AK 99660, (907) 223–8754. | $2,000,000 | Construct 6 homes and rehabilitate 25 homes. |
| Tlingit-Haida Regional Housing Authority, Blake Kazama, President, P.O. Box 32237, Juneau, AK 99803, (907) 780–6868. | $4,000,000 | Construct 17 unit Senior complex in Saxman, Alaska. |
| Village of Venetie, Ernest Erick, 1st Chief, P.O. Box 81119, Venetie, AK 99781, (907) 849–8212. | $2,000,000 | Construct 6 homes. |
| Total for Alaska Region ..... | $36,958,899 | |
| **Eastern Woodlands Region** | | |
| Akwesasne Housing Authority, Retha Herne, Executive Director, 378 State Rt. 37, Hogansburg, NY 13655, (518) 358–9020. | $3,000,000 | Expansion of Sunrise Acres—20 additional rental units. |
| Aquinnah Wampanoag Tribal Housing Authority, Jane A. Greene, Housing Administrator, PO Box 479, Chilimark, MA 02535, (508) 645–2711. | $1,895,855 | Rehabilitate 25 homes. |
| Bad River Housing Authority, Joe Bresette, Interim Executive Director, PO Box 57, Odanah, WI 54861, (715) 682–7111. | $2,000,000 | Green House Project 1. |
| Bay Mills Indian Community Housing Authority, Cheryl Parish, Executive Director, 3095 S. Towering Pines, Brimley, MI 49715, (906) 248–5524. | $2,000,000 | Energy Efficiency Rehab Project. |
| Bois Forte Band of the Minnesota Chippewa Tribe, Kevin Leecy, Chairperson, PO Box 16, Nett Lake, MN 55772, (218) 757–3261. | $2,000,000 | 16 units of rental housing. |
| Choctaw Housing Authority, Eric Willis, Executive Director, PO Box 6088, Choctaw, MS 39350, (601) 656–6617. | $2,988,987 | Construct 32 rental units. |
| Fond du Lac Band of the Minnesota Chippewa Tribe, Karen Diver, Chairperson, 1720 Big Lake Rd., Cloquet, MN 55720, (218) 879–4593. | $2,629,550 | Assisted Living Project. |
| Grand Portage Housing Authority, Gale Carlson, Executive Director, PO Box 303, Grand Portage, MN 55605, (218) 475–2277. | $2,000,000 | West Village Rental Housing Development Project. |
| Grand Traverse Band of Ottawa and Chippewa Indians, Derek Bailey, Tribal Chairman, 2605 N West Bay Shore Dr., Peshawbestown, MI 49682, (231) 534–3538. | $2,000,000 | Construction of 16 units. |
| Hannahville Indian Community, Kenneth Meshigaud, Chairperson, N14911 Hannahville B1 Rd., Wilson, MI 49896, (906) 723–2294. | $1,516,850 | Expansion of Elderly Complex. |
| Ho-Chunk Housing and Community Development Agency, Mark Butterfield, Executive Director, PO Box 730, Tomah, WI 54660, (608) 374–1245. | $3,000,000 | New Housing Construction, acquisition and rehabilitation. |
| Houlton Band of Maliseet Indians Housing Authority, Aaron Greenlaw, Executive Director, PO Box 13, Houlton, ME 04730, (207) 532–7638. | $2,000,000 | New Housing Construction. |
| Keweenaw Bay Ojibwa Housing Authority, Eddy Edwards, Executive Director, 220 Main St., Baraga, MI 49908, (906) 353–7117. | $1,974,968 | Beartown Subdivision—New Home Construction. |
| Lac Courte Oreilles Housing Authority, Jean Thayer, Executive Director, 13416 W. Trepania Rd., Hayward, WI 54843, (715) 634–2147. | $3,000,000 | New Housing Construction. |
| Lac du Flambeau Chippewa Housing Authority, Gary Smith, Executive Director, PO Box 187, Lac du Flambeau, WI 54538, (715) 586–3348. | $2,000,000 | Green Rehabilitation. |
| Lac Vieux Desert Band of Lake Superior Chippewa, Anthony LaBine, Executive Director, PO Box 466, Watersmeet, MI 49969, (906) 358–0344. | $1,996,338 | Construction of Community Center and 9 new homes. |

| Name of applicant | Amount funded | Project description |
|---|---|---|
| Leech Lake Housing Authority, Marlene Mitchell, Executive Director, PO Box 938, Cass Lake, MN 56633, (218) 335–8280. | $3,000,000 | New Housing Construction. |
| Little River Band of Ottawa Indians, Larry Romanelli, Ogema, 375 River St., Manistee, MI 49660, (231) 723–8288. | $2,000,000 | New Housing Construction. |
| Little Traverse Bay Bands of Odawa Indians, Ken Harrington, Chairman, 7500 Odawa Circle, Harbor Springs, MI 49740, (231) 242–1402. | $2,000,000 | Little Murray Road Housing Development Project. |
| Lower Sioux Indian Housing Authority, Karen Bogan, Housing Director, PO Box 308, Morton, MN 56270, (507) 697–6412. | $2,000,000 | Construction of 6 new homes. |
| Lumbee Tribe of North Carolina, Jimmy Goins, Chairperson, PO Box 2709, Pembroke, NC 28372. | $4,000,000 | Housing Rehabilitation. |
| Mashpee Wampanoag Tribe, Cedric Cromwell, Chairperson, 483 Great Neck Rd. South, Mashpee, MA 02649, (508) 477–0208. | $2,000,000 | Infrastructure for 50 new homes. |
| Match E-Be-Nash-She-Wish Band of the Pottawatomi, David K. Sprague, Chairman, PO Box 218 Dorr, MI 49323, (616) 681–8830. | $2,000,000 | Build 5 to 7 new homes. |
| Menominee Indian Tribe of Wisconsin, Lisa Waukau, Chairperson, PO Box 910, Keshena, WI 54135, (715) 799–5114. | $3,000,000 | Renovation of 131 units. |
| MOWA Band of Choctaw Housing Authority, Craig Taylor, Executive Director, 1080 Red Fox Rd., Mt. Vernon, AL 36560, (251) 829–5000. | $960,000 | Nine units of Single Family Housing. |
| Narragansett Indian Tribe of RI, Matthew Thomas, Chief Sachem, PO Box 268, Charlestown, RI 02813. | $2,000,000 | Rehabilitation of Elderly Housing Project. |
| Nottawaseppi Huron Band of the Potawatomi, Laura Spurr, 2221 11/2 Mile Road, Fulton, MI 49052, (269) 729–5151. | $2,000,000 | New Housing and Infrastructure. |
| Oneida Tribe of Indians of Wisconsin, Rick Hill, Chairperson, PO Box 365, Oneida, WI 54155, (920) 869–4000. | $3,000,000 | Energy Efficiency Project. |
| Pleasant Point Reservation Housing Authority, Reuben Cleaves, Executive Director, 15 Elders Way, Suite 201, Perry, ME 04667, (207) 853–0900. | $2,000,000 | New Housing Construction of Affordable Housing. |
| Pokagon Band of Potawatomi Indians, Matt Wesaw, Chairperson, PO Box 180, Dowagiac, MI 49047, (269) 782–8998. | $2,000,000 | Housing Community Center. |
| Red Cliff Housing Authority, Raymond DePerry, Executive Director, 37645 New Housing Rd., Bayfield, WI 54814, (715) 779–3744. | $2,000,000 | New Housing Construction. |
| Red Lake Reservation Housing Authority, Jane Barrett, Executive Director, PO Box 219, Red Lake, MN 56671, (218) 679–3368. | $3,000,000 | New Housing Construction. |
| Sault Ste Marie Tribe Housing Authority, Joni Talentino, Director, 154 Parkside Drive, Kincheloe, MI 49788, (906) 495–5555. | $3,000,000 | Housing Rehabilitation. |
| Seneca Nation Housing Authority, Wenona Scott, MPA, Executive Director, 50 Iroquis Dr., Irving NY (716) 532–5000. | $3,000,000 | New Construction of 15 housing units. |
| Sokaogon Chippewa Community, Arlyn Ackley, Chairperson, 3051 Sand Lake Rd., Crandon, WI 54520, (715) 478–7500. | $1,885,661 | New Housing Construction. |
| Stockbridge-Munsee Community of Wisconsin, Robert Chicks, President, N. 8476 He Con Nuck Rd., Bowler, WI 54416, (715) 793–4387. | $2,000,000 | New Housing Construction. |
| White Earth Reservation Housing Authority, Robert Durant, Executive Director, 3303 Hwy #59, Waubun, MN 56589, (218) 473–4663. | $3,000,000 | New Housing Construction. |
| Total for Eastern Woodlands Region ..... | $85,848,209 | |
| **Northern Plains Region** | | |
| Northern Arapaho Tribal Housing Authority, Patrick Goggles, Executive Director, 501 Ethete Road, Ethete, WY 82520, (307) 332–5318. | $1,596,000 | Construct 12 single-family units. |
| Northern Cheyenne Tribal Housing Authority, Lafe Haugen, Executive Director, P.O. Box 327, Lame Deer, MT 59043, (406) 477–6419. | $3,000,000 | Upgrade water system for 14 families and rehabilitate 75 single-family units. |
| Oglala Sioux (Lakota) Housing Authority, Paul Iron Cloud, CEO, P.O. Box 603, Pine Ridge, SD 57770, (605) 867–5161. | $4,000,000 | Construct 18 single-family units and develop sites for future housing. |
| Salish & Kootenai Housing Authority, Jason Adams, Executive Director, P.O. Box 38, Pablo, MT 59855, (406) 675–4491. | $3,000,000 | Construct 8 duplexes (16 units). |
| Sicangu Wicoti Awanyakapi (Rosebud) Corp., Amos Prue, CEO, P.O. Box 69, Rosebud, SD 57570, (605) 747–2203. | $4,000,000 | Develop infrastructure for 85 new home sites. |

| Name of applicant | Amount funded | Project description |
|---|---|---|
| Utah Paiute Housing Authority, Jessie Laggis, Executive Director, 665 North, 100 East Cedar City, UT 84721, (435) 586–1122. | $2,000,000 | Rehabilitate 88 units. |
| Total for Northern Plains Region ..... | $17,596,000 | |
| **Northwest Region** | | |
| Cowlitz Indian Tribal Housing, Mr. Larry Coyle, Executive Director, PO Box 711, 107 Spencer Road, Chehalis, WA 98532, (360) 864–8720. | $2,624,865 | *Project 1* is for construction of a wastewater treatment facility for a 36 unit housing development near Toledo, WA (98591) *Project 2* is to provide infrastructure (roads, sewer, and water) for a planned 31 unit housing development in Toledo, WA (98591). |
| Suquamish Tribe, Mr. Leonard Forsman, Tribal Chairman, PO Box 498, Suquamish, WA 98392, (360) 394–8400. | $1,902,448 | *Project 1* is for construction of 8 homes including a neighborhood playground. *Project 2* is for construction of 2 elder units, provide infrastructure (road and sidewalks) improvements, and rehabilitate a community center. |
| Coos, Lower Umpqua & Siuslaw Tribe, Ms. Wendy Williford, Tribal Council, 1245 Fulton Ave., Coos Bay, OR 97420–2895, (541) 888–2853. | $1,998,800 | *Project 1* is for construction of 4 duplexes (8 units) in Qaxas Heights near North Bend, OR (97459) *Project 2* is to acquire and rehabilitate 4 units (2 duplexes or 1 4-plex) near Florence, OR (97439). |
| Coeur D'Alene Tribal Housing Authority, Ms. Cielo Gibson, Executive Director, P.O. Box 267 Plummer, ID 83851, (208) 686–1927. | $2,000,000 | Construction of 12 3-Bedroom Housing Units & Underground Cistern for Rainwater Harvesting at Gathering Place Subdivision. |
| Colville Indian Housing Authority, Ms. Elena Bassett, Executive Director, P.O. Box 528, Nespelem, WA 99155, (509) 634–4767. | $3,000,000 | Construction of 27 homes and a Community Center. |
| Kalispel Tribe of Indians, Mr. Glen Nenema, Tribal Chairman, P.O. Box 39, Usk, WA 99180, (509) 445–1147. | $1,034,542 | Construction of 6 Housing Units (1 2-BDR, 3 3-BDR, and 2 4-BDR homes). |
| Lummi Indian Housing Authority, Ms. Diana Phair, Executive Director, 2828 Kwina Road, Bellingham, WA, (360) 312–8407. | $3,000,000 | Construct 36 Apartment Units. |
| Port Gamble S'Klallam Housing Authority, Ms. Teresa Lange, Executive Director, 3200 Little Boston Road, N.E., Kingston, WA 98346–0155, (360) 297–6275. | $1,679,763 | Construction of 14 new affordable Rental Housing units. |
| Puyallup Nation Housing Authority, Ms. Annette Bryan, Executive Director, P.O. Box 1844, 2806 East Portland Ave., Ste 200, Tacoma, WA 98404–1844, (253) 573–7956. | $3,000,000 | Construction of 10 (ten) Housing Units, Community Building, Site Amenities, and a Maintenance Building. |
| Quinault Housing Authority, Ms. Tina DeLaCruz, Executive Director, P.O. Box 160, Taholah, WA 98587, (360) 276–4320. | $2,000,000 | Construction of 18 new affordable Housing units on lots at Qui-Nai-Elt Village subdivision. |
| Confederated Tribes of Siletz Indians, Ms. Delores Pigsley, Tribal Chairperson, P.O. Box 549, Siletz, OR 97380, (503) 444–8340. | $2,935,000 | Construction of 16 new apartments (8 at Lakeside Village and 8 at Gwee Shut Road). |
| Squaxin Island Tribe, Mr. Brian Thompson, Planning Director, 10 S.E. Squaxin Lane, Shelton, WA 98584, (360) 432–3907. | $1,196,160 | Construction of 2 six-unit Apartment Buildings at Slocum Ridge III Multifamily Housing Project. |
| Yakama Nation Housing Authority, Mr. James Berg, Executive Director, P.O. Box 156, Wapato, WA 98951–1499, (509) 877–6171. | $3,000,000 | Housing repairs and improvements for at least 64 low-income families. |
| Total for Northwest Region ..... | $29,371,578 | |
| **Southern Plains Region** | | |
| Absentee Shawnee Housing Authority, Sherry Gleckler, Executive Director, PO Box 425, Shawnee, OK, 74802, (405) 273–1050. | $2,677,572 | Rehabilitation approximately 50 homes in our low rent program. New construction of 5 homes (including 1 handicap accessible unit). |
| Cherokee Nation, Chad Smith, Principal Chief, PO Box 948, Tahlequah, OK, 74465, (918) 456–0671. | $5,000,000 | Three activities: (1) Construction of utility and related infrastructure to support 30 house sites at "Redbird" site; (2) construction of utility and related infrastructure to support 26 house sites at the "Fairfield" site; and (3) construction of 15 energy efficient houses at the "Redbird" site for eligible applicants. |
| Cheyenne-Arapaho Housing Authority, Reggie Wassana, Executive Director, 2100 Dog Patch Road, Clinton, OK, 73601, (580) 331–2401. | $3,000,000 | Rehabilitation of community building; renovations of 71 tribal elder's homes; and Acquisition of three (3) homes for low-income tribal members. |
| Choctaw Nation Housing Authority, Russell Sossamon, Executive Director, PO Box G, Hugo, OK 74743, (580) 326–7521. | $4,000,000 | Construction of 32, 1-bedroom, single family rental units for the low-income elderly (4 locations, 8 units each location: Durant, Hugo, Talihina, and Idabel, OK). |
| Citizen Potawatomi Nation, John A. Barrett, Chairman, 1601 South Gordon Cooper Drive, Shawnee, OK 74801, (405) 275–3121. | $2,745,831 | Development of infrastructure elder housing complex and construction of 10 duplexes (20 unites). |

| Name of applicant | Amount funded | Project description |
|---|---|---|
| Iowa Tribe of KS and NE Housing Authority, Brad Campbell, Executive Director, PO Box 68, White Cloud, KS, 66094, (785) 595–3380. | $1,983,000 | Construct ten (10) home ownership units and the infrastructure units for qualified applicants. |
| HA of Peoria Tribe of Indians of Oklahoma, Claude Landers, Executive Director, 3606 Sencay Avenue, Miami, OK 74354, (918) 542–1873. | $2,000,000 | Construction of 14 low income residential rental units in three duplexes and two single family residences. |
| Muscogee (Creek) Nation, A.D. Ellis, Principal Chief, PO Box 580, Okmulgee, OK 74447, (918) 756–8700. | $5,000,000 | Elderly Housing Construction for 24 units within existing complex. |
| Seminole Nation Housing Authority, Thomas McGeisey, Executive Director, PO Box 1493, 101 S. Hitchite Avenue, Wewoka, OK 74884, (405) 257–6604. | $2,000,000 | Roads, water lines and electrical infrastructure for Econtuchka Estates that will result in 15 single family residences, 50 multi-family residences, and a recreational/wellness center. |
| Tonkawa Tribe, Donald L.Patterson, President, 1 Rush Buffalo Road, Tonkawa, OK 74653, (580) 628–2561. | $1,937,804 | Rehabilitate 74 low-income homes to include energy efficient appliances, windows, water saving devices, and handicap accessibility. |
| Wichita Tribe Housing Authority, Ben Hatfield, Executive Director, 1 Coronado Circle, Anadarko, OK 73005, (405) 247–7470. | $2,000,000 | Construction for fourteen (14) new energy-efficient housing units construction and acquisition/payoff of three (3) duplexes. |
| Wyandotte Nation, Leaford Bearskin, Chief, 64700 E. Highway 60, Wyandotte, OK 74370, (918) 678–2297. | $1,717,490 | Energy efficient new rental construction of twelve (12) single-family units and two (2) duplex units for low to moderate income tribal members. |
| Total for Southern Plains Region ..... | $34,061,697 | |
| **Southwest Region** | | |
| All Mission Indian Housing Authority, Dave Shaffer, Executive Director, 27740 Jefferson Avenue, Suite 200, Temecula, CA 92590, (951) 760–7390. | $2,000,000 | New construction of 8 single-family homes, 2 on each member reservation for Cahuilla, Torres-Martinez, Santa Rosa, and La Jolla. |
| Bear River Band of Rohnerville Rancheria, Leonard Bowman, Tribal Chairperson, 27 Bear River Drive, Loleta, CA 95551, (707) 733–1900. | $2,000,000 | New housing construction of 9 single-family homeownership units (Tish Non Village) on land located immediately adjacent to the Rancheria and purchased with Tribal funds. |
| Bishop Paiute Tribe, Monty Bengochia, Chairperson, P.O. Box 548, 50 Tu Su Lane, Bishop, CA 93514–8058, (760) 873–3584. | $1,998,580 | Rehabilitate and modernize 31 homes on the reservation. |
| Chico Rancheria Housing Corporation, Heath Browning, Executive Director, 585 East Avenue, Chico, CA 95926, (530) 343–4048. | $1,758,000 | Acquisition of 3 rental housing units. |
| Fort Bidwell Paiute Indian Community, Aaron Townsend, Chairperson, P.O. Box 129, Fort Bidwell, CA 96112, (530) 279–6310. | $2,000,000 | Housing Rehabilitation of 15—2 & 3 bedroom homes and 5—2 bedroom apartments located on the reservation. |
| Greenville Rancheria of Maidu Indians, Kyle Self, Chairperson, P.O. Box 279, Greenville, CA 95947, (530) 284–7990. | $2,000,000 | Construction of 7 single-family homes. |
| Isleta Pueblo Housing Authority, Edward Torres, Executive Director, P.O. Box 760, Isleta, NM 87022–0760, (505) 869–4153. | $2,000,000 | New Construction of 20 New Homes located at the Sunset Hills III subdivision. |
| Karuk Tribe Housing Authority, Sami Jo Difuntorum, Executive Director, P.O. Box 1159, Happy Camp, CA 96039. | $2,936,850 | Rehabilitate & modernize 30 single family homes at Happy Camp. |
| Laguna Housing Development & Management Enterprise, William Sommers, Executive Director, P.O. Box 178, Laguna, NM 87026, (505) 552–6430. | $2,000,000 | New construction of 18 rental housing units. |
| Manzanita Band of Diegueno Indians, Nelson Pinola, Chairperson, P.O. Box 1302, Boulevard, CA 91905, (619) 766–4930. | $1,965,662 | Purchase and install ten (10) manufactured homes for low- and moderate-income persons on the Manzanita Reservation. |
| Mescalero Apache Housing Authority, Alvin Benally, Acting Executive Director, P.O. Box 227, Mescalero, NM 88340, (575) 464–9235. | $3,000,000 | Housing Rehabilitation of 34 units in Pena's Subdivision. |
| Modoc Lassen Indian Housing Authority, Phil Bush, Executive Director, 401 Peninsula Drive, Suite 6, Lake Almanor, CA 96137, (530) 596–4127. | $2,000,000 | Moderate rehabilitation of 8 tribal housing units and 31 rental housing stock units.<br>Replacement of 4 housing units. Purchase and installation of 3 new modular housing units on vacant lots in an existing subdivision. |
| Nambe Pueblo Housing Entity, Christine Brock, Executive Director, 11 West Gutierrez, P.O. Box 3456, Santa Fe, NM 87510, (505) 455–0158. | $2,000,000 | Infrastructure including streets, curbs, and gutters for the Buffalo Range Housing Subdivision |
| Ohkay Owingeh Housing Authority, Tomasita Duran, Executive Director, P.O. Box 1059, Ohkay Owingeh, NM 87566, (505) 852–0189. | $2,000,000 | Rehabilitation of 22 traditional adobe homes occupied by low or moderate income (LMI) homeowners and residents in the historic Ohkay Owingeh plaza area. |
| Pinoleville Pomo Nation, Leona L. Williams, Tribal Chair, 500 B. Pinoleville Drive, Ukiah, CA 95482, (707) 468–3835. | $375,511 | Construction of 6 new 4-bedroom, 2-bath homes for low-income Tribal citizens. |
| San Felipe Pueblo Housing Authority, Isaac Perez, Executive Director, P.O. Box 4222, San Felipe Pueblo, NM 87001, (505) 771–9291. | $2,000,000 | Infrastructure for 100 acre affordable housing sub-division on the Pueblo of San Felipe. |

| Name of applicant | Amount funded | Project description |
|---|---|---|
| Susanville Indian Rancheria Housing Authority, George Baker, Executive Director, P.O. Box 970, Susanville, CA 96130, (530) 257–5033. | $799,236 | Infrastructure improvements including road extension and utilities, street work, a storm drain system, water system, sewer system, electrical system and erosion control to support new home sites. |
| Taos Pueblo Housing, John Mirabal, Executive Director, P.O. Box 2570, Taos, NM 87571, (575) 737–9704. | $579,778 | Construction of new Taos Pueblo Housing Office Building. |
| Yerington Paiute Tribal Housing Authority, Ralph Rogers, Executive Director, 31 West Loop Road, Yerington, NV 89447, (775) 463–2225. | $2,000,000 | New Housing Construction of 7 units in the Willows Court Subdivision. |
| Zuni Housing Authority, Michael Chavez, Executive Director, P.O. Box 710, Zuni Pueblo, NM 87024–0710, (505) 782–4564. | $3,000,000 | New Housing Construction of 12 homes (Phase III) of a master-planned community. |
| Total for Southwest Region | $38,413,617 | |
| Grand Total | $242,250,000 | |

[FR Doc. E9–25731 Filed 10–26–09; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Invasive Species Advisory Committee

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Notice of public meetings of the Invasive Species Advisory Committee.

**SUMMARY:** Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of meetings of the Invasive Species Advisory Committee. The purpose of the Advisory Committee is to provide advice to the National Invasive Species Council, as authorized by Executive Order 13112, on a broad array of issues related to preventing the introduction of invasive species and providing for their control and minimizing the economic, ecological, and human health impacts that invasive species cause. The Council is co-chaired by the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce. The duty of the Council is to provide national leadership regarding invasive species issues. The purpose of a meeting on December 1–2, 2009 is to convene the full Advisory Committee and to discuss implementation of performance elements in the 2008–2012 National Invasive Species Management Plan, and will focus upon the interactions between climate change and invasive species.

**DATES:** Meeting of the Invasive Species Advisory Committee: Tuesday, December 1, 2009 and Wednesday, December 2, 2009; beginning at approximately 8 a.m., and ending at approximately 5 p.m. each day.

**ADDRESSES:** Westin Grand Hotel, 2350 M Street, NW., Washington, DC 20037. The general session will be held in the Washington Ballroom.

**FOR FURTHER INFORMATION CONTACT:** Kelsey Brantley, National Invasive Species Council Program Analyst and ISAC Coordinator, (202) 513–7243; Fax: (202) 371–1751,

Dated: October 21, 2009.

**Chris Dionigi,**

*Acting Executive Director, National Invasive Species Council.*

[FR Doc. E9–25825 Filed 10–26–09; 8:45 am]

BILLING CODE 4310–RK–P

## DEPARTMENT OF THE INTERIOR

### Performance Review Board Appointments

**AGENCY:** Department of the Interior.

**ACTION:** Notice of Performance Review Board appointments.

**SUMMARY:** This notice provides the names of individuals who have been appointed to serve as members of the Department of the Interior Performance Review Board.

**DATES:** These appointments are effective upon publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Sharl Grigsby, Director, Office of Human Resources, Office of the Secretary, Department of the Interior, 1849 C Street, NW., Washington, DC 20240, Telephone Number: (202) 208–6761.

The members of the Department of the Interior Performance Review Board are as follows:

Name: Archuleta, Deanna A., Baca, Sylvia V., Batten, Katharine M., Bean, Michael J., Beck, Richard T., Beckmann, Darryl H., Blanchard, Mary Josie, Brown, Robert E., Burzyk, Carla M., Cardinale, Richard T., Douglas, Nicholas, Farquhar, Edward P., Fearn, Milton L., Ferriter, Olivia B., Gonzales, Elena, Henderson, John C., Holly, Amy, Iudicello, Fay S., Jackson, Andrew J., Jacobson, Rachel L., Keable, Edward T., Laverdure, Donald E., Malam, Pamela R., Miller, Mary Jane A., More, Robert S., Nedd, Michael D., Nichols, James, Owens, Glenda Hudson, Payne, Grayford F., Perez, Benito A., Plummer, Leonard, Roberson, Edwin L, Russ, David P., Russell, Lisa L., Simpson, Jerry W., Skibine, George T.C., Smith, Michael R., Sonderman, Debra E., Taylor, Willie R., Thorsen, Kimberley A., Triebsch, George F., Velasco, Jan Ine M., Wainmann, Barbara W., Zippin, Jeffrey P.

Dated: October 8, 2009.

**Sharlyn A. Grigsby,**

*Director, Office of Human Resources.*

[FR Doc. E9–25624 Filed 10–26–09; 8:45 am]

BILLING CODE M

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### Notice of Proposed Information Collection for 1029–0120

**AGENCY:** Office of Surface Mining Reclamation and Enforcement.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request approval to continue the collection of information for two Technical Training Program forms: For nominations, and for payment of travel and per diem expenses. This information collection activity was previously approved by the

Office of Management and Budget (OMB), and assigned control number 1029–0120.

**DATES:** Comments on the proposed information collection activity must be received by December 28, 2009, to be assured of consideration.

**ADDRESSES:** Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

**FOR FURTHER INFORMATION CONTACT:** To receive a copy of the information collection request, contact John Trelease, at (202) 208–2783 or by e-mail.

**SUPPLEMENTARY INFORMATION:** OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require 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 OSM will be submitting to OMB for renewed approval. This collection is for OSM's Technical Training Program Non-Federal Nomination Form (OSM–l05), and Request for Payment of Travel and Per Diem Expenses Form (OSM–140). OSM will request a 3-year term of approval for each information collection activity.

*Comments are invited on:* (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment-including your personal identifying information-may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Title:* Technical Training Program's Nominations for Non-Federal Personnel Form and Request for Payment of Travel and Per Diem Expenses Form.

*OMB Control Number:* 1029–0120.

*Summary:* The information is used to identify and evaluate the training courses requested by students to enhance their job performance, to calculate the number of classes and instructors needed to complete OSM's technical training mission, and to estimate costs to the training program.

*Bureau Form Numbers:* OSM 105, OSM 140.

*Frequency of Collection:* Once for each form.

*Description of Respondents:* State and Tribal regulatory and reclamation employees and industry personnel.

*Total Annual Responses:* 2,400 total responses (1,200 responses per form).

*Total Annual Burden Hours:* 200 hours (100 hours per form).

Dated: October 20, 2009.

**John R. Craynon,**

*Chief, Division of Regulatory Support.*

[FR Doc. E9–25658 Filed 10–26–09; 8:45 am]

**BILLING CODE 4310–05–M**

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## DEPARTMENT OF THE INTERIOR

### National Park Service

### Big Cypress National Preserve Off-Road Vehicle Advisory Committee

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of renewal.

**SUMMARY:** The Secretary of the Interior is giving notice of the renewal of the Big Cypress National Preserve Off-Road Vehicle Advisory Committee to offer recommendations, alternatives and possible solutions to management of off-road vehicles at Big Cypress National Preserve.

**FOR FURTHER INFORMATION CONTACT:** Pedro Ramos, Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail E, Ochopee, Florida 34141; 239–695–1103.

**SUPPLEMENTARY INFORMATION:** The Big Cypress National Preserve Off-Road Vehicle Advisory Committee has been established as directed in the *Off-Road Vehicle Management Plan, 2000.* This plan guides the National Park Service in its management of recreational off-road vehicle (ORV) use in Big Cypress National Preserve, and tiers off of the Preserve's 1991 General Management Plan. The National Park Service agreed to prepare an ORV management plan as part of a settlement agreement negotiated in 1995 between the Florida Biodiversity Project and several Federal agencies and bureaus. The agreement settled a lawsuit which alleged failure by the agencies to comply with Federal statutes, including the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act.

The *Off-Road Vehicle Management Plan, 2000* (p. 29) states ''Under the proposed action, the National Park Service would establish an advisory committee of concerned citizens to examine issues and make recommendations regarding the management of ORVs in the Preserve. The establishment of the committee meets the legal requirements of the 1972 Federal Advisory Committee Act (FACA) (Pub. L. 92–463, 1972, as amended). The advisory committee provides access to the extensive knowledge available in the public arena and offers advice to the National Park Service in the decision-making process in a manner consistent with FACA. This committee is an element of the adaptive management approach used to develop best management practices for ORV use.''

As part of the ORV management plan, NPS committed to establishing the ORV Advisory Committee. In addition, the establishment of the Committee fulfills the agency's policy of civic engagement. This committee strengthens the relationship that the NPS has with its partners and communities. The Committee is composed of individuals that represent (1) sportsmen/ORV users; (2) landowners; (3) academia; (4) environmental advocates; (5) the state government; and (6) Tribes.

*Certification:* I hereby certify that the renewal of the Big Cypress Off-Road Vehicle Advisory Committee is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by the Act of August 25, 1916, 16 U.S.C. 1 *et seq.,* and other statutes relating to the administration of the National Park System.

Dated September 30, 2009.

**Ken Salazar,**

*Secretary of the Interior.*

[FR Doc. E9–25849 Filed 10–26–09; 8:45 am]

**BILLING CODE P**

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## DEPARTMENT OF THE INTERIOR

### National Park Service

### Minor Boundary Revision of Lassen Volcanic National Park

**AGENCY:** National Park Service, Interior.

**ACTION:** Announcement of boundary revision.

**SUMMARY:** This notice announces the revision to the boundary of Lassen Volcanic National Park, pursuant to the authority specified below, to include

two adjacent and contiguous tracts totaling 79.97 acres. Tract 01–171 contains 62.77 acres, is located in Tehama County, and is further identified by Tehama County Assessor's Parcel Number 015–040–13. Tract 01–172 contains 17.20 acres, is located in Plumas County, and is further identified by Plumas County Assessor's Parcel Number 011–010–02.

The tracts are depicted on Drawing No. 111/92000, Sheet 1 of 3, Segment Map 01, revised October 24, 2007. This map is on file and available for inspection at the following locations: National Park Service, Land Resources Program Center, Pacific West Region, 1111 Jackson St., Suite 700, Oakland, CA 94607, and National Park Service, Department of the Interior, 1849 C Street, NW., Washington, DC 20240.

**SUPPLEMENTARY INFORMATION:** 16 U.S.C. 4601–9(c)(1) provides that, after notifying the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Secretary of the Interior is authorized to make this boundary revision. The Committees were so notified by letter dated September 2, 2009. The National Park Service proposes to acquire these parcels by donation from The Wilderness Land Trust.

**DATES:** The effective date of this boundary revision is October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** National Park Service, Chief, Pacific Land Resources Program Center, Pacific West Region, 1111 Jackson St., Suite 700, Oakland, CA 94607, (510) 817–1414. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 22, 2009.

**Jonathan B. Jarvis,**

*Regional Director, Pacific West Region.*

[FR Doc. E9–25844 Filed 10–26–09; 8:45 am]

BILLING CODE P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLNM920000 L13100000 FI0000; NMNM 117542]**

### Notice of Proposed Reinstatement of Terminated Oil and Gas Lease NMNM 117542

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Reinstatement of Terminated Oil and Gas Lease.

**SUMMARY:** Under the Class II provisions of Title IV, Public Law 97–451, the Bureau of Land Management received a petition for reinstatement of oil and gas lease NMNM 117542 from the lessee David H. Arrington Oil and Gas for lands in Eddy County, New Mexico. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

**FOR FURTHER INFORMATION CONTACT:** Becky C. Olivas, Bureau of Land Management, New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502 or at (505) 438–7609.

**SUPPLEMENTARY INFORMATION:** No valid lease has been issued that affects the lands. The lessee agrees to new lease terms for rentals and royalties of $10 per acre or fraction thereof, per year, and 16⅔ percent, respectively. The lessee paid the required $500 administrative fee for the reinstatement of the lease and $166 cost for publishing this Notice in the **Federal Register.** The lessee met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188). We are proposing to reinstate lease NMNM 117542, effective the date of termination March 1, 2009, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

**Becky C. Olivas,**

*Land Law Examiner, Fluids Adjudication Team.*

[FR Doc. E9–25851 Filed 10–26–09; 8:45 am]

BILLING CODE 4310–FB–P

## DEPARTMENT OF JUSTICE

### Parole Commission

### Public Announcement; Pursuant to the Government In the Sunshine Act; (Pub. L. 94–409) [5 U.S.C. 552b]

**AGENCY HOLDING MEETING:** Department of Justice, United States Parole Commission.

**DATE AND TIME:** 2 p.m., Monday, October 26, 2009.

**PLACE:** U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

The following matter will be considered during the closed meeting:

One consideration of an original jurisdiction case pursuant to 28 CFR 2.27.

**AGENCY CONTACT:** Thomas W. Hutchison, Chief of Staff, United States Parole Commission, (301) 492–5990.

Dated: October 20, 2009.

**Rockne Chickinell,**

*General Counsel, U.S. Parole Commission.*

[FR Doc. E9–25647 Filed 10–26–09; 8:45 am]

BILLING CODE 4410–31–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Information Card Foundation

Notice is hereby given that, on September 25, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act'') Information Card Foundation has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Carrillon Information Security, Vaudreuil-Dorion, Quebec, Canada; iMagic Software, Solvang, CA; Kick Willemse (individual member), Haanlem, The Netherlands; and John Bradley (individual member), Santiago, Chile have been added as parties to this venture. Also, Gemalto, Austin, TX has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Information Card Foundation intends to file additional written notifications disclosing all changes in membership.

On June 2, 2008, Information Card Foundation filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to

Section 6(b) of the Act on July 16, 2008 (73 FR 40883).

The last notification was filed with the Department on July 6, 2009. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 21, 2009 (74 FR 42330).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E9–25625 Filed 10–26–09; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on September 4, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), DVD Copy Control Association (''DVD CCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, China Hualu Group, Ltd., Dalian, People's Republic of China; JVC Kenwood Holdings, Inc., Kanagawa, Japan; and SIIX Corp., Osaka, Japan have been added as parties to this venture.

Also, A&A Stamper House, Inc., Baldwin Park, CA; Evatone, Inc., Clearwater, FL; Kat Digital Corp., Taipei, Taiwan; Kenwood Corporation, Tokyo, Japan; Polar Frog Digital, Scottsdale, AZ; Sea Star Technology (Hong Kong) Company Ltd., Hong Kong, Hong Kong-China; Shenzhen Sea Star Technology Co., Ltd., Shenzhen, People's Republic of China; Soaring Technology Co., Ltd., Taipei-Hsien, Taiwan; Victor Company of Japan, Limited, Kanagawa, Japan; and Zentek Technology Japan, Inc., Tokyo, Japan have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on June 5, 2009. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 15, 2009 (74 FR 34364).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E9–25626 Filed 10–26–09; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Consumer Panel, LLC

Notice is hereby given that, on October 5, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''),the National Consumer Panel, LLC has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identity of the parties to the venture are: The Nielsen Company (''Nielsen''), New York, NY; and Information Resources, Inc. (''IRI''), Chicago, IL. The general area of The National Consumer Panel's planned activity is to collect consumer panel data for Nielsen and IRI to use in creating and providing their respective products.

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E9–25630 Filed 10–26–09; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

October 21, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/email: *DOL_PRA_PUBLIC@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Bureau of Labor Statistics (BLS), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/ Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register.** In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* Bureau of Labor Statistics.

*Type of Review:* Revision of a currently approved collection.

*Title of Collection:* Telephone Point of Purchase Survey.

*OMB Control Number:* 1220–0044.

*Affected Public:* Individuals or households.

*Total Estimated Number of Respondents:* 21,649.

*Total Estimated Annual Burden Hours:* 10,280.

*Total Estimated Annual Costs Burden:* $0.

*Description:* The purpose of this collection is to develop and maintain a timely list of retail, wholesale, and service establishments at which people shop for specific consumer items. The information collected is used to select establishments for pricing market basket items as needed for the Consumer Price Index. For additional information, see related notice published at Vol. 74 FR 40610 on August 12, 2009.

*Agency:* Bureau of Labor Statistics.

*Type of Review:* Reinstatement without change of a previously approved collection.

*Title of Collection:* Displaced Worker, Job Tenure, and Occupational Mobility Supplement to CPS.

*OMB Control Number:* 1220–0104.

*Affected Public:* Individuals or households.

*Total Estimated Number of Respondents:* 55,000.

*Total Estimated Annual Burden Hours:* 7,333.

*Total Estimated Annual Costs Burden:* $0.

*Description:* The Displaced Worker, Job Tenure, and Occupational Mobility Supplement provides information on people who have lost or left jobs because their plant or company closed or moved, there was insufficient work for them to do, or their position or shift was abolished. It also gathers the number of years workers have been with their current employer and the economic impact of tenure. The information can be used to assess employment stability, displacement levels, occupational change over the year, and the need for, and scope of, programs serving adult displaced workers. For additional information, see related notice published at Vol. 74 FR 38672 on August 4, 2009.

**Darrin A. King,**

*Departmental Clearance Officer.*

[FR Doc. E9–25775 Filed 10–26–09; 8:45 am]

**BILLING CODE 4510–24–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

October 21, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Mine Safety and Health Administration (MSHA), Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, Telephone: 202–395–4816/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the applicable OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

*Agency:* Mine Safety and Health Administration.

*Type of Review:* Extension without change of currently approved collection.

*Title of Collection:* Fire Protection (Underground Coal Mines).

*OMB Control Number:* 1219–0054.

*Form Number:* N/A.

*Estimated Number of Respondents:* 622.

*Estimated Total Annual Burden Hours:* 75,729.

*Estimated Total Annual Cost Burden (does not include hourly wage costs):* $1,344.

*Affected Public:* Business or other for profits (mines).

*Description:* Underground mine operators are required to submit to MSHA for approval, a plan for the instruction of miners in firefighting and evacuation procedures to be followed in event of an emergency. In addition, fire drills are to be conducted quarterly, equipment tested, and a record kept of the drills and testing results. For additional information, see related notice published at Vol. 74 FR 31997 on July 06, 2009.

*Agency:* Mine Safety and Health Administration.

*Type of Review:* Extension without change of currently approved collection.

*Title of Collection:* Petitions for Modification—Pertains to All Mines.

*OMB Control Number:* 1219–0065.

*Form Number:* N/A.

*Estimated Number of Respondents:* 80.

*Estimated Total Annual Burden Hours:* 2,560.

*Estimated Total Annual Cost Burden (does not include hourly wage costs):* $32,358.

*Affected Public:* Business or other for profits (mines).

*Description:* The Department's regulations at 30 CFR 44.9, 44.10, and 44.11 provide procedures by which a mine operator, representative of miners, or independent contractor may request relief from a mandatory safety standard. For additional information, *see* related notice published at Vol. 74 FR 37061 on July 27, 2009.

**Darrin A, King,**

*Departmental Clearance Officer.*

[FR Doc. E9–25809 Filed 10–26–09; 8:45 am]

**BILLING CODE 4510–43–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,575]**

### Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance: Visteon Corp., Visteon Headquarters, et al.

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 28, 2009, applicable to workers of Visteon Corporation, Visteon Headquarters, including Headquarter employees at Plymouth, Michigan site and on-site leased workers from MSX International and Manpower, Van Buren Township, Michigan. The notice was published in the **Federal Register** September 22, 2009 (74 FR 48303).

At the request of the State Agency and the company, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the manufacturing of automotive systems. The Visteon Headquarter sites provide support services including research, engineering, manufacturing support, and administrative services such as purchasing, material planning and logistics, legal, human resources, finance, information technology and sales to their affiliated production sites.

The company reports that on-site leased workers from the above mentioned firms were employed on-site at the Van Buren Township, Michigan location of Visteon Corporation, Visteon Headquarters, including Headquarter Employees at the Plymouth, Michigan site. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from the above mentioned firms working on-site at the Van Buren Township, Michigan location of Visteon Corporation, Visteon Headquarters, including Headquarter Employees at the Plymouth, Michigan site.

The amended notice applicable to TA–W–70,575 is hereby issued as follows:

All workers of Visteon Corporation, Visteon Headquarters, including Headquarter employees at the Plymouth, Michigan site and on-site leased workers from MSX International, Manpower, Acro service Corp., Adecco, Inc., Aerotek, Inc., CDI Corp., Emergent Systems Corp., EnGenius, Inc., G-Tech Professional Staffing, Inc., Innovision Technologies, Inc., MEDA Technical Services, Inc., Midwest Labor Services, Inc., Talascend (formerly know as Modern Professional Services, Inc.), Rapid global Business Solutions, Inc., TempStaff, Inc., The Epitec Group, Trialon Corp., Webrunners, Inc., d/b/a W3R, Synetel, Inc., Computer Horizons Corp., Simmetrix, Inc., Mika Systems, Inc., Integrated Management Systems, Inc. (IMSI), Logica (bought out by Teledata Precision Design, Inc.), Sigma Technologies, Inc., Halo Group, LLC, Black Diamond Software, Ciber, Inc., Engineering Technology Associates, Inc., TAC Transportation, The Bartech Group, Manpower Temporary Services and Kelly Services, Inc., Van Buren Township, Michigan, who became totally or partially separated from employment on or after May 18, 2008, through July 28, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 13th day of October 2009.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25732 Filed 10–26–09; 8:45 am]

**BILLING CODE 4510–FN–P**

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–64,494; TA–W–64,494A; TA–W–64,494B]**

### Chrysler LLC, Currently Known as Chrysler Group LLC, Kokomo Transmission Plant, Powertrain Division, Including On-Site Leased Workers From Aerotek, American Food & Vending and Wackenhut Security, Kokomo, Indiana; Chrysler LLC, Currently Known as Chrysler Group LLC, Indiana Transmission, Plants 1 & 2, Powertrain Division, Including On-Site Leased Workers From Aerotek, American Food & Vending and Wackenhut Security, Kokomo, Indiana; Chrysler LLC, Currently Known as Chrysler Group LLC, Kokomo Casting Plant, TCMA Division, Including On-Site Leased Workers From Aerotek, American Food & Vending and Wackenhut Security, Kokomo, Indiana; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 15, 2008, applicable to workers of Chrysler LLC, Kokomo Transmission Plant, Powertrain Division, Kokomo, Indiana, Chrysler LLC, Indiana Transmission Plants 1 and 2, Powertrain Division, Kokomo, Indiana, and Chrysler LLC, Kokomo Casting Plant, TCMA Division, Kokomo, Indiana. The notice was published in the **Federal Register** on January 14, 2009 (74 FR 2136). The notice was amended on March 23, 2009 to include leased workers from Aerotek, American Food & Vending, and Wackenhut Security who were employed on-site at the Kokomo, Indiana locations of the subject firm. The notice was published in the **Federal Register** on March 31, 2009 (74 FR 14581–14582).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of aluminum transmissions, cases and component parts.

Information shows following a bankruptcy ruling, Chrysler LLC is currently known as Chrysler Group LLC. Workers separated from employment at the subject firm had their wages reported under a separated unemployment insurance (UI) tax account for Chrysler Group LLC.

Accordingly, the Department is amending this certification to include workers whose unemployment insurance (UI) wages are reported to Chrysler Group LLC.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected as an upstream supplier to a trade certified primary firm.

The amended notice applicable to TA–W–64,494 is hereby issued as follows:

''All workers of Chrysler LLC, currently known as Chrysler Group LLC, Kokomo Transmission Plant, Powertrain Division, including on-site leased workers from Aerotek, American Food & Vending and Wackenhut Security, Kokomo, Indiana (TA–W–64,494), Chrysler LLC, currently known as Chrysler Group LLC, Indiana Transmission Plants 1 & 2, Powertrain Division, including on-site leased workers from Aerotek, American Food & Vending and Wackenhut Security, Kokomo, Indiana (TA–W–64,494A), and Chrysler LLC, currently known as Chrysler Group LLC, Kokomo Casting Plant, TCMA Division, including on-site leased workers from Aerotek, American Food & Vending and Wackenhut Security, Kokomo, Indiana (TA–W–64,494B), who became totally or partially separated from employment on or after November 14, 2007 through December 15, 2010, are eligible to

apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 16th day of October 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25795 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,623]**

### General Motors Company, Lordstown Assembly Plant, Including On-Site Leased Workers From Adroit Software & Consulting, Inc., ACRO Service Corporation, the Bartech Group and Aerotek Automotive, Warren, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 2, 2009, applicable to workers of General Motors Company, Lordstown Assembly Plant, Warren, Ohio. The notice will be published soon in the **Federal Register**.

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers assemble the Chevrolet Cobalt and Pontiac G5. The workers are not separately identifiable by vehicle.

The company reports that workers leased from Adroit Software & Consulting, Inc., Acro Service Corporation, The Bartech Group and Aerotek Automotive were employed on-site at the Warren, Ohio location of General Motors Company, Lordstown Assembly Plant.

The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Adroit Software & Consulting, Inc., Acro Service Corporation, The Bartech Group and Aerotek Automotive working on-site at the Warren, Ohio location of General Motors Company, Lordstown Assembly Plant.

The amended notice applicable to TA–W–70,623 is hereby issued as follows:

All workers of General Motors Company, Lordstown Assembly Plant, including on-site leased workers from Adroit Software & Consulting, Inc., Acro Service Corporation, The Bartech Group and Aerotek Automotive, Warren, Ohio, who became totally or partially separated from employment on or after May 18, 2008, through September 2, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 13th day of October 2009.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25788 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,295]**

### Ultimizers, Inc., Boring, OR; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated September 21, 2009, a company official requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of the subject firm. The determination was issued on September 9, 2009. The Notice of Determination will soon be published in the **Federal Register**.

The initial investigation resulted in a negative determination based on the finding that imports of optimizing lumber cut-off saws, feeders, sorters and scanners did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding customers of the subject firm and imports of optimizing lumber cut-off saws, feeders, sorters and scanners.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

**Conclusion**

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 15th day of October 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25797 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2009–0037]**

### Electrical Protective Equipment Standard and the Electric Power Generation, Transmission, and Distribution 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 public comments concerning its request for an extension of the information collection requirements specified in its standards on Electrical Protective Equipment (29 CFR 1910.137) and Electric Power Generation, Transmission, and Distribution (29 CFR 1910.269).

**DATES:** Comments must be submitted (postmarked, sent, or received) by December 28, 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–2009–0037, 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 Requirements (ICR) (OSHA–2009–0037). 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 Theda Kenney at the address below to obtain a copy of the ICR.

**FOR FURTHER INFORMATION CONTACT:** Theda Kenney 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 (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 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 Electrical Protective Equipment Standard (29 CFR 1910.137) and the Electric Power Generation, Transmission, and Distribution Standard (29 CFR 1910.269) specify several paperwork requirements. The following describes the information collection requirements contained in the Standards and addresses who will use the information.

*Electrical Protective Equipment Standard (§ 1910.137)*

Testing Certification (§ 1910.137(b)(2)(xii))

Employers must certify that the electrical protective equipment used by their workers have passed the tests specified in paragraphs (b)(2)(viii), (b)(2)(ix), and (b)(2)(xi) of the Standard. The certification must identify the equipment that passed the tests and the dates of the tests. This provision ensures that electrical protective equipment is reliable and safe for worker use and will provide adequate protection against electrical hazards. In addition, certification enables OSHA to determine if employers are in compliance with the equipment testing requirements of the Standard.

*Electric Power Generation, Transmission, and Distribution Standard (§ 1910.269)*

Training Certification (§ 1910.269(a)(2)(vii))

This provision requires employers to certify that each worker has received the training specified in paragraph (a)(2) of the Standard. Employers must provide certification after a worker demonstrates proficiency in the work practices involved.

The training conducted under paragraph (a)(2) of the Standard must ensure that: workers are familiar with the safety-related work practices, safety procedures, and other procedures, as well as any additional safety requirements in the Standard that pertain to their respective job assignments; workers are familiar with any other safety practices, including applicable emergency procedures (such as pole top and manhole rescue), addressed specifically by this Standard that relate to their work and are necessary for their safety; and qualified workers have the skills and techniques necessary to distinguish exposed live parts from other parts of electric equipment, can determine the nominal voltage of the exposed live parts, know the minimum approach distances specified by the standard for voltages when exposed to them, and understand the proper use of special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on or near exposed and energized parts of electric equipment.

Workers must receive additional training or retraining if: The supervision and annual inspections required by the Standard indicate that they are not complying with the required safety-related work practices; new technology or equipment, or revised procedures, require the use of safety-related work practices that differ from their usual safety practices; and they use safety-related work practices that are different than their usual safety practices while performing job duties.

The training requirements of the Standard inform workers of the safety hazards of electrical exposure and provide them with the understanding required to minimize these safety hazards. In addition, workers must receive proper training in safety-related work practices, safety procedures, and other safety requirements specified in the Standard. The required training, therefore, provides information to workers that enable them to recognize how and where electrical exposures occur, and what steps to take, including work practices, to limit such exposure. The certification requirement specified by paragraph (a)(2)(vii) of the Standard helps employers monitor the training their workers received and helps OSHA determine if employers provided the required training to their workers.

## 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 collection of information requirements contained in the Standards on Electrical Protective Equipment (29 CFR 1910.137), and Electric Power Generation, Transmission, and Distribution (29 CFR 1910.269). The Agency is proposing to increase the burden hours in the currently approved information collection request from 30,533 hours to 34,208 hours (a total increase of 3,675 hours). The increase is a result of an increase in the number of affected workers from 227,683 to 275,000.

The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB.

*Type of Review:* Extension of a currently approved information collection.

*Title:* Electrical Protective Equipment (29 CFR 1910.137) and Electric Power Generation, Transmission, and Distribution (29 CFR 1910.269).

*OMB Number:* 1218–0190.

*Affected Public:* Business or other for-profit.

*Number of Respondents:* 20,765.

*Frequency:* On occasion; semi-annually; annually.

*Average Time per Response:* Varies from one minute (.02 hour) for a clerical employee to maintain training certification records to 15 minutes (.25 hour) to test a batch of gloves or sleeves.

*Estimated Total Burden Hours:* 34,208.

*Estimated Cost (Operation and Maintenance):* $0.

### 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–2009–0037). 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* website to submit comments and access the docket is available at the website'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

Jordan Barab, 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 31160).

Signed at Washington, DC, this 22nd day of October 2009.

**Jordan Barab,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. E9–25779 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–26–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–63,747]**

### Hynix Semiconductor Manufacturing America, Inc., Including On-Site Leased Workers From Securitas Security Sytems, Global Tech Building Services Corp., Air Liquide Electronics U.S. LP and Lam Research Corporation, Eugene, Oregon; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on August 20, 2008, applicable to workers of Hynix Semiconductor Manufacturing America, Inc., Eugene, Oregon. The notice was published in the **Federal Register** on September 3, 2008 (73 FR 51529). The certification was amended on October 30, 2008 to include on-site leased workers from Securitas Security Systems and Global Tech Building Services Corp. The notice was published in the **Federal Register** on November 7, 2008 (73 FR 66273). A second certification was amended on January 13, 2009 to include on-site leased workers from Air Liquide Electronics U.S. LP. The notice was published in the **Federal Register** on February 2, 2009 (74 FR 5866).

At the request of the petitioners, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of Dynamic Random Access Memory (DRAM) wafers.

New information shows that leased workers of Lam Research Corporation were employed on-site at the Eugene, Oregon location of Hynix Semiconductor Manufacturing America, Inc. The Department has determined that these workers were sufficiently under the control of the subject firm.

Based on these findings, the Department is amending this certification to include leased workers of Lam Research Corporation working on-site at the Eugene, Oregon location of the subject firm.

The intent of the Department's certification is to include all workers employed at Hynix Semiconductor Manufacturing America, Inc., Eugene,

Oregon who were adversely affected by increased imports following a shift in production of Dynamic Random Access Memory (DRAM) wafers to South Korea.

The amended notice applicable to TA–W–63,747 is hereby issued as follows:

All workers of Hynix Semiconductor Manufacturing America, Inc. including on-site leased workers from Securitas Security Systems, Global Tech Building Services Corp., Air Liquide Electronics U.S. LP and Lam Research Corporation, Eugene, Oregon, who became totally or partially separated from employment on or after July 24, 2007, through August 20, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 8th day of October 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25792 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,496]**

### Tektronix, Inc.: Information Technology Division, Data Center Operations Group, Including On-Site Leased Workers From Adecco Employment Services; Beaverton, OR; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 26, 2009, applicable to workers of Tektronix, Inc. This notice was published in the **Federal Register** on August 19, 2009 (74 FR 41934–41936).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers provided telephone call center support services for the computer systems of Tektronix, Inc.

The company reports that on-site leased workers from Adecco Employment Services were employed on-site at the Beaverton, Oregon location of Tektronix, Inc. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Adecco Employment Services working on-site at the Beaverton, Oregon location of Tektronix, Inc.

The amended notice applicable to TA–W–71,202 is hereby issued as follows:

All workers of Tektronix, Inc., Information Technology Division, Data Center Operations Group, including on-site leased workers from Adecco Employment Services, Beaverton, Oregon, who became totally or partially separated from employment on or after May 21, 2008, through June 26, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 15th day of October, 2009.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25787 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–61,945]**

### Delphi Corporation, Automotive Holding Group, Chassis Business Support Functions, Including On-Site Leased Workers From Kforce Staffing and Alliance Technical Services, Kettering, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on 20, 2007, applicable to workers of Delphi Corporation, Automotive Holding Group, Chassis Business Support Functions, Kettering, Ohio. The notice was published in the **Federal Register** on October 3, 2007 (72 FR 56384). The notice was amended on April 30, 2008 to include on-site leased workers from Kforce Staffing. The notice was published on the **Federal Register** on May 13, 2008 (73 FR 27557–27558)

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers provide a variety of business services for an automotive brake parts manufacturing facility.

New information shows that leased workers of Alliance Technical Services were employed on-site at the Kettering, Ohio location of Delphi Corporation, Automotive Holding Group, Chassis Business Support Functions. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers of Alliance Technical Services working on-site at the Kettering, Ohio location of the subject firm.

The intent of the Department's certification is to include all workers employed at Delphi Corporation, Automotive Holding Group, Chassis Business Support Functions, Kettering, Ohio who were adversely affected by increased imports.

The amended notice applicable to TA–W–61,945 is hereby issued as follows:

All workers of Delphi Corporation, Automotive Holdings Group, Chassis Business Support Functions, including on-site leased workers from Kforce Staffing and Alliance Technical Services, Kettering, Ohio, (excluding workers of Delphi at other Kettering, Ohio Locations: Delphi Corporation, Automotive Holdings Group, Formerly Delphi Energy Chassis Systems Division, Kettering, Ohio (TA–W–57,754) and Delphi Corporation, Automotive Holdings Group, Chassis Division, Kettering, Ohio (TA–W–61,950), who became totally or partially separated from employment on or after August 3, 2006, through September 20, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 15th day of October 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25791 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–64,158]**

### NCM Chassis Systems, LLC, a Subsidiary of Metaldyne Company, LLC, Including On-Site Leased Workers From Securitas, Fuch's Lubricants, Inc., Alpha Placement Services and Ferguson Enterprises, Inc., New Castle, IN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 23, 2008 applicable to workers of NCM Chassis Systems, LLC, a subsidiary of Metaldyne Company, LLC, New Castle, Indiana. The notice was published in the **Federal Register** on November 10, 2008 (73 FR 66676). The notice was amended on August 26, 2009 to include leased workers from Securitas and Fuch's Lubricants, Inc., who were employed on-site at the New Castle, Indiana site. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48298).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of chassis components for the automobile industry.

New information shows that workers leased from Alpha Placement Services and Ferguson Enterprises, Inc. were employed on-site at the New Castle, Indiana location of NCM Chassis Systems, LLC. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Alpha Placement Services and Ferguson Enterprises, Inc., working on-site at the New Castle, Indiana site location of NCM Chassis Systems, LLC.

The amended notice applicable to TA–W–64,158 is hereby issued as follows:

All workers of NCM Chassis Systems, LLC, a subsidiary of Metaldyne Company, LLC, including on-site leased workers from Securitas, Fuch's Lubricants, Inc., Alpha Placement Services and Ferguson Enterprises, Inc., New Castle, Indiana who became totally or partially separated from employment on or after October 1, 2007, through October 23, 2010 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 16th day of October 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25794 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–63,939]**

### Hewlett Packard, Inkjet and Web Solutions Division, Including On-Site Leased Workers From CDI, Manpower, Securitas Security Services USA, Volt, Cable Consultants, D/B/A Black Box Network Services, Managed Business Solutions, 888 Consulting Group, Inc., D/B/A Tac Worldwide, Finesse Personnel, Techlink Systems, Inc., Lionbridge and Cornerstone/Trinite, Corvallis, OR; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 19, 2008, applicable to workers of Hewlett Packard, Inkjet and Web Solutions Division, including on-site leased workers from CDI, Manpower, Securitas Security Services USA and Volt, Corvallis, Oregon. The notice was published in the **Federal Register** on October 3, 2008 (73 FR 57682). The certification was amended on December 4, 2008, February 20, 2009 and September 18, 2009 to include on-site leased workers from Cable Consultants, d/b/a Black Box Network Services, Managed Business Solutions, 888 Consulting Group, Inc., d/b/a TAC Worldwide, Finesse Personnel, Techlink Systems, Inc. and Lionbridge. The notices were published in the **Federal Register** on December 15, 2008 (73 FR 76058), March 4, 2009 (74 FR 9431–9432) and October 5, 2009 (74 FR 51178).

At the request of State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of inkjet supplies, particularly in jet printer cartridge heads.

New information shows that workers leased from Cornerstone/Trinite were employed on-site at the Corvallis, Oregon location of Hewlett Packard, Inkjet and Web Solutions Division. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers from Cornerstone/Trinite working on-site at the Inkjet and Web Solutions Division, Corvallis, Oregon location of the subject firm.

The amended notice applicable to TA–W–63,939 is hereby issued as follows:

All workers of Hewlett Packard, Inkjet and Web Solutions Division, including on-site leased workers from CDI, Manpower, Securitas Security Services USA, Volt, Managed Business Solutions, 888 Consulting Group, Inc., d/b/a TAC Worldwide, Finesse Personnel, Techlink Systems, Inc., Lionbridge and Cornerstone/Trinite, Corvallis, Oregon, engaged in the production of inkjet supplies, who became totally or partially separated from employment on or after August 26, 2007, through September 19, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 14th day of October 2009.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25793 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–71,004]**

### Radisys Corporation, Including On-Site Leased Workers From Employment Trends, DB Professionals, Inc., and Prosource Network; Hillsboro, OR; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''),

19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 14, 2009, applicable to workers of RadiSys Corporation, including on-site leased workers from Employment Trends, Hillsboro, Oregon. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48303).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of PCB boards, telecommunication systems and medical systems.

The company reports that workers leased from DB Professionals, Inc. and ProSource Network were employed on-site at the Hillsboro, Oregon location of RadiSys Corporation. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from DB Professionals, Inc. and ProSource Network working on-site at the Hillsboro, Oregon location of RadiSys Corporation.

The amended notice applicable to TA–W–71,004 is hereby issued as follows:

All workers of RadiSys Corporation, including on-site leased workers from Employment Trends, DB Professionals, Inc., and ProSource Network, Hillsboro, Oregon, who became totally or partially separated from employment on or after June 1, 2008, through August 14, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 13th day of October 2009.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25790 Filed 10–26–09; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,272]**

### Mercedes-Benz United States International, Inc., Including On-Site Leased Workers From Talent Tree and Formel D, Vance, AL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 13, 2009 applicable to workers of Mercedes-Benz United States International, Inc., Vance, Alabama. The notice was published in the **Federal Register** on September 22, 2009 (74 FR 48299–48302).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the assembly of automobiles.

The company reports that on-site leased workers from Formel D were employed on-site at the Vance, Alabama location of Mercedes-Benz United States International, Inc. The Department has determined that these workers were sufficiently under control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Formel D on-site at the Vance, Alabama location of Mercedes-Benz United States International, Inc.

The amended notice applicable to TA–W–70,272 is hereby issued as follows:

All workers of Mercedes-Benz United States International, Inc., including on-site leased workers from Talent Tree and Formel D, Vance, Alabama, who became totally or partially separated from employment on or after May 18, 2008, through two years from the date of certification, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 15th day of October 2009.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25796 Filed 10–26–09; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,384; TA–W–70,384A]**

### National Mills, Inc., Including On-Site Leased Workers From Manpower Temp Service, Pittsburg, KS; National Mills, Inc., Executive Offices, Marriam, KS; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 26, 2009, applicable to workers of National Mills, Inc., including on-site leased workers from Manpower Temp Service, Pittsburg, Kansas. The notice was published in the **Federal Register** on August 19, 2009 (74 FR 41935).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to the production of fashion decorated T-shirts.

The company reports that worker separations occurred at the Executive Offices, Merriam, Kansas location of the subject firm. The Executive Offices provides administrative, sales and financial service functions for the subject firm's production facility in Pittsburg, Kansas.

Accordingly, the Department is amending this certification to include workers of the National Mills, Inc., Executive Offices, Merriam, Kansas.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by the shift in production of fashion decorated T-shirts to Honduras.

The amended notice applicable to TA–W–70,384 is hereby issued as follows:

All workers of National Mills, Inc., including on-site leased workers from Manpower Temp Service, Pittsburg, Kansas (TA–W–70,384), and National Mills, Inc., Executive Offices, Merriam, Kansas (TA–W–70,384A), who became totally or partially separated from employment on or after May 19, 2008 through June 26, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 17th day of September 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25786 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–70,631]**

### Electronic Data Systems, an HP Company, Plano, TX; Notice of Negative Determination Regarding Application for Reconsideration

By application postmarked September 14, 2009, a petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on September 2, 2009 and will soon be published in the **Federal Register**.

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative TAA determination issued by the Department for workers of Electronic Data Systems, an HP Company, Plano, Texas was based on the finding that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974.

The petitioner stated that he was separated from the employment during May 2009 at which time his position was shifted to Brazil.

When assessing eligibility for TAA, the Department determines whether each required criterion is met. In order for the criteria (a)(2)(A)(i) and 222(c)(1) to be met, the Department exclusively considers the relevant employment data (for one year prior to the date of the petition and any imminent layoffs) for the facility where the petitioning worker group was employed.

In case at hand, the investigation revealed that employment levels at Electronic Data Systems, an HP Company, Plano, Texas declined by two during the relevant period and there was no threat of separations. Significant number or proportion of the workers in a firm or appropriate subdivision means at least three workers in a workforce of fewer than 50 workers, five percent of the workers in a workforce of over 50 workers, or at least 50 workers. Therefore, criterion I of Section 222(a) and criterion (1) of Section 222(c) of the Act were not met.

The petitioner also alleged that there was a shift in services provided by the workers of the subject firm to Brazil.

The allegation of the shift in services to Brazil would have been relevant if it was determined that all other criteria have been met. However, it was revealed that there was no significant employment decline at the subject facility during the relevant period.

Should conditions change in the future, the petitioner is encouraged to file a new petition on behalf of the worker group which will encompass an investigative period that will include these changing conditions.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

#### Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 15th day of October 2009.

**Elliott S. Kushner,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. E9–25789 Filed 10–26–09; 8:45 am]

BILLING CODE 4510–FN–P

## LEGAL SERVICES CORPORATION

### Sunshine Act Meeting of the Board of Directors and the Board's Six Committees; Notice

**DATE AND TIME:** The Legal Services Corporation Board of Directors and the Board's six Committees will meet on October 30–31, 2009 in the order set forth in the following schedule. The first meeting scheduled for October 30, will commence at 2 p.m. Eastern Time. Each meeting thereafter will commence promptly upon adjournment of the immediately preceding meeting, except that meetings of the Provisions and Audit Committees will run concurrently and the meeting of the Search Committee will commence at 4:30 p.m. and for a period of time run concurrently with the meeting of the Operations and Regulations Committee. The first meeting scheduled for October 31, will commence at 8:30 a.m., and each meeting thereafter will commence promptly upon adjournment of the immediately preceding meeting.

**LOCATION:** Particular attention should be given to the fact that the location of the meetings on Friday, October 30th is different from the location of meetings on Saturday, October 31st as follows:

**Friday, October 30, 2009**

Rutgers School of Law—Camden, 217 North Fifth Street, Camden, New Jersey 08102.

**Saturday, October 31, 2009**

Crown Plaza Philadelphia-Center City, 1800 Market Street, Philadelphia, PA 19103.

**PUBLIC OBSERVATION:** Three committee meetings will be open in their entirety to public observation, but portions of three other committee meetings and a portion of the full board meeting will not be open to the public. For all meetings and portions thereof open to public observation, members of the public who are unable to attend but wish to listen to the proceedings may do so by the following the telephone call-in directions given below. You are asked to keep your telephone muted to eliminate background noises. From time to time, comments from the public may be solicited by the presiding Chairman.

#### Call-in Directions for Open Session

*Friday, October 30, 2009*

- Call toll-free number: 1–800–247–9979;
- When prompted, enter the following numeric pass code: 34833626;
- When connected to the call, please ''MUTE'' your telephone immediately.

*Saturday, October 31, 2009*

• Call toll-free number: 1–800–247–9979;

• When prompted, enter the following numeric pass code: 34833626;

• When connected to the call, please ''MUTE'' your telephone immediately.

**Meeting Schedule**

| | Time |
|---|---|
| **Friday, October 30, 2009** | |
| Location: Rutgers School of Law: | |
| 1. Provision for the Delivery of Legal Services[1] Committee (''Provisions Committee''). | 2 p.m. |
| 2. Audit Committee. | |
| 3. Search Committee[2] | 4:30 p.m. |
| 4. Operations & Regulations Committee. | |
| **Saturday, October 31, 2009** | |
| Location: Crown Plaza Philadelphia: | |
| 5. Governance and Performance Review Committee. | 8:30 a.m. |
| 6. Finance Committee. | |
| 7. Board of Directors. | |

**STATUS OF MEETING:** Open, except as noted below.

• *Search Committee*—Open except that a portion of the meeting will be closed to the public pursuant to a vote of the Board of Directors so the committee may consider and perhaps act on a recommendation to make the board as to an Interim President for LSC.

A *verbatim* written transcript will be made of the closed session of the Committee meeting. However, the transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2), and the corresponding provisions of the Legal Services Corporation's implementing regulation, 45 CFR 1622.5 will not be available for public inspection. A copy of the General Counsel's Certification that in his opinion the closing is authorized by law will be available upon request.

• *Audit Committee*—Open, except that a portion of the meeting will be closed so the Committee can hear a follow-up report to the FY 2008 Annual Audit reference on classification of LSC consultants and OIG audit of LSC's consultant contracts.

A *verbatim* written transcript will be made of the closed session of the Committee meetings. However, the transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(9)(B), and the corresponding provisions of the Legal Services Corporation's implementing regulation, 45 CFR 1622.5(g), and will not be available for public inspection. A copy of the General Counsel's Certification that in his opinion the closing is authorized by law will be available upon request.

• *Finance Committee*—Open, except that a portion of the meeting will be closed to the public pursuant to a vote of the Board of Directors so the committee may consider and perhaps act on a staff report on the classification of LSC consultants.

A *verbatim* written transcript will be made of the closed session of the closing is authorized by law will be available upon request.

• *Board of Directors Meeting*—Open, except that a portion of the meeting of the Board of Directors may be closed to the public pursuant to a vote of the Board of Directors to consider and perhaps act on the General Counsel's report on potential and pending litigation involving LSC and consider and act on staff and committee reports on the classification LSC consultants. The closed session will also include a briefing by LSC's Inspector General.

A *verbatim* written transcript will be made of the closed session of the Board meeting. However, the transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(9)(B) and (10), and the corresponding provisions of the Legal Services Corporation's implementing regulation, 45 CFR 1622.5(g) and (h) will not be available for public inspection. A copy of the General Counsel's Certification that in his opinion the closing is authorized by law will be available upon request.

**MATTERS TO BE CONSIDERED:**

**Committee on the Provision for the Delivery of Legal Services (October 30, 2009)**

*Agenda*

1. Approval of agenda.
2. Approval of the Committee's meeting minutes of July 24, 2009.
3. Presentation by the New Jersey LSC Program Executive Directors on coordination of work in the face of increased client demand and decreased funding, with an overview by De Miller, President, Legal Services of New Jersey.

• Felipe Chavana, Essex-Newark Legal Services Project;

• John Fitzgerald, Northeast New Jersey Legal Services;

• Douglas Gershuny, South Jersey Legal Services;

• Paul Mullin, Central Jersey Legal Services;

• William Rempel, Ocean-Monmouth Legal Services;

• Diane Smith, Legal Services of Northwest Jersey.

4. Staff Update on activities implementing the *LSC Private Attorney Involvement Action Plan—Help Close the Justice Gap: Unleash the Power of Pro Bono.*
5. Staff Update on Native American Delivery and Funding.
6. Staff Report on LSC training initiatives.
7. Public comment.
8. Consider and act on other business.
9. Consider and act on adjournment of session.

**Audit Committee (October 30, 2009)**

*Agenda*

Open Session

1. Approval of agenda.
2. Approval of minutes of the Committee's July 24, 2009 meeting.
3. Discussion with outside auditors on Fiscal Year 2009 audit.
4. Consider and act on whether to conduct a closed meeting.

Closed Session

5. Follow-up to FY 2008 Annual Audit reference on classification of consultants and OIG audit of LSC's consultant contracts.

Open Session

6. Staff report on potential amendment to LSC's 403(b) Plan.
7. Public comment.
8. Consider and act on other business.
9. Consider and act on adjournment of meeting.

**Search Committee for Interim LSC President (October 30, 2009)**

*Agenda*

Open Session

1. Approval of agenda.
2. Consider and act on whether to conduct a closed session of the Committee to address items listed below under Closed Session.

Closed Session

3. Consider and act on a recommendation to make to Board as to an Interim President for LSC.
4. Consider and act on adjournment of meeting.

[1] The Provisions Committee and Audit Committee will meet concurrently commencing at 2 pm ET.

[2] Please note during the latter portion of the open meeting of the Operations and Regulations Committee, a concurrent closed meeting of the Search Committee will be convened.

**Operations & Regulations Committee (October 30, 2009)**

*Agenda*

1. Approval of agenda.
2. Approval of the minutes of the Committee's April 25, 2009 meeting.
3. Approval of the minutes of the Committee's July 25, 2009 meeting.
4. Consider and act on proposed revisions to LSC's Employee Handbook.
5. Consider and act on the LSC Board of Directors' role in collective bargaining.
6. Staff report on LSC's survey of grantees' Boards of Directors.
7. Discussion of need for and wisdom of requiring grantees' governing bodies to establish audit committees.
8. Office of Inspector General (''OIG'') report on IPA survey results.
9. Report on status of GAO review.
10. Consider and act on Inspector General's proposal for a modified LSC logo.
11. Consider and act on whether to amend 45 CFR part 1622 to remove from its requirements either all councils and non-executive committees of the Board or to remove from its requirements only the Board's Governance & Performance Review Committee performance evaluations of the President and the Inspector General.
12. Other public comment.
13. Consider and act on other business.
14. Consider and act on adjournment of meeting.

**Governance and Performance Review Committee (October 31, 2009)**

*Agenda*

1. Approval of agenda.
2. Approval of the minutes of the Committee's July 25, 2009 meeting.
3. Consider and act on performance review of the Inspector General.
4. Distribution of Forms and Instructions for Individual and Board Self-Assessment for 2009.
5. Report on orientation for new Board members.
- Staff Report from Victor Fortuno and John Constance.
6. Consider and act on amendment to Committee charter to add responsibility for oversight of LSC's compensation plan.
7. Consider and act on other business.
8. Consider and act on adjournment of meeting.

**Finance Committee (October 31, 2009)**

*Agenda*

1. Approval of agenda.
2. Approval of the minutes of the meeting of September 21, 2009.
3. Consider and act on FY 2009 COB reallocations and Resolution 2009–016.
4. Presentation on LSC's Financial Reports for the Year Ending September 30, 2009.
- Presentation by David Richardson;
- Comments by Charles Jeffress;
- Comments by Jeffrey Schanz.
5. Consider and act on whether to conduct a closed meeting.

Closed Session

6. Consider and act on staff report on the classification of LSC consultants.

Open Session

7. Consider and act on amendment to LSC's 403(b) Plan and Resolution 2009–017.
8. Staff report on status of FY 2010 appropriations process.
- Presentation by John Constance.
9. Consider and act on Resolution # 2008–018, Temporary Operating Budget for FY 2010.
- Presentation by David Richardson;
- Comments by Charles Jeffress.
10. Public comment.
11. Consider and act on other business.
12. Consider and act on adjournment of meeting.

**Board of Directors (October 31, 2009)**

*Agenda*

1. Approval of agenda.
2. Approval of the minutes of the *Board's* Open Session meeting of July 25, 2009.
3. Approval of the minutes of the *Board's* Open Session Telephonic meeting of September 8, 2009.
4. Approval of the minutes of the *Board's* Open Session meeting of September 21, 2009.
5. *Chairman's* Report.
6. *Members'* Reports.
7. *President's* Report.
8. *Inspector General's* Report.
9. Consider and act on the report of the Committee on the *Provision for the Delivery of Legal Services.*
10. Consider and act on the report of the *Finance Committee.*
11. Consider and act on the report of the *Operations & Regulations Committee.*
12. Consider and act on the report of the *Audit Committee.*
13. Consider and act on the report of the *Governance & Performance Review Committee.*
14. Consider and act on the report of the *Search Committee* to recommend an interim President.
15. Staff report on Strategic Directions progress.
16. Public comment.
17. Consider and act on whether to authorize an executive session of the Board to address items listed below under Closed Session.

Closed Session

18. Briefing by the Inspector General.
19. Consider and act on staff and committee reports on the classification of LSC consultants.
20. Consider and act on General Counsel's report on potential and pending litigation involving LSC.
21. Consider and act on other business.
22. Consider and act on motion to adjourn meeting.

**CONTACT PERSON FOR INFORMATION:** Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: October 23, 2009.

**Victor M. Fortuno,**

*Vice President & General Counsel.*

[FR Doc. E9–25996 Filed 10–23–09; 4:15 pm]

BILLING CODE 7050–01–P

## OFFICE OF MANAGEMENT AND BUDGET

### Improving Implementation of the Paperwork Reduction Act

**AGENCY:** Office of Information and Regulatory Affairs, Office of Management and Budget.

**ACTION:** Request for comments.

**SUMMARY:** The Office of Management and Budget (OMB) oversees agency information collection activities under the Paperwork Reduction Act of 1995 (PRA). While information collection is critical to evidence-based decisions and informed government operations, unnecessary paperwork requirements can impose serious burdens on the public, especially small entities. The PRA requires Federal agencies to minimize the burden on the public resulting from their information collections, and to maximize the practical utility of the information collected. OMB is committed to working with agencies and the public to promote compliance with the PRA and to reduce

unnecessary paperwork and improve PRA guidance and implementation. To that end, OMB is inviting comments from the public on how to strengthen and improve implementation of the PRA. Specifically, OMB seeks comments on reducing current paperwork burdens, especially on small entities; increasing the practical utility of information collected by the Federal Government; ensuring accurate burden estimates; and preventing unintended adverse consequences.

**DATES:** To ensure consideration, responses must be written and received by December 28, 2009.

**ADDRESSES:** Submit comments by one of the following methods:

- *Web site: www.regulations.gov.*
- *E-mail: oira_submission@omb.eop.gov.*
- *Fax:* (202) 395–7245.

Comments submitted in response to this notice may be made available to the public through relevant Web sites. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an e-mail comment, 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. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

**FOR FURTHER INFORMATION CONTACT:** Mabel Echols, Office of Information and Regulatory Affairs, Records Management Center, Office of Management and Budget, Room 10102, NEOB, 725 17th Street, NW., Washington, DC 20503, Telephone: (202) 395–6880.

**SUPPLEMENTARY INFORMATION:** In this **Federal Register** notice, OMB seeks public comments on possible initiatives to improve the implementation of the Paperwork Reduction Act of 1995 (PRA)—and in particular, to reduce the paperwork burden on the public, especially on small entities; to maximize the utility of the information collected; to ensure accurate burden estimates; to improve the process of OMB review; and to prevent unintended adverse consequences. OMB plans to use the comments it receives in response to this notice to inform its preparation of the 2010 Information Collection Budget (ICB), which is a report that will be provided to Congress on the Federal Government's effectiveness in implementing the Paperwork Reduction Act of 1995. OMB will also use these comments to inform its practices for evaluating information collections submitted to OMB by agencies.

## Improving Paperwork Burden Estimates

Agencies estimate PRA paperwork burden in terms of the time and financial resources the public devotes annually to responding to information collections. The term ''burden'' means the ''time, effort, or financial resources'' the public expends to provide information to or for a Federal agency, or otherwise fulfill statutory or regulatory requirements. 44 U.S.C. 3502(2); 5 CFR 1320.3(b). ''Burden'' therefore includes:

- Reviewing instructions;
- Using technology to collect, process, and disclose information;
- Adjusting existing practices to comply with requirements;
- Searching data sources;
- Completing and reviewing the response; and
- Transmitting or disclosing information.

Currently, agencies estimate and report the burden of these activities in terms of the time, or burden hours, and the financial costs that the public devotes to reporting, recordkeeping, and disclosure requirements. In estimating the time and resources devoted to information collections, agency Chief Information Officer offices typically consult agency program staff, who are responsible for managing the information and thus possess the substantive knowledge that is essential to estimating the number of respondents to an information request relating to that program. The agency then uses its knowledge of the program to consider how much time a respondent would need to respond to the information request. Multiplying the amount of time per respondent by the number of respondents and the number of times the information is submitted each year produces the total annual burden hours imposed by a given collection.

After agencies produce a preliminary burden estimate, several reviews of its accuracy take place. First, agencies solicit public feedback on the accuracy of their estimates in **Federal Register** notices that provide for an initial 60-day public comment period. Any comments received by the agency are used to refine the estimate that is submitted for OMB review. Second, OMB analysts who review agency information collection requests (ICRs) can provide comments on the agency's estimate. Finally, OMB review is accompanied by a second, 30-day public comment period (initiated with a second **Federal Register** notice), during which the public can again submit comments on the burden estimates.

Agencies have worked hard to improve their burden estimates, and several agencies have undergone extensive studies to do so. For example, the Internal Revenue Service accounts for a large share (over 76 percent) of the Federal Government's total paperwork burden. In light of this fact, the IRS has devoted considerable resources to measuring the burden it imposes on taxpayers so that policymakers and the public can better understand the cost to society of tax collection and compliance with the Internal Revenue Code. The IRS has made efforts to improve the accuracy and transparency of taxpayer burden estimates. Starting in FY 2006, the IRS began using a new methodology based on a statistical model—the Individual Taxpayer Burden Model (ITBM)—to estimate the reporting burden imposed on individual taxpayers. The ITBM's approach to measuring burden focuses on the characteristics and activities of individual taxpayers rather than the forms they ultimately use.

Despite public input and certain common methodological techniques, agency estimation methodologies can sometimes produce imprecise and inconsistent burden estimates. Some agencies have relied on program analysts to generate burden estimates based on their individual consideration of, for example, the number and types of questions asked, what records will need to be created and maintained, how long it will take people to complete these and other tasks, and how many people will be performing the tasks. These officials are often experts in their areas of responsibility and are usually familiar with the public's experience with responding to information collections they oversee. In some cases, however, it is not clear that their estimates are based on sufficiently rigorous or internally consistent methodologies. This is a particular concern in the case of large collections, the burden of which may be measured in millions of hours or tens of millions of dollars.[1]

[1] For more information on how agencies estimate their paperwork burden, please refer to pages 29–39 of the Information Collection Budget of the United States Government, FY 1999, Office of Management and Budget, which can be found at *http://www.whitehouse.gov/omb/assets/omb/inforeg/icb-fy99.pdf.*

In addition, OMB is aware of the possibility that information collections may impose significant burdens on small businesses. Because of economies of scale, a collection may be more burdensome for a small entity than for a large one. However, currently there is no uniform method for agencies to account for situations in which a collection may have a disproportionate impact on a particular type of respondent, such as a small entity.

In summary, there is some variation across individual agencies in the methodologies used for estimating the time and financial burden associated with their collections. This variation makes it difficult to ensure accurate assessment on the part of all individual agencies and to upgrade government-wide performance in implementing the PRA.

**OMB Seeks Comment on How To Improve the Current Situation, Including:**

- Examples of substantially inaccurate burden estimates for information collections, including an analysis of the inaccuracy and, if possible, the collection's OMB Control Number.
- New or improved practices for estimating burden, such as new burden estimation methodologies and recommendations about how to use technology and social media applications to seek comments from those most informed about a collection's burden.
- Possible distinctions, in burden estimates, between mandatory and voluntary information collections.
- Examples of information collections (if possible, including the OMB Control Number) that inaccurately estimate the impact of burden upon small entities.
- Whether the creation of a separate burden estimate for small entities is necessary and, if so, the best methodology by which to estimate burden.
- Whether and how burden hours should be monetized. If so, should a single valuation of time (as represented, for example, by a respondent's wage rate or the fee paid to a contractor) be used for all collections, or should it be derived separately for different types of collections? Also, should a single valuation be used for all respondents to a particular collection, or should valuations differ according to respondent characteristics?
- Whether OMB should establish a means for reporting annual burden estimates rather than the three-year average burden estimates that are commonly reported today.

In submitting comments to this notice, please provide supporting evidence where feasible—with data, specific examples of information collections, and, if possible, the collections' OMB Control Numbers—along with concrete recommendations.

**Reducing Paperwork Burden and Maximizing the Utility of Information Collected by the Federal Government**

Over the years, the number of hours that the public has spent responding to Federal Government information collections has been steadily increasing. In FY 2000, the public spent an estimated 7.4 billion hours responding to information collections subject to the PRA. In FY 2007, the number of hours grew to an estimated 9.64 billion, an increase of more than 30 percent. Much of this increase is attributed to factors that make it difficult for agencies to control their paperwork burden, such as new statutory requirements and demographic and economic changes. A much smaller portion is a result of discretionary decisions made by agencies that increase burden.

While the overall trend in paperwork burden has been rising, several agencies have dramatically reduced the burden of their collections, and in some cases improved the utility of a collection in the process. The following are examples of successful initiatives by agencies to reduce burden on the public:

- The Department of Homeland Security (DHS) expanded electronic reporting options for its National Fire Incident Reporting System (NFIRS), which allows the Department to analyze fire incident data at the Federal, State, and local levels. The revised system continues to help DHS identify common fire trends on a national scale, but in a more efficient manner. The revisions to the system resulted in a reduction of 1.28 million burden hours and $17.545 million in costs to respondents.
- Within the Department of Health and Human Services, the Health Resources and Services Administration (HRSA) managed a work group to examine some of its forms for possible duplication or redundancy with currently approved Standard Forms. The group found that the health professions programs could operate with the Standard Forms, allowing HRSA to discontinue one of its program-specific forms, the Competing Grant Training Application. As a result, burden was reduced by 101,531 hours.
- The Social Security Administration (SSA) reduced the amount of time necessary to complete the initial online filing for Social Security retirement and disability benefits by enabling respondents to sign the application electronically, rather than in hard copy. This portion of the SSA's Signature Proxy Initiative resulted in an annual reduction of 32,401 hours.[2]

Agencies also often undertake efforts to improve the utility of information that they collect through relatively small increases in burden. For example, statistical agencies routinely pretest new surveys or new items for existing surveys to ensure that respondents understand the question being asked, have the information to be able to respond, and are able to convey their response in accordance with the options provided by the agency. Similarly, agencies conducting program evaluations or research studies often engage in small-scale formative or exploratory research to inform larger-scale investigations. With increasing use of the Internet to collect and disseminate information, more agencies are also engaging in usability testing to improve their Web sites and electronic forms and questionnaires.

OMB is committed to helping agencies build on these initiatives and to ensuring that the PRA is implemented in a way that suits current conditions. OMB is also aware that concerns have been expressed about unintended consequences of the administration of the Act, including delays in the conduct of surveys and research in contexts in which citizens are asked, but not required, to respond to information collection requests by the Federal Government.

In this notice, OMB is seeking public comment to provide new ideas for reducing paperwork burden and ensuring practical utility. As part of its efforts to improve this situation, OMB invites comments from the public on all issues relating to improvement of the implementation of the PRA, including but not limited to the following topic areas:

- How can OMB improve the PRA review process in a way that increases efficiency and timeliness for agencies while ensuring practical utility and minimizing burden on the public?
- Under the PRA, what are the relevant differences among collections that are mandatory, mandatory to receive a benefit, and voluntary, and what practices could OMB implement in its review processes to recognize these differences? In addition, how would such practices achieve the PRA goals of reducing current paperwork

[2] See page 5 of the Information Collection Budget of the United States Government, FY 2007, Office of Management and Budget, which can be found at *http://www.whitehouse.gov/omb/assets/omb/inforeg/icb/fy_2007_icb_final.pdf.*

burdens and increasing the practical utility of information collected by the Federal Government?

• Should OMB encourage agencies to adopt ''one-stop'' information collection techniques, which consolidate multiple forms via a single electronic form to reduce the burden on the public? How should OMB encourage agencies to take advantage of online tools to simplify the completion of already-approved surveys or mobile technology to deliver a survey by alternative means?

• What practices could OMB implement under the PRA to facilitate the use of new technologies, such as social media, as well as future technologies, while supporting the Federal Government's responsibilities for Information Resource Management?

• What new steps, if any, might be taken under the PRA to eliminate any redundant or excessive mandatory information collections, especially in connection with programs that now impose the most significant burdens, including tax, health, and transportation programs?

• Examples of successful paperwork burden reduction practices implemented by an agency that could be implemented by other agencies. Please provide recommendations, and if possible, OMB control numbers.

**Cass R. Sunstein,**

*Administrator, Office of Information and Regulatory Affairs.*

[FR Doc. E9–25757 Filed 10–26–09; 8:45 am]

**BILLING CODE 3110–01–P**

## NATIONAL SCIENCE FOUNDATION

### Advisory Committee for Social, Behavioral, and Economic Sciences; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

*Name:* Advisory Committee for Social, Behavioral, and Economic Sciences (#1171).

*Date/Time:* November 19, 2009; 8:30 a.m. to 5:30 p.m. November 20, 2009; 8:30 a.m. to 3 p.m.

*Place:* National Science Foundation, 4201 Wilson Boulevard, Stafford I, Room 1235, Arlington, VA 22230.

*Type of Meeting:* Open.

*Contact Person:* Ms. Lisa Jones, Office of the Assistant Director, Directorate for Social, Behavioral, and Economic Sciences, National Science Foundation, 4201 Wilson Boulevard, Room 905, Arlington, Virginia 22230, 703–292–8700.

*Summary of Minutes:* May be obtained from contact person listed above.

*Purpose of Meeting:* To provide advice and recommendations to the National Science Foundation on major goals and policies pertaining to Social, Behavioral and Economic Sciences Directorate programs and activities.

*Agenda:*

**Thursday**

Updates and discussions on continuing activities.

• Budget process and status: FY 2010, FY 2011, and FY 2012.

• SBE Future Directions.

• Division Breakout Sessions: Overview and Key issues.

• Report from Breakout Sessions.

NSF Strategic Plan.

Discussion with NSF Director and Deputy Director.

Follow-up to SBE Science in Federal Context.

**Friday**

Updates and discussion on continuing activities.

• CISE and Cyberinfrastructure.

• SBE/CISE Joint AC Subcommittee on Portfolio Analysis.

• Climate and Energy Research.

• GPRA, OMB/OSTP Priorities and SciSIP. Innovation.

Open Discussion.

Planning for FY 2010 and Beyond.

Dated: October 22, 2009.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. E9–25769 Filed 10–26–09; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0453]**

### Draft Regulatory Guide, DG–1199, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors:'' Issuance, Availability; Extension of Comment Period

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Extension of comment period.

**FOR FURTHER INFORMATION CONTACT:** Mark Blumberg, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1083, or e-mail *Mark.Blumberg@nrc.gov*.

**DATES:** The comment period closes on January 13, 2010.

**ADDRESSES:** You may submit comments by any one of the following methods. Please include Docket ID NRC–2009–0453 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *Regulations.gov*. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

*Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2009–0453. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

*Mail comments to:* Michael T. Lesar, Chief, Rulemaking and Directives Branch (RDB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RDB at (301) 492–3446.

You can access publicly available documents related to this notice using the following methods:

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*. The Draft Regulatory Guide, DG–1199, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors,'' is available electronically under ADAMS Accession Number ML090960464.

**SUPPLEMENTARY INFORMATION:** On October 14, 2009 (74 FR 52822), the NRC published a notice of issuance and

availability of Draft Regulatory Guide DG–1199, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors.'' Due to the amount of highly technical material on DG–1199 the public comment period has been extended 30 additional days. The comment submittal deadline is extended from the original December 11, 2009 deadline to January 13, 2010.

Dated at Rockville, Maryland, this 20th day of October 2009.

For the Nuclear Regulatory Commission.

**Andrea D. Valentin,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. E9–25781 Filed 10–26–09; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0469; Docket No. 030–04552]**

## Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment to Byproduct Materials License No. 19–10306–01 for Unrestricted Release of the Department of the Army's Rad Yard Facility Located in the Bush River Study Area, Aberdeen Proving Ground, MD

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Issuance of Environmental Assessment and Finding of No Significant Impact for license amendment.

**FOR FURTHER INFORMATION CONTACT:** Dennis Lawyer, Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania; telephone 610–337–5366; fax number 610–337–5269 or by e-mail: *dennis.lawyer@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Byproduct Materials License No. 19–10306–01. This license is held by the Department of the Army, U.S. Army Research, Development and Engineering Command (the Licensee), for its 5-acre Rad Yard Facility (the Facility), located in the Bush River Study Area, Aberdeen Proving Ground, Maryland. Issuance of the amendment would authorize release of the Rad Yard Facility for unrestricted use. The Licensee requested this action in a letter dated September 18, 2008. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, *Code of Federal Regulations* (CFR), Part 51 (10 CFR Part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The amendment will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register**.

### II. Environmental Assessment

*Identification of Proposed Action*

The proposed action would approve the Licensee's September 18, 2008, license amendment request, resulting in release of the Rad Yard Facility for unrestricted use. License No. 19–10306–01 was issued on October 27, 1964, pursuant to 10 CFR Part 30, and has been amended periodically since that time. This license authorized the Licensee to use unsealed byproduct materials at the Rad Yard Facility for purposes of storing and processing radioactive waste. The license also authorized use of licensed material at other locations that will not be affected by this action; therefore, the license will not be terminated if the proposed action is approved.

The Rad Yard Facility is situated on approximately five acres and consists of two vacated small buildings, abandoned-in-place concrete slabs, sumps, and a waste water tank. The Facility is located in within the Army's Aberdeen Proving Ground, Edgewood Area and borders on the Bush River.

In October 2002, the Licensee ceased licensed activities at the Facility and initiated a survey and decontamination of the Facility. The Licensee contracted with Weston Solutions Inc. to perform remediation under reciprocity and their New Mexico License No. RD–245–20. Weston Solutions Inc. performed the decontamination in accordance with their NRC-approved, operating radiation safety procedures. The Licensee conducted surveys of the Facility and provided information to the NRC to demonstrate that it meets the criteria in Subpart E of 10 CFR Part 20 for unrestricted release.

*Need for the Proposed Action*

The Licensee has ceased conducting licensed activities at the Facility, and seeks the unrestricted use of its Facility.

*Environmental Impacts of the Proposed Action*

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclides with half-lives greater than 120 days: carbon 14, technetium 99, cobalt 60, strontium 90, and cesium 137. Prior to performing the final status survey, the Licensee's contractor conducted decontamination activities, as necessary, in the areas of the Facility affected by these radionuclides.

The Licensee conducted a final status survey on November 14 through December 12, 2007, February 12, 2008, and May 22, 2008. This survey included soil sampling and surface readings on the remaining building components at the Facility. The final status survey report was attached to the Licensee's amendment request dated September 18, 2008. The Licensee elected to demonstrate compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402 by developing site-specific derived concentration guideline levels (DCGLs), based in part on the screening approach described in NUREG–1757, ''Consolidated NMSS Decommissioning Guidance,'' Volume 2. The DCGL values were 5 pCi/g for cesium 137 and 0.5 pCi/g for cobalt 60, which would also be sufficient to mitigate the carbon 14, technetium 99 and strontium 90 levels. The Licensee's final status survey results were below these DCGLs and are in compliance with the As Low As Reasonably Achievable (ALARA) requirement of 10 CFR 20.1402. The NRC thus finds that the Licensee's final status survey results are acceptable.

The NRC staff conducted a confirmatory survey and sampling on November 13–14, 2007, and May 22, 2008. One of the building surface confirmatory survey results exceeded the DCGLs established for the Facility. Upon discovery, the licensee performed decontamination of the location and increased the measurement protocol to perform a 100 percent scan of the building. No other confirmatory survey or sample results exceeded the DCGLs established for the Facility. Based on its review, the staff has determined that the affected environment and any environmental impacts associated with the proposed action are bounded by the impacts evaluated by the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities'' (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The

Licensee also considered and appropriately accounted for the dose contribution from previous site releases. The calculation was submitted in a letter dated January 14, 2009. The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. The site has been impacted by arsenic contamination. The Army intends to remediate the arsenic contamination following the NRC-approved release of the facility for unrestricted use. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use and the amendment of the NRC materials license is in compliance with 10 CFR 20.1402, including the impact of residual radioactivity at previously-released site locations of use. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will not have a significant effect on the quality of the human environment.

*Environmental Impacts of the Alternatives to the Proposed Action*

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Licensee's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

*Conclusion*

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

*Agencies and Persons Consulted*

NRC provided a draft of this Environmental Assessment to the Maryland Department of the Environment for review on June 12, 2009. On June 23, 2009, the Maryland Department of the Environment's Air and Radiation Management Administration and Hazardous Waste Administration responded by electronic mail. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

## III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

## IV. Further Information

Documents related to this action, including the application for license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at: *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance;''
2. Title 10, *Code of Federal Regulations,* Part 20, Subpart E, ''Radiological Criteria for License Termination;''
3. Title 10, *Code of Federal Regulations,* Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions;''
4. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities;''
5. Final Status Survey Report, Bush River Study Area, Radioactive Waste Management Facility dated September 18, 2008 (ML082700930);
6. Final Status Survey Plan, Bush River Study Area, Radioactive Waste Management Facility dated October 2007 (ML073090556);
7. Bush River Study Area, Removal Action report for Non-Time Critical Removal Action Radioactive Waste Management Facility, Final dated January 2007 (ML071520147);
8. Department of the Army letter dated November 6, 2007, Final Status Survey Plan Revision 1 (ML073130509);
9. Department of the Army letter dated January 14, 2009 (ML090280503) with report (ML090280516);
10. ORISE Analytical Results dated August 21, 2009 (ML092510292); and
11. ORISE Analytical Results dated June 11, 2008 (ML081840212).

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Region I, 475 Allendale Road, King of Prussia this 20th day of October 2009.

For the Nuclear Regulatory Commission.

**James P. Dwyer,**

*Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.*

[FR Doc. E9–25780 Filed 10–26–09; 8:45 am]

BILLING CODE 7590–01–P

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## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0467]**

## Office of New Reactors; Interim Staff Guidance on Post-Combined License Commitments

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Solicitation of public comment.

**SUMMARY:** The NRC is soliciting public comment on its Proposed Interim Staff

Guidance (ISG) ESP/DC/COL–ISG–015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091671355). The purpose of this ISG is to modify and provide early site permit (ESP), design certification (DC) and combined license (COL) applicants additional clarity and guidance for the application of Section C.III.4 of Regulatory Guide (RG) 1.206. In addition, the ISG provides additional clarity to the guidance in NUREG–0800, Standard Review Plan Chapter 1.0, for NRC review of DC and COL applications. While reviewing DC and COL applications, the NRC staff determined that the guidance in Section C.III.4 of RG 1.206 on COL information items that cannot be resolved before the issuance of a license needed some additional clarification and guidance. In addition, it was determined that referring to this category of COL information items as ''COL Holder'' items is inappropriate. Specific guidance for determining which of the commitment types (*i.e.,* inspection, test, analysis, and acceptance criteria, license condition, and final safety analysis report commitment) was the most appropriate for these COL information items was considered necessary, along with examples for clarification, for common understanding by applicants preparing their COL applications and NRC staff reviewing these COL applications. The NRC staff issues ISGs to facilitate timely implementation of current staff guidance and to facilitate activities associated with review of applications by the Office of New Reactors. The NRC staff also intends to incorporate the approved ESP/DC/COL–ISG–015 into the next revision of RG 1.206 and related guidance documents.

**DATES:** Comments must be filed no later than 30 days from the date of publication of this notice in the **Federal Register**. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** Written comments may be submitted to Mr. Michael T. Lesar, Chief, Rulemaking and Directives Branch, MS TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Members of the public are invited and encouraged to submit comments electronically to *http://www.regulations.gov.* Search on Docket ID: NRC–2009–0467 and follow the instructions for submitting comments.

The NRC ADAMS provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by e-mail at *PDR.Resource@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. William F. Burton, Chief, Rulemaking and Guidance Development Branch, Division of New Reactor Licensing, Office of the New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; at telephone 301–415–6332 or e-mail at *william.burton@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The agency posts its issued staff guidance in the agency external Web page (*http://www.nrc.gov/reading-rm/doc-collections/isg/*).

The NRC staff is issuing this notice to solicit public comments on proposed ESP/DC/COL–ISG–015. After the NRC staff considers any public comments, it will make a determination regarding proposed ESP/DC/COL–ISG–015.

Dated at Rockville, Maryland, this 20th day of October 2009.

For the Nuclear Regulatory Commission.

**David B. Matthews,**

*Director, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. E9–25784 Filed 10–26–09; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

### Sunshine Act; Meeting Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATES:** Weeks of October 26, November 2, 9, 16, 23, 30, 2009.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**Week of October 26, 2009**

There are no meetings scheduled for the week of October 26, 2009.

**Week of November 2, 2009—Tentative**

*Tuesday, November 3, 2009*

9:25 a.m. Affirmation Session (Public Meeting) (Tentative). Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Unit 1 and 2); Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 3 and 4)—Referred Rulings on Contention Admissibility (Tentative).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

9:30 a.m. Briefing on Fire Protection Lessons Learned from Shearon Harris (Public Meeting). (Contact: Alex Klein, 301–415–2822.)

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

**Week of November 9, 2009—Tentative**

*Tuesday, November 10, 2009*

9:30 a.m. Briefing on NRC International Activities (Public Meeting). (Contact: Karen Henderson, 301–415–0202.)

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

**Week of November 16, 2009—Tentative**

*Tuesday, November 17, 2009*

9:30 a.m. Briefing on Equal Employment Opportunity (EEO) and Small Business Programs (Public Meeting). (Contact: Elva Bowden Berry, 301–415–1536.)

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

**Week of November 23, 2009—Tentative**

There are no meetings scheduled for the week of November 23, 2009.

**Week of November 30, 2009—Tentative**

*Tuesday, December 4, 2009*

9:30 a.m. Meeting with the Advisory Committee on Reactor Safeguards (Public Meeting). (Contact: Antonio Dias, 301–415–6805.)

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: Rochelle Bavol, (301) 415–1651.

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 *rohn.brown@nrc.gov*. Determinations on

requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed electronically to 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), or send an e-mail to *darlene.wright@nrc.gov*.

Dated: October 22, 2009.

**Rochelle C. Bavol,**

*Office of the Secretary.*

[FR Doc. E9–25924 Filed 10–23–09; 4:15 pm]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0468]**

## Appointments to Performance Review Boards for Senior Executive Service

**AGENCY:** U.S. Nuclear Regulatory Commission.

**ACTION:** Appointment to Performance Review Boards for Senior Executive Service.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has announced the following appointments to the NRC Performance Review Boards.

The following individuals are appointed as members of the NRC Performance Review Board (PRB) responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level employees:

Darren B. Ash, Deputy Executive Director for Corporate Management, Office of the Executive Director for Operations.

R. W. Borchardt, Executive Director for Operations.

Stephen G. Burns, General Counsel.

Elmo E. Collins, Jr., Regional Administrator, Region IV.

Margaret M. Doane, Director, Office of International Programs.

James E. Dyer, Chief Financial Officer.

Kathryn O. Greene, Director, Office of Administration.

Michael R. Johnson, Director, Office of New Reactors.

Eric J. Leeds, Director, Office of Nuclear Reactor Regulation.

Bruce S. Mallet, Deputy Executive Director for Reactor and Preparedness Programs, Office of the Executive Director for Operations.

Martin J. Virgilio, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, Office of the Executive Director for Operations.

Michael F. Weber, Director, Office of Nuclear Material Safety and Safeguards.

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Joseph R. Gray, Acting Deputy General Counsel, Office of the General Counsel.

Brian W. Sheron, Director, Office of Nuclear Regulatory Research.

Roy P. Zimmerman, Director, Office of Nuclear Security and Incident Response.

All appointments are made pursuant to Section 4314 of Chapter 43 of Title 5 of the United States Code.

**DATES:** *Effective Date:* October 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 492–2076.

Dated at Bethesda, Maryland, this 20th day of October 2009.

For the Nuclear Regulatory Commission.

**James F. McDermott,**

*Secretary, Executive Resources Board.*

[FR Doc. E9–25783 Filed 10–26–09; 8:45 am]

**BILLING CODE 7590–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60856; File No. 4–533]**

## Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols To Add BATS Exchange, Inc., as a Party Thereto

October 21, 2009.

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] notice is hereby given that on September 30, 2009, BATS Exchange, Inc., (''BATS'') filed with the Securities and Exchange Commission (''Commission'') an amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols (''Symbology Plan'' or ''Plan'').[3] The amendment proposes to add BATS as a party to the Symbology Plan. The Commission is publishing this notice to solicit comments on the proposed amendment from interested persons.

### I. Description and Purpose of the Amendment

The current parties to the Symbology Plan are NASDAQ OMX BX, Inc. (''BSE''), Chicago Board Options Exchange, Incorporated (''CBOE''), CHX, FINRA, the International Securities Exchange, LLC (''ISE''), Nasdaq, New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Amex LLC (''NYSE Amex'') (f/k/a NYSE Alternext US LLC'' (''NYSE Alternext'')), NSX and Phlx.[4] The proposed amendment to the Symbology Plan would add BATS as a party to the Symbology Plan. A self-regulatory organization (''SRO'') may become a party to the Symbology Plan if it satisfies the requirements of Section I(c) of the Plan. Specifically, an SRO may become a party to the Symbology Plan if: (i) It maintains a market for the listing or trading of Plan Securities[5] in accordance with rules approved by the Commission, which securities are identified by one, two, or three character symbols, on the one hand, or four or five character symbols, on the other hand, in each case prior to any suffix or special conditional identifier; (ii) it signs a current copy of the Plan; and (iii) it pays to the other parties a proportionate share of the aggregate development costs, based upon the number of symbols reserved by the new party during the first twelve (12) months of such party's membership.[6]

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] On November 6, 2008, the Commission approved the Symbology Plan that was originally proposed by the Chicago Stock Exchange, Inc. (''CHX''), The Nasdaq Stock Market, Inc. (''Nasdaq''), National Association of Securities Dealers, Inc. (''NASD'') (n/k/a Financial Industry Regulatory Authority, Inc. (''FINRA'')), National Stock Exchange, Inc. (''NSX''), and Philadelphia Stock Exchange, Inc. (''Phlx''), subject to certain changes. *See* Securities Exchange Act Release No. 58904, 73 FR 67218 (November 13, 2008) (File No. 4–533).

[4] On November 18, 2008, ISE filed with the Commission an amendment to the Plan to add ISE as a member to the Plan. *See* Securities and Exchange Act Release No. 59024 (November 26, 2008), 73 FR 74538 (December 8, 2008) (File No. 4–533).

On December 22, 2008, NYSE, NYSE Arca, and NYSE Alternext (''NYSE Group Exchanges'') and CBOE filed with the Commission amendments to the Plan to add the NYSE Group Exchanges and CBOE as members to the Plan. *See* Securities Exchange Act Release No. 59162 (December 24, 2008), 74 FR 132 (January 2, 2009) (File No. 4–533).

On December 24, 2008, BSE filed with the Commission an amendment to the Plan to add BSE as a member to the Plan. *See* Securities Exchange Act Release No. 59187 (December 30, 2008), 74 FR 729 (January 7, 2009) (File No. 4–533).

[5] ''Plan Securities'' are defined in the Symbology Plan as securities that: (i) are NMS securities as currently defined in Rule 600(a)(46) under the Act; and (ii) any other equity securities quoted, traded and/or trade reported through an SRO facility.

[6] Sections I(c) and V(a) of the Plan.

BATS has submitted a signed copy of the Symbology Plan to the Commission in accordance with the requirement set forth in the Symbology Plan regarding new parties to the plan.

**II. Effectiveness of the Proposed Symbology Plan Amendment**

The foregoing proposed Symbology Plan amendment has become effective pursuant to Rule 608(b)(3)(iii) [7] because it involves solely technical or ministerial matters. At any time within sixty days of the filing of the amendment, the Commission may summarily abrogate the amendment and require that it be refiled pursuant to paragraph (b)(1) of Rule 608,[8] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

**III. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–533 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–533. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–533 and should be submitted on or before November 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–25874 Filed 10–26–09; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 242.608(b)(3)(iii).

[8] 17 CFR 242.608(b)(1).

[9] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice: 6796]**

### 30-Day Notice of Proposed Information Collection: DS–4024, DS–4024e, American Citizens Services Internet Based Registration Service (IBRS), OMB No. 1405–0152

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* American Citizens Services Internet Based Registration Service (IBRS).
- *OMB Control Number:* 1405–0152.
- *Type of Request:* Revision.
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).
- *Form Number:* DS–4024, DS–4024e.
- *Respondents:* United States Citizens and Nationals.
- *Estimated Number of Respondents:* 676,946.
- *Estimated Number of Responses:* 676,946.
- *Average Hours Per Response:* 20 minutes.
- *Total Estimated Burden:* 225,648 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Voluntary.

**DATES:** Submit comments to the Office of Management and Budget (OMB) for up to 30 days from October 27, 2009.

**ADDRESSES:** Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

**FOR FURTHER INFORMATION CONTACT:** You may obtain copies of the proposed information collection and supporting documents from Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/PRI), U.S. Department of State, SA–29, 4th Floor, Washington, DC 20520, who may be reached on (202) 736–9082 or *ASKPRI@state.gov.*

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

*Abstract of proposed collection:* The American Citizens Services Internet Based Registration Service (IBRS) makes it possible for U.S. nationals to register on-line from anywhere in the world. In the event of a family emergency, natural disaster, country-specific notice or international crisis, U.S. embassies and consulates rely on this registration information to provide critical information and assistance to them.

*Methodology:* 99% of responses are received via electronic submission on the Internet. The service is available on the Department of State, Bureau of Consular Affairs web site *http://travel.state.gov* at *https://travelregistration.state.gov/ibrs/.* The paper version of the collection permits respondents who do not have Internet access to provide the information to the U.S. embassy or consulate by fax, mail or in person.

Dated: August 28, 2009.

**Mary Ellen Hickey,**

*Managing Director, Bureau of Consular Affairs, Department of State.*

[FR Doc. E9–25823 Filed 10–26–09; 8:45 am]

**BILLING CODE 4710–06–P**

## DEPARTMENT OF STATE

**[Public Notice: 6795]**

### 30-Day Notice of Proposed Information Collection: DS–2029, Application for Consular Report of Birth Abroad of a Citizen of the United States of America, OMB Control No. 1405–0011

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Application for Consular Report of Birth Abroad of a Citizen of the United States of America.
- *OMB Control Number:* 1405–0011.
- *Type of Request:* Revision.
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).
- *Form Number:* DS–2029.
- *Respondents:* Parents or legal guardians of United States citizen children born overseas.
- *Estimated Number of Respondents:* 64,374.
- *Estimated Number of Responses:* 64,374.
- *Average Hours per Response:* 20 minutes.
- *Total Estimated Burden:* 21,458 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Voluntary.

**DATE(S):** Submit comments to the Office of Management and Budget (OMB) for up to 30 days from October 27, 2009.

**ADDRESSES:** Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

**FOR FURTHER INFORMATION CONTACT:** You may obtain copies of the proposed information collection and supporting documents from Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/PRI), U.S. Department of State, SA–29, 4th Floor, Washington, DC 20520, who may be reached at (202) 736–9082 or *ASKPRI@state.gov.*

**SUPPLEMENTARY INFORMATION:** We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

*Abstract of proposed collection:* The DS–2029, Application for Consular Report of Birth Abroad of a Citizen of the United States of America, is used by parents or legal guardians who claim to have a U.S. citizen child born while abroad. The information collected on this form will be used to certify the acquisition of U.S. citizenship at birth of a person born abroad.

*Methodology:* The DS–2029 is available to download from the Internet. An application for a Consular Report of Birth is normally made in the consular district in which the birth occurred. The parent or guardian respondent will complete the form and present it to a United States Consulate or Embassy, which will examine the documentation, determine whether it is appropriate to issue such Report and enter the information provided into the Department of State American Citizen Services (ACS) electronic database.

Dated: August 28, 2009.

**Mary Ellen Hickey,**

*Managing Director, Bureau of Consular Affairs, Department of State.*

[FR Doc. E9–25822 Filed 10–26–09; 8:45 am]

**BILLING CODE 4710–06–P**

## DEPARTMENT OF STATE

**[Public Notice 6666]**

### Overseas Security Advisory Council (OSAC) Meeting Notice; Closed Meeting

The Department of State announces a meeting of the U.S. State Department—Overseas Security Advisory Council on November 17 at the U.S. Department of State, Washington, DC. Pursuant to Section 10(d) of the Federal Advisory Committee Act (5 U.S.C. Appendix), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(7)(E), it has been determined that the meeting will be closed to the public. The meeting will focus on an examination of corporate security policies and procedures and will involve extensive discussion of trade secrets and proprietary commercial information that is privileged and confidential, and will discuss law enforcement investigative techniques and procedures. The agenda will include updated committee reports, a global threat overview, and other matters relating to private sector security policies and protective programs and the protection of U.S. business information overseas.

For more information, contact Marsha Thurman, Overseas Security Advisory Council, Department of State, Washington, DC 20522–2008, phone: 571–345–2214.

Dated: October 16, 2009.

**Patrick D. Donovan,**

*Director of the Diplomatic Security Service, U.S. Department of State.*

[FR Doc. E9–25840 Filed 10–26–09; 8:45 am]

**BILLING CODE 4710–43–P**

## DEPARTMENT OF STATE

**[Public Notice 6794]**

### In the Matter of the Review of the Designation of al-Qa'ida in the Islamic Maghreb (a.k.a. AQIM, a.k.a. Tanzim al-Qa'ida fi Bilad al-Maghrib al-Islamiya) as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Records assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 re-designation of the aforementioned organization, formerly known as the Salafist Group for Call and Combat, as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of

the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register.**

Dated: October 16, 2009.

**James B Steinberg,**

*Deputy Secretary of State, Department of State.*

[FR Doc. E9–25821 Filed 10–26–09; 8:45 am]

BILLING CODE 4710–10–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236, as detailed below.

**Docket Number FRA–2009–0083**

*Applicant:* Union Pacific Railroad Company, Mr. William E. Van Trump, SR. AVP Engineering—Signal/Comm./TCO, 1400 Douglas Street, Stop 0910, Omaha, Nebraska 68179.

The Union Pacific Railroad Company (UP) seeks approval of the proposed discontinuance and removal of the rail locks on the Conley frogs on the Hudson Swing Bridge at Milepost 18.6 on the UP Altoona Subdivision, near Hudson, Wisconsin.

The reason given for the proposed changes is that the Hudson Swing Bridge has Conley frogs, which are self-aligning and require no locking device. The Hudson Swing Bridge has wedges with circuit controllers which measure the required 1″ to determine that the bridge is properly seated, and circuit controllers and linkage to measure the surface of the rail to within the required ⅜″.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and include a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

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–2009–0083) 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 document (or signing the document, 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 at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on October 21, 2009.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E9–25816 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Notice of Intent To Prepare an Environmental Impact Statement (EIS) for Proposed Transit Improvements in the Corridor Between the Anaheim Regional Transportation Intermodal Center (ARTIC) and The Anaheim Resort™ in the City of Anaheim, Orange County, CA

**AGENCY:** Federal Transit Administration (FTA), Department of Transportation (DOT).

*Subject:* Notice of Intent (NOI) to Prepare Environmental Impact Statement (EIS).

*Project Title:* Anaheim Fixed-Guideway Transit Corridor Study.

**SUMMARY:** The Federal Transit Administration (FTA), in cooperation with the Orange County Transportation Authority (OCTA) and the City of Anaheim, is planning to prepare a Draft Environmental Impact Statement/Environmental Impact Report (DEIS/EIR) to provide transit service over a 3.5-mile corridor between the future ARTIC on the east and The Anaheim Resort on the west. The EIS will be prepared in accordance with regulations implementing the National Environmental Policy Act (NEPA) as well as provisions of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, 2005). The purpose of this Notice of Intent is to alert interested parties regarding the plan to prepare the DEIS, to provide information on the proposed transit project, to invite participation in the EIS process, including comments on the scope of the DEIS proposed in this notice, and to announce that public scoping meetings will be conducted.

**DATES:** Written comments on the scope of the DEIS including the project's purpose and need, the alternatives to be considered, the impacts to be evaluated, and the methodologies to be used in the evaluations should be sent to Ms. Jamie Lai, Transit Manager, by December 1, 2009. A Scoping meeting will be held on Thursday, November 12, 2009 from 4 p.m. to 7 p.m. at the location indicated under **ADDRESSES** below. Agency representatives with an interest in the

proposed project are encouraged to attend a 4:30 p.m. presentation at the location listed below. Representatives of Native American Tribes and all Federal, State, regional and local agencies that may have an interest in any aspect of the project will be invited to be participating or cooperating agencies, as appropriate.

**ADDRESSES:** Written comments on the scope of the DEIS should be sent to Ms. Jamie Lai, Transit Manager, at City of Anaheim, Public Works Department, 200 S. Anaheim Blvd., Suite 276, Anaheim, CA 92805. Comments may be submitted in writing or may be made orally at the public scoping meetings. The address for the public scoping meeting is as follows: Anaheim Downtown Community Center—Assembly Hall A, 250 E. Center Street, Anaheim, CA 92805.

The Scoping Meeting will be held on Thursday, November 12, 2009 from 4 p.m. to 7 p.m. The project's purpose and need and the description of alternatives under consideration for the proposed project will be presented at this meeting. The meeting location will be accessible to persons with disabilities. If special translation or signing services or other special accommodations are needed, please contact Ms. Jennifer Labrado (949) 252–1755 or *jlabrado@consensusp.com* at least 48 hours before the scoping meeting. Paper copies of scoping materials may be obtained from Ms. Labrado. Also, scoping materials will be available at the meeting and on the City of Anaheim Website (*http://www.anaheim.net*).

**FOR FURTHER INFORMATION CONTACT:** Mr. Hymie Luden, City and Regional Planner, of the Federal Transit Administration's San Francisco Regional Office at (415) 744–2732 or write to FTA Region IX Office, 201 Mission Street, Suite 1650, San Francisco, CA 94105–1926.

**SUPPLEMENTARY INFORMATION:**

*Scoping:* The FTA, OCTA, and the City of Anaheim invite all interested individuals and organizations, public agencies, and Native American Tribes to provide comments on the scope of the DEIS, including the project's purpose and need, the alternatives under consideration, the impacts to be evaluated, and the evaluation methods to be used. Comments should focus on: alternatives that may be less costly or have fewer environmental or community impacts while achieving similar transportation objectives and the identification of any significant social, economic or environmental issues related to alternatives.

*The Proposed Project:* The Anaheim Fixed-Guideway Transit Corridor Study proposes to provide a new east-west transit connection between the ARTIC regional transportation hub in the Platinum Triangle area of the City of Anaheim and the general area of The Anaheim Resort. The project is envisioned to operate as a high-capacity system, providing convenient and efficient transfers to Metrolink, Amtrak, local fixed-route bus, and future bus rapid transit and high-speed train services connecting at ARTIC. This connection will link Orange County's ''backbone'' Metrolink commuter rail system to Anaheim's major employment and activity centers in the Platinum Triangle and The Anaheim Resort.

Funding for the Anaheim Fixed-Guideway Transit Corridor study was awarded to the City of Anaheim through OCTA's Go Local Program, which provides competition-based transit grants to Orange County cities for projects intended to improve transit access to Metrolink (commuter train) service. OCTA is providing program management oversight of the Anaheim Fixed Guideway Transit Corridor study.

*Purpose and Need for the Proposed Project:* The primary purpose of the Anaheim Fixed-Guideway Transit Corridor Study is to provide a safe, convenient, frequent, and easy-to-navigate transportation connection, in the heavily-traveled east-west corridor between the ARTIC and The Anaheim Resort, for residents, employees, and visitors to local and regional destinations. The project is needed to accommodate existing and projected future demand for local and regional travel in a unique visitor/recreational market in the heart of central Orange County's entertainment district. Connecting Anaheim activity centers with a new and highly visible transit option to the proposed ARTIC addresses deficiencies in Anaheim's transportation system. Such a project would also be expandable to serve local and region-wide travel needs. In November 2006, voters in Orange County approved the renewal of Measure M (a half-cent local sales tax) to fund future transportation investments. The Renewed Measure M Transportation Investment Plan is a 30-year, multi-billion dollar program, with 25 percent of the net revenue to be dedicated solely to countywide transit programs. The OCTA created the Go Local Program that provides funding through transit grants, so that Orange County cities can improve transit access to Metrolink (commuter train) service. This connection will address transportation issues and deficiencies related to highway congestion, transit, population and employment, parking demand and air quality in the corridor. A Fixed-Guideway project in this corridor is part of the City of Anaheim's 2007 Transit Master Plan. In addition, the proposed project is part of the Southern California Association of Governments' adopted 2008 Regional Transportation Plan (Strategic Plan List of Projects).

*Alternatives:* Project alternatives currently under consideration include a No-Build Alternative, a Transportation System Management Alternative, a Bus Rapid Transit Alternative, and an Elevated Fixed-Guideway Alternative, as follows:

- *No-Build Alternative*—the No-Build Alternative includes all programmed transportation improvements in the greater project area through the year 2035, excepting all elements of the Anaheim Fixed-Guideway Transit Corridor Study.
- *Transportation System Management (TSM) Alternative*—The TSM Alternative focuses on low-cost improvements to the project area transportation system that would address the project's purpose and need without requiring a major capital investment. The TSM Alternative includes strategies such as changeable message signs along freeways and improved traffic signal timing; transit service improvements (for example, bus route restructuring, expanded use of low-floor, multi-door buses, timed transfers, signal prioritization for buses, and simplified fare collection); a new bus route to serve the study corridor; and additional marketing to encourage carpool/vanpool usage.
- *Semi-Exclusive At-Grade Bus Rapid Transit (BRT) Alternative*—this alternative consists of a new BRT route approximating the proposed Fixed-Guideway alignment and including five new bus stations. The new BRT service would operate at grade on local city streets in exclusive lanes where sufficient right-of-way exists and in mixed-flow traffic where existing right-of-way does not allow for a dedicated lane.
- *Elevated Fixed-Guideway-Central Alignment Alternative*—the Elevated Fixed-Guideway Alternative would begin at the planned ARTIC transportation hub and travel westward along Gene Autry Way, northward along Haster Street and Anaheim Boulevard, westward along Disney Way, and southward along Harbor Boulevard to terminate at Harbor Boulevard and Convention Way. A tail track for operational purposes will be included south of Convention Way along Harbor

Boulevard and would terminate north of Orangewood Avenue. The Fixed-Guideway facility would be completely elevated. Four station locations and one transit center/station, as well as four alternative maintenance facility sites, will be evaluated for this alternative. The technology to be used would be some form of automated guideway technology. A specific technology would be selected only if the Elevated Fixed-Guideway Alternative is approved after completion of the environmental evaluation. The Elevated Fixed-Guideway Alternative has two alignment variations to the north of Disney Way in the segment between Anaheim Boulevard and Harbor Boulevard. Four pedestrian connectors linking stations to activity centers are also proposed as part of the project: from the station at Gene Autry Way and State College Boulevard eastward to the Angel Stadium of Anaheim, from the station on Disney Way or north of Disney Way southward to The Shops at Anaheim GardenWalk, from this same station westward to the Disney theme park entrance on Harbor Boulevard, and from the station at Harbor Boulevard and Convention Way westward along Convention Way to the Anaheim Convention Center entrance.

Station/stop locations for both build alternatives are proposed to serve major activity centers in the study area, including the ARTIC transportation hub, Angel Stadium of Anaheim, the Platinum Triangle, the residential area west of the Interstate 5 Freeway, and attractions in The Anaheim Resort district including The Shops at Anaheim GardenWalk, Disney theme parks, and the Anaheim Convention Center.

*The EIS Process and the Role of Participating Agencies and the Public:* The purpose of the EIS process is to explore in a public setting the potentially significant effects of implementing the proposed action and alternatives on the physical, human, and natural environment. Areas of investigation include, but are not limited to, land use, environmental justice, cultural resources (including historical, archaeological, and paleontological resources), visual and aesthetic qualities, air quality, noise and vibration, energy use, traffic, safety and security, wetlands, threatened and endangered species, and hazardous materials. Regulations implementing NEPA, as well as provisions of SAFETEA–LU, call for public involvement in the EIS process. Section 6002 of SAFETEA–LU requires that FTA, OCTA, and the City of Anaheim do the following: (1) Extend an invitation to other Federal and non-Federal agencies and Native American Tribes that may have an interest in the proposed project to become ''participating agencies'', (2) Provide an opportunity for involvement by participating agencies and the public in helping to define the purpose and need for a proposed project, as well as the range of alternatives for consideration in the impact statement, and (3) Establish a plan for coordinating public and agency participation in and comment on the environmental review process. An invitation to become a participating agency, with the scoping information packet appended, will be extended to other Federal and non-Federal agencies and Native American Tribes that may have an interest in the proposed project. It is possible that we may not be able to identify all Federal and non-Federal agencies and Native American Tribes that may have such an interest. Any Federal or non-Federal agency or Native American Tribe interested in the proposed project that does not receive an invitation to become a participating agency should notify the City of Anaheim Transit Manager identified above under **ADDRESSES**, at the earliest opportunity, but no later than 30 days following this notice.

A comprehensive public involvement program has been developed. A technical advisory committee called the Project Development Team, consisting of representatives of state, regional and local agencies, is in place. The program also includes a two-part public scoping process consisting of a combined California Environmental Quality Act (CEQA)/early NEPA scoping process with a meeting held July 29, 2009 and a NEPA scoping process, noticed herein; a public review/comment period and public hearing on the Draft Environmental Impact Statement; development and distribution of project newsletters; and posting of information on the project website. We invite the public and participating agencies to consider the preliminary statement of purpose and need for the proposed project, as well as the alternatives proposed for consideration. Comments on potential significant environmental impacts that may be associated with the proposed project are also welcomed. All comments and suggestions will be given serious consideration. In accordance with 23 CFR 771.105(a) and 771.133, FTA will comply with all Federal environmental laws, regulations and executive orders applicable to the proposed project during the environmental review process to the maximum extent practicable. These requirements include, but are not limited to, the regulations of the Council on Environmental Quality implementing NEPA (40 CFR parts 1500–1508 and 23 CFR part 771), the project-level air quality conformity regulation of the U.S. Environmental Protection Agency (EPA) (40 CFR Part 93), Section 404(b)(1) guidelines of EPA (40 CFR Part 230), Executive Orders 11988, 11990 and 12898 regarding floodplains, wetlands, and environmental justice, respectively, Section 106 of the National Historic Preservation Act (36 CFR Part 800), Section 7 of the Endangered Species Act (50 CFR Part 402), and Section 4(f) of the Department of Transportation Act (23 CFR 771.135).

**Edward Carranza, Jr.,**

*Regional Administrator, FTA, Region 9.*

[FR Doc. E9–25820 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–57–P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on an Operational Improvement Project in Santa Cruz County, CA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by FHWA, pursuant to 23 U.S.C. 327.

**SUMMARY:** The FHWA is issuing this notice to announce actions taken by FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. Section 139(*l*)(1). The actions relate to the Highway 1 Soquel to Morrissey Auxiliary Lanes Project in the City of Santa Cruz, and Santa Cruz County, California. The project would include the following: Adding auxiliary lanes to Highway 1 between the interchanges of Soquel Avenue and Morrissey Boulevard for a distance of less than one mile; replacing the La Fonda overcrossing while providing wider sidewalks and new bike lanes; providing sidewalk improvements at Rooney Street and Morrissey Boulevard west of Pacheco Avenue; and installing a raised crosswalk at the south end of the La Fonda Bridge near the entrance to Harbor High School.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the project will be barred unless the claim is filed on or before April 26, 2010. If the Federal law that authorizes judicial

review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Sheila Masters, Transportation Engineer, 650 Capitol Mall, Suite 4–100, Sacramento, California, 95814; phone: (916) 498–5043; fax (916) 498–5008; e-mail *sheila.masters@dot.gov;* regular office hours 8 AM to 5 PM. For Caltrans: G. William ''Trais'' Norris, III Senior Environmental Planner, 2015 E. Shields Ave., Suite 100, Fresno, CA 93726–5428; phone: (559) 243–8178; e-mail: *trais_norris@dot.ca.gov* or fax; (559) 243–8215; regular office hours 8 a.m. to 5 p.m., closed the first, second, and third Fridays of each month.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the Federal Highway Administration (FHWA) has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following project in the State of California. The purpose of the Soquel to Morrissey Auxiliary Lanes Project is to improve traffic conditions for lane changes and merges on Highway 1 between Soquel Avenue and Morrissey Boulevard and improve pedestrian and bicycle access and safety. This project is subject to federal and state environmental review requirements because state and federal funds are proposed for use in this project. Project documentation, therefore, was prepared in compliance with both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (EA)/Finding of No Significant Impact (FONSI) for the project, approved on September 18, 2009, and in other documents in the FHWA administrative records. The EA/FONSI and other documents are available by contacting FHWA or Caltrans at the addresses provided above. The FHWA EA/FONSI can be viewed online at *http://www.dot.ca.gov/dist05/projects/soquel/index.htm* and at these public locations in the project area: Central Library, 224 Church Street, Santa Cruz, CA 95060; Branciforte Library, 230 Gault Street, Santa Cruz, CA 95062; Live Oak Library, 2380 Portola Drive, Santa Cruz, CA 95062; Santa Cruz County Regional Transportation Commission office at 1523 Pacific Avenue, Santa Cruz, CA 95060.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. Council on Environmental Quality regulations
2. National Environmental Policy Act (NEPA)
3. Department of Transportation Act of 1966
4. Federal Aid Highway Act of 1970
5. Clean Air Act Amendments of 1990
6. Clean Water Acts of 1977 and 1987
7. Endangered Species Act of 1973
8. Migratory Bird Treaty Act
9. Title VI of the Civil Rights Act of 1964
10. Uniform Relocation Assistance and Real Property Acquisition Act of 1970
11. National Historic Preservation Act of 1966
12. Historic Sites Act of 1935
13. Executive Order 11990, Protection of Wetlands
14. Executive Order 13112, Invasive Species
15. Executive Order 11988, Floodplain Management
16. Executive Order 12898, Environmental Justice

**Authority:** 23 U.S.C. 139(*l*)(1).

Issued on: October 21, 2009.

**Karen Bobo,**

*Director, Local Agency Programs, Federal Highway Administration, Sacramento, California.*

[FR Doc. E9–25778 Filed 10–26–09; 8:45 am]

**BILLING CODE 4910–RY–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2009–49]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before November 16, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2009–0665 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Katherine Haley, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 493–5708, facsimile (202) 267–5075; e-mail: *katherine.l.haley@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on October 21, 2009.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2009–0665.

*Petitioner:* Airbus.

*Section of 14 CFR Affected:* Sections 25.1457(a)(6); 91.609(i)(1); and 121.359(j)(1).

*Description of Relief Sought:* Airbus seeks relief on behalf of U.S.-registered operators taking delivery of new Airbus

airplanes, manufactured between April 7, 2010 and December 31, 2011. The relief sought would enable Airbus A318/319/320/321 and Airbus A330/340 airplanes to be operated for a specific time without the datalink recording requirements and without increased sampling rates of certain flight data recorder parameters required by the sections listed above.

[FR Doc. E9–25744 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2009–48]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before November 16, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2009–0922 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Katherine Haley, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 493–5708, facsimile (202) 267–5075; e-mail: *katherine.l.haley@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on October 21, 2009.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2009–0922.

*Petitioner:* Bombardier Aerospace.

*Section of 14 CFR Affected:* Sections 25.1457(a)(6) and (d)(5); 91.609(i)(1); 121.359(j)(1); 125.227(i); 129.24; 135.151(g)(1) and (g)(2); and related footnotes in App E of part 91, App M of part 121, App E of part 125, and App F of part 135.

*Description of Relief Sought:* Bombardier Aerospace seeks relief on behalf of U.S. registered operators taking delivery of the Bombardier Global and Challenger business jet, Q-Series turboprop, CRJ regional jet airplanes manufactured between April 7, 2010 and April 7, 2012. The relief sought would enable operation of these airplanes for a specific time without the (1) datalink recording requirements, (2) increased sampling rates of certain flight data recorder parameters, and (3) cockpit voice recorder (CVR) independent power source required by the sections listed above. Additionally, the relief sought would enable Bombardier to offer controller pilot datalink communications capability on Global Express XRS and Global 500 airplanes manufactured on or after April 7, 2010.

[FR Doc. E9–25746 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2009–50]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before November 16, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2009–0933 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to http://www.regulations.gov and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may

review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Katherine Haley, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 493–5708, facsimile (202) 267–5075; e-mail: *katherine.l.haley@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on October 21, 2009.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2009–0933.

*Petitioner:* Gulfstream Aerospace Corporation.

*Section of 14 CFR Affected:* Sections 25.1457(a)(6) and (d)(5); 91.609(i)(1) and (j); 129.24; 135.151(g)(1) and (h); Part 91 Appendix E, footnote 5 and Part 135 Appendix E, footnote 18.

*Description of Relief Sought:* Gulfstream Aerospace Corporation seeks relief on behalf of itself and other U.S.-registered operators taking delivery of Gulfstream Model GIV–X (G350/G450) and Model GV–SP (G500/G550) airplanes manufactured between April 7, 2010 and April 7, 2012. The relief sought would enable these airplanes to be operated for a specific time without the (1) Datalink recording requirements, (2) increased sampling rates of certain flight data recorder parameters, and (3) cockpit voice recorder (CVR) independent power source required by the sections listed above.

[FR Doc. E9–25747 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2009–18]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before November 16, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2009–0438 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Katherine Haley, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 493–5708, facsimile (202) 267–5075; e-mail: *katherine.l.haley@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on October 21, 2009.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2009–0438.

*Petitioner:* The Boeing Company.

*Section of 14 CFR Affected:* Sections 25.1457(a)(6); 91.609(i)(1); 121.359(j)(1); 121.227(i); and related footnotes in App E of part 91, App M of part 121, App E of part 125.

*Description of Relief Sought:* The Boeing Company seeks relief on behalf of U.S. registered operators taking delivery of new Boeing Model 777 manufactured between April 7, 2010 and December 31, 2013. The relief sought would enable operation of these airplanes for a specific time without the (1) datalink recording requirements and (2) increased sampling rates of certain flight data recorder parameters required by the sections listed above.

[FR Doc. E9–25748 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2009–47]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before November 16, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2009–0672 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Katherine Haley, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 493–5708, facsimile (202) 267–5075; e-mail: *katherine.l.haley@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on October 21, 2009.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2009–0672.

*Petitioner:* The Boeing Company.

*Section of 14 CFR Affected:* Sections 25.1457(a)(6) and (d)(5); 91.609(i)(1); 121.359(j)(1); 125.227(i); 129.24; 135.151(g)(1) and (2); and related footnotes in App E of part 91, App M of part 121, App E of part 125, and App F of part 135.

*Description of Relief Sought:* The Boeing Company seeks relief on behalf of U.S. registered operators taking delivery of new Boeing Model 737, 747, 767, and 777 airplanes manufactured between April 7, 2010 and April 7, 2011. The relief sought would enable operation of these airplanes for a specific time without (1) Datalink recording requirements, (2) increased sampling rates of certain flight data recorder parameters, and (3) cockpit voice recorder (CVR) independent power source required by the sections listed above. Additionally, the relief sought would enable operation of Boeing Model 777 airplanes without CVR independent power source. The relief sought would also enable Boeing to offer controller pilot datalink communications capability on these models for airplanes operated after April 7, 2010.

[FR Doc. E9–25745 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–13–P

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## 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.

### Michigan State Trust for Railway Preservation, Inc.

[Docket Number FRA–2009–0084]

The Michigan State Trust For Railway Preservation, Inc. (Petitioner) seeks a waiver of compliance from certain provisions of Railroad Freight Car Safety Standards, 49 CFR 215.303, that requires restricted railroad freight car be stencilled in a specified way.

The Petitioner is a Michigan Corporation and 501(c)(3) public charity whose mission is to preserve the nation's steam locomotive heritage. The Petitioner operates the Steam Railroading Institute, with the address of P.O. Box 665, Owosso, Michigan 48867–0665.

The Petitioner owns ten freight cars of various built dates ranging from December 1923, to January 1957. In a separate request, the Petitioner is seeking special approval of continued use of these cars in accordance with 49 CFR 215.203(c). In this petition, the petitioner stated that the main reason for the petitioner's maintenance and operation of these historic cars is their status and the attraction as operating historic artifacts. Stencilling the cars in order to meet the letter of Section 215.303 would violate the historic impression that the car is maintained to preserve. The Petitioner further stated that the operation will be confined to the Great Lakes Central Railroad in Michigan, at speeds not exceeding 40 miles per hour with light tonnage, in accordance with Part 215. These cars will never be subject to interchange.

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–2009–0084) 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 document (or signing the document, 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 at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on October 21, 2009.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E9–25819 Filed 10–26–09; 8:45 am]

**BILLING CODE 4910–06–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) has received a request for a waiver of compliance from 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.

**Central California Traction Company & the United Transportation Union**

[Waiver Petition Docket Number FRA–2009–0077]

The Central California Traction Company (CCT) and the United Transportation Union (UTU) jointly seek a waiver from compliance of the provisions of 49 U.S.C. 21103(a)(4), which provides that a train employee may not be required or allowed to remain or go on duty after that employee has initiated an on-duty period each day for 6 consecutive days, unless that employee has had at least 48 hours off duty at the employee's home terminal.

The parties state that provisions of their current collective bargaining agreements provide for an enhanced level of rest and safety for employees working regular or extra board assignments that is superior to the conditions imposed by 49 U.S.C. 21103(a)(4). Specifically, the agreements provide for four regular assignments working Monday through Friday, with regular starting times. Extra assignments are operated on weekends, usually one on Saturday and one on Sunday. Employees are called on Friday afternoon for the weekend assignments with Extra board employees, who fill vacancies in regular and extra weekend assignments, are subject to call during certain calling windows, and have one scheduled day off. CCT crews always complete their assignments and spend their off-duty periods at their home terminal. These provisions would be combined with compliance with other provisions of the hours of service laws, including a minium of 10 hours of undisturbed rest between assignments, and employees not exceeding 276 hours of service a month. At the time of this petition, CCT had 16 employees in train and engine service; 12 on regular assignments and the remainder on the extra board. The petition submitted by CCT and UTU may be viewed at *http://www.regulations.gov* under the docket number listed above.

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–2009–0077) 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 document (or signing the document, 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 at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on October 21, 2009.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E9–25817 Filed 10–26–09; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Title 49 Code of Federal Regulations (CFR) § 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance with certain requirements of the Federal railroad safety regulations. 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.

**New Jersey Transit Rail Corporation**

[Docket Number FRA–2009–0096]

The New Jersey Transit Rail Corporation (NJTR) seeks a waiver from the requirements of 49 CFR 240.117(e)(1) through (4), 49 CFR 240.305, and 49 CFR 240.307 in connection with implementation of a Close Call Reporting System (C3RS) Demonstration Pilot Project (Pilot Project) sponsored by FRA's Office of Research and Development. These sections of the regulation relate to punitive actions that are required to be taken against locomotive engineers for the violation of certain railroad operating rules. Refer to 49 CFR Part 240 for the specific regulatory requirements.

NJTR and selected employees of NJTR's rail system represented by the American Train Dispatchers Association (ATDA), the Brotherhood of Locomotive Engineers and Trainmen (BLET), and the United Transportation Union (UTU), desire to participate in the Pilot Project, which is one of the action items included in FRA's *Action Plan for Addressing Critical Railroad Safety Issues* (Action Plan). The Action Plan is available at *http://www.fra.dot.gov*. In addition, 49 U.S.C. 20156, enacted as part of the Rail Safety Improvement Act of 2008 (Pub. L. 110–432) authorizes the conduct of ''pilot programs'' designed to evaluate and manage railroad safety risks. The Pilot Project is one such program.

As noted in the *Action Plan,* in other industries such as aviation and mining, as well as in the European railway industry, implementation of ''close call'' reporting systems that shield reporting employees from discipline (and the employers from punitive sanctions levied by regulation) have contributed to major reductions in accidents. In March of 2005, FRA completed an overarching memorandum of understanding with railroad labor organizations and management to develop pilot programs to document close calls, *i.e.*, unsafe events that do not result in a reportable accident but very well could have. Participating railroads are expected to develop corrective actions to address the problems that may be revealed. The aggregate data may prove useful in FRA's decision-making concerning regulatory and other options to address human factor-caused accidents.

NJTR, ATDA, BLET, UTU, the Bureau of Transportation Statistics (BTS) and FRA have developed and signed an implementing memorandum of understanding (IMOU), based on the FRA's overarching memorandum of understanding, as a first step in commencing the Pilot Project. The Pilot Project would involve approximately 1,400 yard, road service, yardmaster, and train dispatcher employees working within the boundaries of NJTR's operating territory (including the Southern Tier and Pascack Valley Line, but not Conrail and Amtrak operating territories). As referenced in the IMOU, certain ''close calls'' may be properly reported by the employee(s) involved and later discovered by NJTR, for example, through subsequent retrospective analysis of locomotive event recorder data, etc. In order to encourage employee reporting of close calls, the IMOU contains provisions to shield the reporting employee from NJTR discipline. NJTR, ATDA, BLET, and UTU also desire to shield the reporting employee(s) and NJTR from punitive sanctions that would otherwise arise as provided in certain sections of 49 CFR Part 240 for properly reported close call events as defined in the IMOU. The waiver petition is requested for the duration of the Pilot Project (5 years from implementation or until the demonstration project is completed or parties to the IMOU withdraw as described in the IMOU, whichever is first).

**Note:** Article 7.2 (of the IMOU) CONDITIONS UNDER WHICH A REPORTING EMPLOYEE IS NOT PROTECTED FROM NJTR DISCIPLINE AND/OR DECERTIFICATION AND OTHER FRA ENFORCEMENT—NJTR employees included in this C3RS/IMOU receive no protection from discipline and/or decertification or from FRA enforcement action when one or more of the following conditions occur:

1. The employee's action or lack of action was intended to damage NJTR or another entity's operations or equipment or to injure other individuals, or intentionally places others in danger (*e.g.*, sabotage);
2. The employee's action or lack of action involved a criminal offense;
3. The employee's behavior involved substance abuse or inappropriate use of controlled substances;
4. If the report is rejected by BTS or the Peer Review Team (PRT);
5. The event resulted in any type of accident and/or has caused or alleged to have caused any injury, illness, or medical treatment of any kind to any person involved in the event;
6. The event resulted in an identifiable release of a hazardous material; or
7. The event was observed in real-time by FRA and/or a railroad employee and reported to NJTR management; or
8. The event was observed in real time as part of Efficiency Testing.

Similarly, an employee is not exempt from discipline and/or decertification for a violation that NJTR or FRA identifies contemporaneously (*e.g.*, a block circuit is occupied by a train without authority, and the train dispatcher notices it before the train backs off the circuit) before the employee files a close call report. In such situations, NJTR or FRA may use event recorder information to support discipline and/or decertification and/or enforcement. For example, a NJTR official, who observes a train operate past a signal that requires a stop, may use any relevant data recorded by the locomotive's event recorder in pursuing disciplinary action against the train crew, regardless of whether a member of the crew timely files a close call report.

In its petition, NJTR indicated that the parties signatory to the IMOU believe the data from these properly reported close call incidents as defined in the IMOU will be invaluable in analysis and development of effective corrective actions. NJTR expressed the view that without the requested waiver, the employee(s) involved in incidents such as those described above will not file reports of the incidents and that the incidents will likely go undetected, resulting in no opportunity for analysis, data trending or appropriate corrective actions. Noting the success of close call reporting systems in other industries (*e.g.*, aviation and maritime), NJTR further indicated that all parties signatory to the IMOU and participating in the Pilot Project believe that the Project and requested regulatory relief is in the public interest and consistent with railroad safety.

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–2009–0096) 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 20 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 October 21, 2009.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E9–25815 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Request for an Extension of a 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) has received a request for an extension of a waiver of compliance from 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.

**Union Pacific Railroad Company**

[Docket Number FRA–2007–27322)

Pursuant to 49 CFR 211.41 and 211.51, by letter dated November 13, 2007, FRA authorized the Union Pacific Railroad Company (UP) to conduct field testing of its processor-based train control system identified as the Vital-Train Management System (V–TMS). In the same letter, FRA provided UP temporary conditional relief from certain provisions of 49 CFR Parts 216, 217, 218, 229, 233, 235, 236, and 240 related to the field testing. By letter dated August 3, 2009, UP has requested that FRA extend the regulatory relief granted in order to continue field testing of its V–TMS system until December 31, 2015, or until such time as the relief is superseded by an FRA approved Positive Train Control Implementation Plan (PTCIP) and any other filings required in accordance with final regulations implementing § 104 of the Rail Safety Improvement Act of 2008 (codified at 49 U.S.C. 20157).

A request for an informational filing extension, as required under 49 CFR Part 236, subpart H, has also been prepared and submitted in conjunction with this waiver extension request and can be found in the same docket (FRA–2007–27322) as this waiver extension request. UP has an approved Railroad Safety Program Plan as provided for 49 CFR 236.905 (Docket Number FRA–2006–24002).

Although FRA is not soliciting public comment on the waiver extension request, interested parties are invited to review the request and associated documents at the following locations:

- *Web site: http://www.regulations.gov*. Follow the online instructions for a simple search on the DOT electronic docket site (Docket Number FRA–2007–27322). All documents in the public docket that are associated with the waiver request are available on the web site for inspection and copying.
- 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.

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 October 19, 2009.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E9–25818 Filed 10–26–09; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

October 20, 2009.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before November 27, 2009 to be assured of consideration.

**Alcohol and Tobacco Tax and Trade Bureau (TTB)**

*OMB Number:* 1513–0100.

*Type of Review:* Extension.

*Title:* Applications, Notices, and Relative to Importation and Exportation of Distilled Spirits, Wine, and Beer, Including Puerto Rico and Virgin Islands.

*Description:* Beverage alcohol, industrial alcohol, beer, and wine are taxed when imported. The taxes on these commodities coming from the Virgin Islands and Puerto Rico are largely returned to these insular possessions. Exports are mainly tax-free. These documents ensure that proper taxes are collected and returned according to law.

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 180 hours.

*Clearance Officer:* Frank Foote (202) 927–9347, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G. Street, NW., Washington, DC 20005.

*OMB Reviewer:* Shagufta Ahmed, (202) 395–7873, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Celina Elphage,**

*Treasury PRA Clearance Officer.*

[FR Doc. E9–25755 Filed 10–26–09; 8:45 am]

BILLING CODE 4810–31–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Revenue Procedure 97–46 and Revenue Procedure 97–44

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

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 98–46 and Revenue Procedure 97–44, LIFO Conformity Requirement.

**DATES:** Written comments should be received on or before December 28, 2009 to be assured of consideration.

**ADDRESSES:** Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or

copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* LIFO Conformity Requirement.

*OMB Number:* 1545–1559.

*Revenue Procedure Number:* Revenue Procedure 98–46 and Revenue Procedure 97–44.

*Abstract:* Revenue Procedure 97–44 permits automobile dealers that comply with the terms of the revenue procedure to continue using the LIFO inventory method despite previous violations of the LIFO conformity requirements of Internal Revenue Code section 472(c) or (e)(2). Revenue Procedure 98–46 modified Revenue Procedure 97–44 by allowing medium-and heavy-duty truck dealers to take advantage of the favorable relief provided in Revenue Procedure 97–44.

*Current Actions:* There are no changes being made to the revenue procedure at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 5,000.

*Estimated Average Time per Respondent:* 20 hours.

*Estimated Total Annual Reporting Burden:* 100,000.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 13, 2009.

**R. Joseph Durbala,**

*IRS Reports Clearance Officer.*

[FR Doc. E9–25741 Filed 10–26–09; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Risk-Based Capital Standards: Advanced Capital Adequacy Framework

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

**DATES:** Submit written comments on or before November 27, 2009. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 395–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at *ira.mills@ots.treas.gov,* (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

*Title of Proposal:* Risk-Based Capital Standards: Advanced Capital Adequacy Framework.

*OMB Number:* 1550–0115.

*Form Number:* N/A.

*Description:* On December 7, 2007, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation issued the joint final rule titled Risk-Based Capital Standards: Advanced Capital Adequacy Framework (rule) implementing a new risk-based regulatory capital framework for institutions in the United States (72 FR 69288). The rule is based on the June 2004 Basel Committee on Banking Supervision's document, ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' (New Accord).

The OTS is now issuing a 30-Day **Federal Register** Notice to implement Basel II for institutions in the United States. The rule sets forth a new risk-based capital adequacy framework that would require some savings associations and allow other qualifying savings associations to use an internal ratings-based approach to calculate regulatory credit risk capital requirements and advanced measurement approaches to calculate regulatory operational risk capital requirements. Information collection requirements in the proposed rule are found in Appendix F, Sections 21–23, 42, 44, 53, and 71. The collections of information are necessary in order to implement Basel II.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 3.

*Estimated Number of Responses:* 3.

*Estimated Burden Hours per Response:* 4,000 hours per response.

*Estimated Frequency of Response:* Quarterly; annually.

*Estimated Total Burden:* 12,000 hours.

*Clearance Officer:* Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Date: October 21, 2009.

**Ira L. Mills,**

*Paperwork Clearance Officer, Office of Thrift Supervision.*

[FR Doc. E9–25760 Filed 10–26–09; 8:45 am]

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Federal Register

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# Part II

# Environmental Protection Agency

## 40 CFR Parts 51, 52, 70, et al.
## Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 51, 52, 70, and 71

**[EPA–HQ–OAR–2009–0517; FRL–8966–7]**

**RIN 2060–AP86**

## Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to tailor the major source applicability thresholds for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act) and to set a PSD significance level for GHG emissions. This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions and, as a result, trigger PSD and title V applicability requirements for GHG emissions. If PSD and title V requirements apply at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate. On the basis of the legal doctrines of ''absurd results'' and ''administrative necessity,'' this proposed rule would phase in the applicability thresholds for both the PSD and title V programs for sources of GHG emissions. The first phase, which would last 6 years, would establish a temporary level for the PSD and title V applicability thresholds at 25,000 tons per year (tpy), on a ''carbon dioxide equivalent'' ($CO_2e$) basis, and a temporary PSD significance level for GHG emissions of between 10,000 and 25,000 tpy $CO_2e$. EPA would also take other streamlining actions during this time. Within 5 years of the final version of this rule, EPA would conduct a study to assess the administrability issues. Then, EPA would conduct another rulemaking, to be completed by the end of the sixth year, that would promulgate, as the second phase, revised applicability and significance level thresholds and other streamlining techniques, as appropriate.

**DATES:** *Comments.* Comments must be received on or before December 28, 2009. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 27, 2009.

*Public Hearing:* If anyone contacts us requesting to speak at a public hearing on or before November 16, 2009, we will hold a public hearing approximately 30 days after date of publication in the **Federal Register.**

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0517 by one of the following methods:

- *http://www.regulations.gov.* Follow the online instructions for submitting comments. Attention Docket ID No. EPA–HQ–OAR–2009–0517.
- *E-mail: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2009–0517.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2009–0517.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2009–0517, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of 2 copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, Northwest, Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2009–0517. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions.* Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0517. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *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, avoid any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket.* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, 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 for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph Mangino, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–9778; fax number: (919) 541–5509; e-mail address: *mangino.joseph@epa.gov.*

To request a public hearing, please contact Pam Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0641; fax number: (919) 541–5509 no later than November 16, 2009 to request a hearing.

**SUPPLEMENTARY INFORMATION:**

## I. Preamble Glossary of Terms and Abbreviations

The following are abbreviations of terms used in the preamble.

APA Administrative Procedure Act
ANPR Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
AQRV Air Quality Related Value
BACT Best Available Control Technology
CAA Clean Air Act
CAM Compliance Assurance Monitoring
CBI Confidential Business Information
CFR Code of Federal Regulations
$CH_4$ Methane
$CO_2$ Carbon Dioxide
$CO_2e$ Carbon Dioxide Equivalent
CO Carbon Monoxide
EG Emission Guidelines
EPA U.S. Environmental Protection Agency
FERC Federal Energy Regulatory Commission
FIP Federal Implementation Plan
FLM Federal Land Manager
FTC Federal Trade Commission
FTE Full-Time Equivalent
GHG Greenhouse Gas
GWP Global Warming Potential
HAP Hazardous Air Pollutant
HFC Hydrofluorocarbon
HFE Hydrofluorinated Ether
ICR Information Collection Request
IPCC Intergovernmental Panel on Climate Change
MWCs Municipal Waste Combustion Facilities
NAAQS National Ambient Air Quality Standard
NESHAP National Emission Standards for Hazardous Air Pollutants
NOD Notice of Deficiency
$NO_X$ Nitrogen Oxides
NSPS New Source Performance Standard
NSR New Source Review
OMB Office of Management and Budget
OTAQ Office of Transportation and Air Quality
PFC Perfluorocarbon
ppm Parts Per Million
PSD Prevention of Significant Deterioration
PTE Potential to Emit
RIA Regulatory Impact Analysis
SBA Small Business Administration
$SO_2$ Sulfur Dioxide
$SF_6$ Sulfur Hexafluoride
SIP State Implementation Plan
Tg Teragrams
TIP Tribal Implementation Plan
tpy Tons Per Year
UNFCCC United Nations Framework Convention on Climate Change

## II. General Information

### *A. Does this action apply to me?*

Entities affected by this proposed action include sources in all sectors of the economy, including commercial and residential sources. Entities potentially affected by this proposed action also include States, local permitting authorities, and tribal authorities. The majority of categories and entities potentially affected by this action are expected to be in the following groups:

| Industry Group | NAICS[a] |
|---|---|
| Agriculture, fishing, and hunting | 11. |
| Mining | 21. |
| Utilities (electric, natural gas, other systems) | 2211, 2212, 2213. |
| Manufacturing (food, beverages, tobacco, textiles, leather) | 311, 312, 313, 314, 315, 316. |
| Wood product, paper manufacturing | 321, 322. |
| Petroleum and coal products manufacturing | 32411, 32412, 32419. |
| Chemical manufacturing | 3251, 3252, 3253, 3254, 3255, 3256, 3259. |
| Rubber product manufacturing | 3261, 3262. |
| Miscellaneous chemical products | 32552, 32592, 32591, 325182, 32551. |
| Nonmetallic mineral product manufacturing | 3271, 3272, 3273, 3274, 3279. |
| Primary and fabricated metal manufacturing | 3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329. |
| Machinery manufacturing | 3331, 3332, 3333, 3334, 3335, 3336, 3339. |
| Computer and electronic products manufacturing | 3341, 3342, 3343, 3344, 3345, 4446. |
| Electrical equipment, appliance, and component manufacturing | 3351, 3352, 3353, 3359. |
| Transportation equipment manufacturing | 3361, 3362, 3363, 3364, 3365, 3366, 3369. |
| Furniture and related product manufacturing | 3371, 3372, 3379. |
| Miscellaneous manufacturing | 3391, 3399. |
| Waste management and remediation | 5622, 5629. |
| Hospitals/Nursing and residential care facilities | 6221, 6231, 6232, 6233, 6239. |
| Personal and laundry services | 8122, 8123. |
| Residential/private households | 8141. |
| Non-Residential (Commercial) | Not available. Codes only exist for private households, construction and leasing/sales industries. |

[a] North American Industry Classification System.

### *B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this action will be posted on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at *http://www.epa.gov/nsr*.

### *C. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2009–0517.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a

Code of Federal Regulations (CFR) part or section number.

- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

*D. How can I find information about a possible public hearing?*

People interested in presenting oral testimony or inquiring if a hearing is to be held should contact Ms. Pamela S. Long, New Source Review Group, Air Quality Policy Division (C504–03), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–0641. If a hearing is to be held, persons interested in presenting oral testimony should notify Ms. Long at least 2 days in advance of the public hearing. Persons interested in attending the public hearing should also contact Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed rules.

*E. How is the preamble organized?*

The information presented in this preamble is organized as follows:

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## III. Overview of Proposed Rule

EPA is proposing to tailor the major source applicability thresholds for GHG emissions under the PSD and title V programs of the CAA by setting first-phase levels under both programs, setting a first-phase PSD significance level [1] for GHG emissions, undertaking efforts to streamline administrability of the programs, and committing to an assessment of administrability within 5 years and a second-phase rulemaking within 6 years.

This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions. When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD program, meaning that from that point forward, prior to constructing any new major source or major modifications that would increase GHGs, a source owner would need to apply for, and a permitting authority would need to issue, a permit under the PSD program that addresses these increases. Similarly, for title V it would mean that any new or existing source exceeding the major source applicability level for those regulated GHGs, if it did not have a title V permit already, would have 1 year to submit a title V permit application.

If PSD and title V requirements apply at the applicability levels provided under the CAA, many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications. In addition, State permitting authorities would be paralyzed by enormous numbers of these permit applications; the numbers are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities. Based on the long-established judicial doctrines of

[1] ''Significant levels'' for regulated NSR pollutants are commonly called ''significance levels'' or ''significance thresholds,'' and these terms are used interchangeably for purposes of this proposed action.

''absurd results'' and ''administrative necessity,'' this proposed rule would phase in PSD and title V applicability. As the first phase, this rule would establish applicability thresholds for both the PSD and title V programs at the level of 25,000 tpy $CO_2e$, and would establish a PSD significance level of between 10,000 and 25,000 tpy $CO_2e$. This rule also marks the beginning of a concerted effort by EPA to streamline administration of the PSD and title V programs as much as possible and as quickly as possible. In addition, EPA commits that, within 5 years of promulgating the first phase, EPA will conduct a study of the permitting authorities' ability to administer the programs going forward, and then, within a year, conduct rulemaking for the second phase of the program. This second phase will either confirm the first-phase permitting levels or establish revised ones or other streamlining techniques. EPA also proposes to identify as the pollutant subject to PSD and title V for applicability purposes the group of up to six GHG emissions, each one weighted for its global warming potential, that are included in regulations for their control under the CAA. EPA also proposes to conform its action on PSD State implementation plans (SIPs) and title V programs to match the proposed Federal applicability requirements.

More specifically, following this overview, section IV of this preamble provides background information as to the nature of GHG emissions and the general requirements of the PSD and title V programs. Currently, PSD applies to sources that emit at least 100 or 250 (depending on the source category) tpy of pollutants subject to regulation under the CAA, and title V generally applies to sources that emit at least 100 tpy of pollutants subject to regulation under the CAA. Currently, PSD and title V requirements apply on the basis of emissions applicability thresholds that are pollutant-specific mass emissions rates expressed in tpy. Under PSD, construction of a stationary source that has the potential to emit (PTE) a regulated NSR pollutant in an amount exceeding 100 or 250 tpy (depending on the source category) (the ''major stationary source'' threshold, in the terminology of EPA regulations) triggers PSD permitting requirements. PSD permitting requirements are also triggered if a major stationary source undertakes a modification that is projected to increase emissions of a regulated NSR pollutant above an emissions threshold (the ''significance level''). For any particular pollutant, this level is zero unless and until EPA establishes one on the basis of *de minimis* emissions or administrative necessity. Under title V, a source with emissions exceeding a ''major source'' emissions threshold—generally 100 tpy on a PTE basis—triggers title V permitting requirements.

It should be noted that, as further explained in the background section, there are no geographic areas currently designated ''nonattainment'' for GHG pollutants; as a result, this action affects only the PSD program, and we are not proposing to amend the ''nonattainment NSR'' provisions of our major NSR program at this time, nor are we proposing to amend any provisions that affect minor NSR permitting.

Section IV of this preamble further describes the current and expected future treatment of GHG emissions for applicability purposes under those PSD and title V programs. In particular, section IV describes the light-duty motor vehicle rule, which EPA recently proposed and expects to promulgate by the end of March 2010, and which will control GHG emissions from certain mobile sources. Under EPA's current interpretation of PSD and title V applicability requirements, promulgation of this motor vehicle rule will trigger the applicability of PSD and title V requirements for stationary sources that emit GHGs.

In section V of this preamble, EPA describes the administrative burdens on permitting authorities if the requirements of PSD and title V programs are triggered without having this tailoring rule in place. In short, without this tailoring rule, the administrative burdens would be immense, and they would immediately and completely overwhelm the permitting authorities. Without this tailoring rule, permitting authorities would receive approximately 40,000 PSD permit applications each year—currently, they receive approximately 300—and they would be required to issue title V permits for approximately some six million sources—currently, their title V inventory is some 15,000 sources. These increases are measured in orders of magnitude. We estimate the additional resource burdens in full-time equivalents (FTEs) and time delays in processing permits, but the sheer numbers of additional permits by themselves paint the picture of the overwhelming administrative burdens.

In section VI of this preamble, we describe the legal rationale for this tailoring rule. The judicial doctrine of ''absurd results'' authorizes departure from a literal application of statutory provisions if it would produce a result that is inconsistent with other statutory provisions or congressional intent, and particularly one that would undermine congressional purposes. The judicial doctrine of ''administrative necessity'' authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer. However, the agency must first attempt to mitigate administrative problems through techniques consistent with the statutory requirements, and, if variance from the statutory requirements nevertheless is necessary to allow administrability, the variance must be limited as much as possible.

As discussed in section VI of this preamble, to apply the statutory PSD and title V applicability thresholds to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. This extraordinary increase in the scope of the permitting programs, coupled with the resulting burdens on the small sources and on the permitting authorities, were not contemplated by Congress in enacting the PSD and title V programs. Moreover, the administrative strains would lead to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs. Sources of all types—whether they emit GHGs or not—would face long delays in receiving PSD permits, which Congress intended to allow construction or expansion. Similarly, sources would face long delays in receiving title V permits, which Congress intended to promote enforceability. For these reasons, the absurd results doctrine applies to avoid a literal application of the thresholds.

By the same token, the impossibility of administering the permit programs brings into play the administrative necessity doctrine. This doctrine also justifies EPA to avoid a literal application of the threshold provisions.

Instead, these doctrines authorize EPA to apply the PSD and title V applicability provisions through a phased program. The first phase would establish the applicability thresholds at the 25,000-tpy levels and vigorously develop streamlining measures that would facilitate applying PSD and title V on a broader scale with overburdening sources and administrators. In this manner, the phased approach reconciles the language of the statutory provisions with the results of their application and with congressional intent.

In section VII of this preamble, we describe the streamlining techniques—short of limiting the applicability of PSD and title V to higher-emitting sources—that may be available to improve administrability. These techniques range from defining ''potential to emit''—which is the basis for calculating the statutory thresholds—to be closer to actual emissions, to general permits and presumptive best available control technology (BACT), which is the principal control requirement under the PSD program. Although these techniques offer promise over the long term to improve administrability, they cannot be in place by March 2010, when we expect PSD and title V requirements to be triggered for GHG emitters, or within a several-year period thereafter. Accordingly, this tailoring rule is necessary at this time.

In section VIII of this preamble, we describe in detail our proposed tailoring rule. For the PSD program, we are proposing to establish, as the first phase, the GHG ''major stationary source'' emissions applicability threshold level at 25,000 tpy on a $CO_2$e basis. That is, sources that emit at this level or higher would be considered ''major stationary sources'' and therefore would become subject to PSD requirements when they construct or modify. We are also proposing to establish in this first phase a PSD ''significance level'' emissions rate for GHGs and are proposing a range for that value of 10,000 to 25,000 tpy $CO_2$e for comment. The ''significance'' level is important for determining whether existing sources that make physical or operational changes become subject to PSD and for determining whether sources that are subject to PSD for other pollutants are also subject to PSD for their GHG emissions.

As further described in section VIII of this preamble, for the title V operating permits program, we are also proposing to establish the GHG emissions applicability threshold level at 25,000 tpy $CO_2$e for this first phase. That is, sources that emit at this level or higher would be considered ''major sources'' and therefore would become subject to title V requirements.

As further described in section VIII of this preamble, as an integral part of the tailoring rule, EPA proposes to commit to complete, within 5 years of a final rule, a study to evaluate the actual administrative burden resulting from the proposed GHG permitting thresholds and possible other thresholds, and the progress of developing streamlining techniques and augmentation of permitting authorities' resources. In addition, EPA commits to propose and promulgate a rulemaking—informed by the study—within 6 years from the effective date of a final version of this rulemaking (*i.e.,* 1 year from the completion of the study) that would establish the second phase, which would either reaffirm the GHG permitting thresholds, promulgate alternative thresholds, adopt other streamlining techniques, and/or take other action consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

During this first phase of the tailoring program, EPA proposes to make a concerted effort to assess and implement streamlining options, tools, and guidance—some of which we describe in section VII of this preamble—to reduce the administrative burden on permitting authorities when implementing PSD and title V for GHGs. EPA proposes to undertake as many of these streamlining actions as possible and to do so as quickly as possible. In addition, for larger sources that would be subject to PSD and title V requirements during the first phase, EPA intends to work closely with the stakeholders to develop efficient methods for implementing those requirements. For smaller sources for which PSD and title V requirements would not apply during the first phase due to the increase in the major source applicability threshold, EPA intends to identify cost-effective opportunities available as soon as possible to achieve GHG reductions through means other than PSD and title V (*e.g.,* energy efficiency and other appropriate measures).

Section VIII of this preamble further describes our proposal to define the relevant pollutants as the group of up to six GHG emissions that have been regulated for control, calculated on the basis of global warming potential (GWP).[2]

Section IX of this preamble describes the burden and economic impacts of the proposed rule.

Section X of this preamble discusses implementation issues related to this proposal. These include conforming EPA approval of the PSD programs in SIPs and EPA approval of the State title V programs to be consistent with the proposed applicability threshold levels. By way of background, as soon as EPA promulgates a rule regulating for control of GHG emissions—which we expect to occur with the proposed light-duty motor vehicle rule, scheduled for promulgation at the end of March 2010—stationary sources will become subject to PSD and title V requirements. The major source thresholds for PSD and title V, significance level for PSD, and identification of GHGs subject to PSD and title V as proposed in this tailoring rule would each take effect immediately in the Federal PSD program (codified at 40 CFR 52.21) and in the Federal operating permits program (codified at 40 CFR 71), as applicable. To conform EPA action on PSD SIPs and State title V programs, EPA intends to limit its previous approval of those SIPs and title V programs to cover only the permitting of sources of GHG emissions at or above the proposed threshold levels. EPA will take no action on—that is, EPA will not disapprove—the PSD SIPs and title V programs to the extent they require permitting of GHG emitters at levels below the proposed thresholds. EPA proposes to take this action by virtue of its authority to reconsider its previous regulatory actions. Section X of this preamble also explains how we propose to address the treatment of GHGs in the fee programs under title V.

## IV. Background

### *A. What are greenhouse gases and their sources?*

Gases that trap heat in the atmosphere are often called GHGs. Some GHGs such as carbon dioxide ($CO_2$) are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. The primary GHGs of concern directly emitted by human activities include $CO_2$, methane ($CH_4$), nitrous oxide ($N_2O$), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride ($SF_6$). These six primary GHGs will, for the purposes of this proposal, be referred to collectively as ''the six primary GHGs.'' These six gases, once emitted, remain in the atmosphere for decades to centuries. Thus, they become well-mixed globally in the atmosphere and their concentrations accumulate when emissions exceed the rate at which natural processes remove them from the atmosphere. The heating effect caused by the human-induced buildup of GHGs

[2] The Intergovernmental Panel on Climate Change (IPCC) describes GWP as an index, based upon radiative properties of well-mixed GHGs, measuring the radiative forcing of a unit mass of a given well-mixed greenhouse gas in the present-day atmosphere integrated over a chosen time horizon, relative to that of $CO_2$. The GWP represents the combined effect of the differing times these gases remain in the atmosphere and their relative effectiveness in absorbing outgoing thermal infrared radiation. (Intergovernmental Panel on Climate Change (IPCC), Glossary of Terms used in the IPCC Fourth Assessment Report, WG1). *http://www.ipcc.ch/*

in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding proposal (Docket ID No. EPA–HQ–OAR–2009–0171–0137).[3]

In the U.S., the combustion of fossil fuels (*e.g.,* coal, oil, gas) is the largest source of $CO_2$ emissions and accounts for 80 percent of total GHG emissions. More than half the energy-related emissions come from large stationary sources such as power plants, while about a third come from transportation. Of the six primary GHGs, four ($CO_2$, $CH_4$, $N_2O$, and HFCs) are emitted by motor vehicles. Industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHG emissions in the U.S. These emissions are inventoried at a national level by EPA in the Inventory of U.S. Greenhouse Gas Emissions and Sinks.[4]

Different GHGs have different heat-trapping capacities. It is useful to compare them to each other through the use of the $CO_2e$ metric. This metric incorporates both the heat-trapping ability and atmospheric lifetime of each GHG and can be used to adjust the quantities, in tpy, of all GHGs relative to the GWP of $CO_2$. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a $CO_2e$ basis. Depending on which GWP values are used, the calculated GHG emissions on a $CO_2e$ basis will vary. Throughout this preamble, we are applying the GWP values established by the Intergovernmental Panel on Climate Change (IPCC) in its Second Assessment Report (SAR) (IPCC 1996).[5] For example, $CH_4$ has a GWP of 21, meaning each ton of $CH_4$ emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of $CO_2$ emissions. Thus, on the basis of heat-trapping capability, 1 ton of $CH_4$ would equal 21 tons of $CO_2e$. The GWPs of the six primary GHGs range from 21 (for $CH_4$) up to 23,900 (for $SF_6$). Aggregating all GHGs on a $CO_2e$ basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric. For a complete list of the applicable GWP values for each GHG, please refer to EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks.

*B. What are the general requirements of the PSD program?*

1. Overview of the PSD Program

The PSD program is a preconstruction review and permitting program applicable to ''new major stationary sources'' and ''major modifications'' at existing major stationary sources, in the terminology of EPA's implementing regulations. The PSD program applies in areas meeting the health-based National Ambient Air Quality Standards (NAAQS) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas). The PSD program is contained in part C of title I of the CAA. The ''nonattainment NSR'' program applies in areas not meeting the NAAQS and in the Ozone Transport Region, and is implemented under the requirements of part D of title I of the CAA. Collectively, we also commonly refer to these two programs as the major NSR program. The governing EPA rules are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendices S and W. There is no NAAQS for $CO_2$ or any of the other primary GHGs, nor does EPA plan to promulgate one; therefore, we do not anticipate that the ''nonattainment'' major NSR program will apply to GHGs.

The applicability of the PSD program to a particular source must be determined in advance of construction or modification and is pollutant-specific. The primary criterion in determining PSD applicability is whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or major modification, both of which are described below.

a. Major Stationary Sources

Under PSD, a ''major stationary source'' is any source type belonging to a specified list of 28 source categories which emits or has a PTE of 100 tpy or more of any pollutant subject to regulation under the CAA, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy. *See, e.g.,* 40 CFR 52.21(b)(1). We may refer to these levels as the 100/250-tpy thresholds. A new source with a PTE at or above the applicable ''major stationary source threshold'' amount is subject to major NSR. These limits originate from section 169 of the CAA, which applies PSD to any ''major emitting facility''[6] and defines the term to include any source with a PTE of 100 or 250 tpy, depending on source category.

b. Major Modifications

PSD applies to not only new construction but also to existing sources that undertake a ''major modification,'' which is defined in terms of the following three criteria:

(1) A physical change in, or change in the method of operation of, a ''major stationary source'' must occur;

(2) The change must result in an increase in emissions that is ''significant,'' that is, equal to or above the significance level defined for the pollutant in question, *e.g.,* in 40 CFR 52.21(b)(23)); and

(3) The increase in emissions resulting from the change must be a significant net emissions increase. In other words, when the increase from the project is added to other contemporaneous increases or decreases in actual emissions at the source, the net emissions increase must be significant (equal to or above the significance level defined, *e.g.,* in 40 CFR 52.21(b)(23)).

Generally, significance levels for PSD are pollutant-specific emissions rates. For example, the significance level for emissions of nitrogen oxides ($NO_X$) is 40 tpy. *See, e.g.,* 40 CFR 52.21(b)(23)(i). However, for a regulated NSR pollutant for which no specific significance level is listed, PSD applies to ''any increase.'' *See, e.g.,* 40 CFR 52.21(b)(23)(ii). Thus, if GHGs were to become subject to regulation and PSD review, and no significance levels for GHGs had been established, the default value would be ''zero.''

EPA has promulgated significance levels for criteria pollutants and certain other pollutants, which EPA generally based on levels that represent a *de minimis* contribution to air quality problems. For example, for certain pollutants regulated under the new source performance standards (NSPS), EPA generally based significance levels at 20 percent of the NSPS. These concentrations were compared to available health and welfare data to assure that significant adverse effects

[3] ''Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,'' Climate Change Division, Office of Atmospheric Programs, U.S. Environmental Protection Agency, Washington, DC. April 17, 2009.

[4] For additional information about the Inventory of U.S. Greenhouse Gas Emissions and Sinks, and for more information about GHGs, climate change, climate science, *etc., see* EPA's climate change Web site at *http://www.epa.gov/climatechange/.*

[5] ''Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2007,'' U.S. Environmental Protection Agency, EPA 430–R–09–004, April 15, 2009. Table 1–2, p. 1–6. *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

[6] EPA's regulations employ the term ''major stationary source'' in lieu of ''major emitting facility.'' *e.g.,* 40 CFR 52.21(a)(2)(i), (b)(1)(i).

were avoided.[7] To this point, EPA has not established a significance level for GHGs, and we currently do not have an adequate supporting record to establish a similar health and welfare-based *de minimis* level for significance for GHGs.

2. General Requirements for PSD

Under the PSD program, one of the principal requirements is that a new major source or major modification must apply BACT, which is determined on a case-by-case basis taking into account, among other factors, the cost and effectiveness of the control. EPA has developed a ''top-down'' approach for BACT review which involves a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and cost effectiveness, and then selection of BACT. Under PSD, once a source is determined to be major for any regulated pollutant, a BACT review is performed for each attainment pollutant whose emissions exceed its PSD significance level as part of new construction or modification projects at the source.

In addition to performing a BACT review, the source must analyze the impact of the project on ambient air quality to assure that no violation of any NAAQS or PSD increments will result, and must analyze impacts on soil, vegetation, and visibility. Sources or modifications that would impact Class I areas (*e.g.,* national parks) may be subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas. Under PSD, if a source proposes to locate within 100 kilometers of a Class I area, the Federal Land Manager (FLM) is notified and is responsible for evaluating a source's projected impact on the AQRVs and recommending either approval or disapproval of the source's permit application based on anticipated impacts. There are currently no NAAQS or PSD increments established for GHGs, and therefore these PSD requirements would not apply to GHG emissions sources, even when PSD is triggered for GHG emissions sources. However, as noted previously, if PSD is triggered for a GHG emissions source, all regulated NSR pollutants which the new source emits in significant amounts would be subject to PSD requirements. Therefore, if a facility triggers review for regulated NSR pollutants that are non-GHG pollutants for which there are established NAAQS or increments, the air quality, additional impacts, and Class I requirements would apply to those pollutants.

When the reviewing authority reaches a preliminary decision to authorize construction of a proposed new major source or major modification, it must provide notice of the preliminary decision and an opportunity for comment by the general public, industry, and other interested persons. After considering and responding to the comments, the reviewing authority may issue a final determination on the construction permit in accordance with the PSD regulations.

Usually NSR permits are issued by State or local air pollution control agencies. In these cases, State and local air pollution control agencies may have their own permit programs that are approved by EPA in the SIP or they may be delegated the authority to issue permits on behalf of EPA. In some areas, the EPA issues the permits.

3. Minor NSR Program

The permitting program for minor stationary sources is addressed by section 110(a)(2)(C) of the CAA. We commonly refer to this program as the minor NSR program. A minor stationary source means a source whose PTE is lower than the major source applicability threshold for a particular pollutant as defined in the applicable nonattainment major NSR program or PSD program. As with nonattainment NSR requirements, the CAA does not require that minor source programs apply to GHGs because there are no NAAQS for GHGs.

*C. What are the general requirements of the title V operating permits program?*

1. Overview of Title V

The title V operating permits program was added to the CAA by Congress in 1990. The operating permits program requirements under title V are intended to improve sources' compliance with the requirements of the CAA. In summary, the title V program requires major sources (generally defined as sources that actually emit or have the potential to emit 100 tpy) and certain other sources to obtain operating permits that: Consolidate all CAA requirements into a single document; provide for review of these documents by EPA, States, and the public; and require permit holders to track, report, and annually certify their compliance status with respect to their permit requirements.

Title V will be triggered for GHG emissions when EPA regulates them for control under another provision of the CAA. Section 502(a) of the Act sets forth the sources required to obtain operating permits under title V. These sources include: (1) Any affected source subject to acid rain rules under title IV of the Act; (2) any major source; (3) any source required to have a permit under part C or D (PSD/NSR) of title I of the Act; (4) ''any source subject to section 111 [NSPS] or section 112 [NESHAP];'' and (5) any other source designated by rule. *See* also 40 CFR 70.3(a) and 71.3(a). The requirements of section 502(a) are primarily implemented through the operating permit program rules at 40 CFR part 70, which sets out the minimum requirements for title V operating permit programs administered by State, local, and tribal permitting authorities (57 FR 32261; July 21, 1992); and part 71, the Federal operating permit program requirements that apply where EPA or a delegate agency authorized by EPA to carry out a Federal permit program is the title V permitting authority (61 FR 34228, July 1, 1996).

Title V generally does not add new substantive requirements for pollution control, but it does require that each permit contain all of a facility's ''applicable requirements'' under the CAA, and that certain procedural requirements be followed, especially with respect to compliance with these requirements. ''Applicable requirements'' for title V purposes include all stationary source requirements, but do not include mobile source requirements.

2. Title V Permit Requirements

When a source becomes subject to title V, it must apply for a permit within 1 year of the date it became subject. The application must include identifying information, a description of emissions and other information necessary to determine applicability of CAA requirements, identification and certification of the source's compliance status with these requirements (including a schedule to come into compliance for any requirements for which the source is currently out of compliance), a statement of the methods for determining compliance, and other information. The permitting authority then uses this information to issue the source a permit to operate, as appropriate. A title V source may not operate without a permit, except that if it has submitted a complete application, the submission acts as a ''shield'' that

[7] EPA established significance levels for hazardous air pollutants on a similar basis, but subsequently, in the 1990 Clean Air Act Amendments, Congress mooted them by exempting hazardous air pollutants from PSD, under CAA section 112(b)(6).

authorizes it to operate while awaiting issuance of its permit.

Title V permits must contain the following main elements: (1) Emissions standards to assure compliance with all applicable requirements; (2) a duration of no more than 5 years, after which the permit must be renewed; (3) monitoring, recordkeeping, and reporting requirements necessary to assure compliance, including a semiannual report of all required monitoring and a prompt report of each deviation from a permit term; (4) provisions for payment of permit fees as established by the permitting authority such that total fees collected are adequate to cover the costs of developing and implementing the program; and (5) a requirement for an annual compliance certification by a responsible official at the source. An additional specific monitoring requirement, compliance assurance monitoring (CAM), also applies to some emissions units operating at major sources with title V permits. The CAM rule requires source owners to design and conduct monitoring of the operation of add-on control devices used to control emissions from moderately large emissions units. Source owners use the monitoring data to evaluate, verify, and certify the compliance status for applicable emissions limits. The CAM rule is implemented in conjunction with the schedule of the operating permits program. While these are the main elements relevant to a discussion of GHGs, there are numerous other permit content requirements and optional elements, as set forth in the title V regulations at 40 CFR 70.6.

In addition to the permit content requirements, there are procedural requirements that permitting authorities (typically States) must follow in issuing title V permits, including (1) determining and notifying the applicant that its application is complete; (2) providing public notice and a 30-day public comment period on the draft permit, as well as the opportunity for a public hearing; (3) giving notice to EPA and affected States; and (4) preparing and providing to any requester a statement of the legal and factual basis of the draft permit. The permitting authority must take final action on permit applications within 18 months of receipt. EPA also has 45 days from receipt of a proposed permit to object to its issuance, and citizens have 60 days to petition EPA to object. Permits may also need to be revised or reopened if new requirements come into effect or if the source makes changes that conflict with, or necessitate changes to, the current permit. Permit revisions and reopenings follow procedural requirements which vary depending on the nature of the necessary changes to the permits.

*D. What is the current treatment of GHG emissions under the title V and PSD programs and what future actions may change that treatment?*

This section of the preamble describes the current treatment of GHG emissions under the PSD and title V programs—under which GHG emissions are not included for purposes of determining applicability—including recent regulatory and legal developments related to this action, and then describes what future action may change that treatment.

1. Regulation of GHGs Under the CAA

a. The *Massachusetts* U.S. Supreme Court Decision

On April 2, 2007, in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007), the U.S. Supreme Court held that GHGs are air pollutants covered by the CAA. Therefore, the Court further held that GHG emissions are subject to CAA section 202(a) under which the Administrator must determine whether or not emissions of GHGs from new motor vehicles or motor vehicle engines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. This decision resulted from a petition for rulemaking under section 202(a) filed by more than a dozen environmental, renewable energy, and other advocacy organizations. As a result of this decision, EPA decided to issue an advance notice of proposed rulemaking (ANPR), discussed later in this preamble, soliciting comment on how GHG emissions should be regulated under the CAA.

b. The EPA ANPR

On July 30, 2008, EPA published an ANPR in the **Federal Register** entitled, ''Regulating Greenhouse Gas Emissions under the CAA.'' 73 FR 44354, July 30, 2008. This ANPR presented information relevant to, and solicited public comment on how to respond to, the U.S. Supreme Court's decision in *Massachusetts* v. *EPA,* holding that GHGs are air pollutants subject to the CAA. The notice reviewed the various CAA provisions (including the PSD and title V requirements) that may be applicable to sources of GHGs, examined the issues that regulating GHGs under those provisions may raise, provided information regarding potential regulatory approaches and technologies for reducing GHG emissions, and raised issues relevant to possible legislation and the potential for overlap between legislation and CAA regulation.

In addition, the notice described and solicited comment on petitions the EPA had received to regulate GHG emissions from ships, aircraft, and nonroad vehicles such as farm and construction equipment. Finally, the notice discussed several other actions concerning stationary sources for which EPA has received comment regarding the regulation of GHG emissions, including promulgation of performance standards or guidelines under CAA section 111 for new and existing sources in various source categories. The EPA included options for phasing in the PSD program and title V programs to mitigate burdens that would occur if GHGs were to be regulated under the CAA and solicited comments on those actions. Section V.C of this preamble summarizes some of the substantive comments received on the ANPR. In issuing the ANPR, EPA made clear that it believed that the best way to address the problems posed by GHG emissions would be through legislation directly addressing GHG emissions, rather than through use of the tools in the CAA.

2. Current Applicability of the PSD Program to Sources of GHG Emissions

As explained earlier in this preamble, EPA treats sources as subject to PSD requirements only if they emit ''regulated NSR pollutants'' at specified threshold levels. Currently, EPA does not consider GHG emissions to be ''regulated NSR pollutants'' under the PSD program because GHG emissions have not, thus far, been subject to regulation requiring control under the CAA. As discussed later in this preamble, EPA is in the process of reviewing its approach to PSD applicability and is in the process of developing a rulemaking—the light-duty motor vehicle rule—that will trigger PSD applicability for GHG emissions.

a. PSD Interpretive Memorandum

EPA is currently reconsidering the PSD Interpretive Memorandum (previously referred to as the ''Johnson Memorandum''), which describes the circumstances under which EPA considers a pollutant subject to PSD requirements. *See* memorandum (in docket for this rulemaking) from Administrator Stephen L. Johnson to Regional Administrators, ''EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program,'' December 18, 2008. The PSD

Interpretive Memorandum followed a decision by the Environmental Appeals Board (EAB) in *In re Deseret Power Electric Cooperative,* on November 13, 2008. PSD Appeal No. 07–03 (EAB 2008) (*In re Deseret*). There, the Board remanded a PSD permit that EPA Region VIII issued on August 30, 2007, to Deseret Power Electric Cooperative, authorizing the latter to construct a new waste-coal-fired electric generating unit near its existing Bonanza Power Plant, in Bonanza, Utah. The primary issue before the Board was whether the permit had to include BACT limits for $CO_2$, which depended on whether $CO_2$ meets the definition of ''regulated NSR pollutant'' under 40 CFR 52.21(b)(50), which in turn interprets the provisions in CAA sections 165 and 169 that apply the BACT requirement to ''each pollutant subject to regulation'' under the CAA. The Board rejected arguments by the petitioner, the Sierra Club, that the CAA compelled a broad interpretation of the phrase ''subject to regulation,'' which, according to the petitioner, required EPA to apply BACT to pollutants as long as they are subject to monitoring and reporting requirements. Currently, and since 1993, sources covered by the Acid Rain program have been required to monitor and report $CO_2$ emissions pursuant to the CAA. The Board also rejected the view advanced by the EPA offices involved in the case—Region VIII and the Office of Air and Radiation—that EPA had already established an interpretation of ''subject to regulation,'' which was that this term authorized BACT only for pollutants subject to actual regulatory controls. Thus, the Board remanded the permit to the Region to ''reconsider whether or not to impose a $CO_2$ BACT limit in light of the 'subject to regulation' definition under the CAA.'' *In re Deseret,* slip op. at 63.

On December 18, 2008, EPA's then-Administrator Stephen Johnson issued a memorandum establishing an interpretation clarifying the scope of the PSD program under the CAA (the PSD Interpretive Memorandum). This memorandum interprets the definition of ''regulated NSR pollutant'' to include each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant, and to exclude pollutants for which EPA regulations only require monitoring or reporting.

On February 17, 2009, EPA Administrator Lisa Jackson responded to an amended petition for reconsideration dated January 6, 2009, filed on behalf of the Sierra Club and other parties (petitioners), seeking reconsideration of the PSD Interpretive Memorandum. In Administrator Jackson's response, she granted the petition for reconsideration in order to allow for public comment on issues raised in the memorandum and stated that EPA will also seek public comment on any issues raised by the opinion of the EAB with regard to the *In re Deseret* decision (as discussed in the PSD Interpretive Memorandum), to the extent they are not coextensive with the issues raised in the memorandum. However, Administrator Jackson made clear that the current interpretations in the PSD Interpretive Memorandum remain in effect during the reconsideration process.

Because the PSD Interpretive Memorandum concerns PSD applicability, its reconsideration will identify the circumstances under which GHG emissions are treated as ''subject to regulation under the CAA'' and, therefore, are ''regulated NSR pollutants.'' Once GHG emissions are considered ''regulated NSR pollutants,'' PSD program requirements for existing thresholds (100/250 tpy) are triggered. The PSD Interpretive Memorandum reconsideration is being addressed in a proposed rule published in the **Federal Register** *on October 7, 2009 (74 FR 51535).* Although several possible triggering events may be considered in that action, the latest of these events would be the one that applies under EPA's current interpretation: A nationwide rule controlling or limiting GHG emissions. Presently, the EPA expects that the first such rule will be the light-duty motor vehicle rule.

b. Light-Duty Vehicle Rule

EPA is currently developing a rule to regulate GHGs from mobile sources under title II of the CAA (74 FR 24007; May 22, 2009). EPA expects to promulgate this rule by the end of March 2010. As described in the PSD Interpretive Memorandum, it is EPA's position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect). Accordingly, as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants ''subject to regulation'' under the CAA and will become subject to PSD and title V requirements.

3. Current Applicability of Title V Program to GHGs

CAA section 502(a) and related definitions under sections 302 and 501, require that specified types of sources have operating permits. These include any source that emits or has a potential to emit 100 tpy of a pollutant subject to regulation (consistent with EPA's policy interpretation) [8], any source with a NSR or PSD permit, any major source of a hazardous air pollutant (HAP), any source subject to acid rain requirements, and certain minor sources subject to section 111 or section 112 standards. As with the PSD program, currently GHGs are not considered to be subject to regulation and have not been considered to trigger title V applicability.

**V. What would be the administrative burdens of implementing PSD and title V at the current permitting thresholds?**

This section of the preamble describes the additional administrative burdens for the PSD and title V programs in terms of staffing needs, time for processing permits, and costs that permitting authorities would incur if sources of GHG emissions were to trigger PSD and title V at the statutory thresholds, which we shorthand as the 100/250-tpy thresholds. Evidence we have collected to this point makes it clear that if PSD and title V applicability requirements are triggered at those threshold levels, an enormous influx of permits would occur—tens of thousands of PSD permits and millions of title V permits—which would create enormous administrative burdens for permitting authorities that would far exceed their current capacity to administer the PSD and title V programs. It is also worth noting here that, under a scenario where

[8] EPA included this policy interpretation that title V addresses 100-tpy sources of ''pollutants subject to regulation'' in a memorandum from Lydia Wegman. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, ''Definition of Regulated Air Pollutant for Purposes of Title V'' (Apr. 26, 1993). EPA continues to maintain this interpretation. The interpretation in this memorandum was based on: (1) EPA's reading of the definitional chain for major source under title V, including the definition of ''air pollutant'' under section 302(g) and the definition of ''major source'' under 302(j); (2) the view that Congress did not intend to require a variety of sources to obtain title V permits if they are not otherwise regulated under the Act, (*see also* CAA section 504(a), providing that title V permits are to include and assure compliance with applicable requirements under the Act); and (3) promoting consistency with the approach under the PSD program. While the specific narrow interpretation in the Wegman Memorandum of the definition of ''air pollutant'' in CAA section 302(g) is in question in light of the *Massachusetts* v. *EPA* decision (finding this definition to be ''sweeping''), EPA believes the core rationale for its interpretation of the applicability of title V remains sound. EPA continues to maintain its interpretation, consistent with CAA sections 302(j), 501, 502 and 504(a), that title V applies to 100 tpy sources of pollutants subject to regulation. This interpretation is based primarily on the purpose of title V to include all regulatory requirements applicable to the source in one document to assure compliance, *see, e.g.,* CAA section 504(a), and to promote consistency with the approach under the PSD program.

State or local permitting authorities do not have the resources to implement the title V or PSD programs for GHG sources at current CAA permitting applicability thresholds, EPA may withdraw its approval, in which case, EPA would become the permitting authority and the enormous resource requirements would shift to EPA to implement these programs.

*A. PSD Implications*

We evaluated the additional administrative burden and cost of including GHG emitters in the PSD program at the current 250-tpy major source permitting threshold (but not at 100 tpy [9]). To calculate the administrative burdens and cost, we first estimated the number of new sources and modifications that would be subject to PSD if GHGs were included at the 250-tpy threshold level. We developed these estimates of number of new sources and modifications as part of our GHG threshold data analyses. For more information on these analyses, *see* the technical support documents entitled ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation'' and ''Methodology for Estimating Modified Sources That Would Be Subject to PSD Permitting for GHGs;'' Prepared by EPA Staff; August 2009 in the docket for this rulemaking.

After estimating the number of affected facilities and sources, we then evaluated the additional administrative burden and cost of including these numbers of new and modified GHG emitters in the PSD program. Our burden estimates are based on labor and cost information from the existing Information Collection Requests (ICRs) for PSD programs.[10]

Based on our GHG threshold data analysis, we estimate that almost 41,000 new and modified facilities per year would be subject to PSD review, based on the current rate of modifications at major sources, if a GHG major source threshold of 250 tpy $CO_2e$ were applied. Compared to the 280 PSD permits currently issued per year, this would be an increase in permits of more than 140-fold.

We estimated the number of workload hours and cost a permitting authority would expend on each new source and each modification. We based these estimates on the workload hours and cost for processing permits for new sources of non-GHG emissions, which we derived from labor and cost information from the existing ICRs for PSD programs. The ICRs show that permitting authorities expend 301 hours to permit a new or modified industrial source. For more detail on information used from the PSD ICR for this evaluation, please refer to the docket for this rulemaking.

We then made assumptions for number of workload hours and costs for new sources of GHG emissions. We assumed that permitting new industrial GHG sources that emit in excess of the 250-tpy threshold would be of comparable complexity to permitting non-GHG emitting industrial sources that are subject to PSD. Thus, for these sources, we assumed that permitting authorities would expend the same number of workload hours and costs, on a per-permit basis, as they do for non-GHG emitting industrial sources. On the other hand, for commercial and residential GHG sources that emit GHGs above the 250-tpy threshold (and as a result would be subject to the requirements of the PSD permitting program at this threshold level), we assumed that the workload hours and cost for permitting these sources would be significantly less than—only 20 percent of—the hours and cost necessary to prepare and issue initial PSD permits or permit modifications for industrial GHG sources. This 20-percent estimate amounts to 60 hours of permitting authority time per residential or commercial permit.

Based on these assumptions, the additional annual permitting burden for permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of $257 million to include all GHG emitters above the 250-tpy threshold.

In addition to conducting our burden analysis, we also reviewed summary information from State and local air permitting agencies regarding additional resources and burden considerations if GHG sources that emit above the 100/250-tpy thresholds were subjected to the PSD and title V programs. This information covered 43 State and local permitting agencies, representing programs from different regions of the country and various permitting program sizes (in terms of geographic and source population coverage). A summary of this information can be found in the docket for this rulemaking.[11] This information showed significant burdens projected by permitting agencies with adding sources of GHG emissions in terms of staffing, budget, and other associated resource needs. Importantly, the agencies based their analysis on the assumption that, for purposes of determining whether a source is major, its emissions would be calculated on an actual emissions (''actuals'') basis, and not on a PTE basis. On an actuals basis, the agencies estimated a 10-fold increase in the number of permits.

Specifically, the agencies estimated that:

- Assuming, again, that number of permits was to increase by 10-fold (based on actual emissions), the resulting workload would require an average of 12 more FTEs per permitting authority at an estimated cost of $1 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to 3 years, which is three times the current average processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- Permitting authorities would also need, on average, eight additional enforcement and judicial FTEs;
- Ninety percent of the permitting agencies indicated that their staff would need training in all aspects of permitting for sources of GHG emissions; and
- A quarter of the permitting agencies reported that they were currently under a hiring freeze.

It is important to reiterate that the State and local permitting information on burden was based on the number of additional facilities subject to PSD because their emissions of GHGs exceed the 100/250-tpy thresholds at actual emissions rates, not PTE-based emissions rates. However, the PSD applicability requirements are based on PTE. By adjusting the increase in number of permits to account for GHG sources that exceed the 100/250-tpy applicability thresholds based on their PTE emissions, EPA estimated a 140-fold increase in numbers of PSD permits, much more than the 10-fold increase estimated by the States based on actual emissions.

The GHG threshold analyses used to identify the number of facilities that would be affected at current PSD permitting thresholds, and which is also used later in Section VIII for evaluating

[9] In light of time and resource constraints, we did not calculate the additional administrative burden and cost of including in the PSD program sources that emit between 100 tpy and 250 tpy and that are among the 28 source categories identified in CAA section 169(l). Including these sources in the calculation would increase the administrative burdens and costs of implementing PSD at the statutory thresholds.

[10] ''Summary of ICR-based Data Used to Estimate Avoided Burden and Evaluate Resource Requirements at Alternative GHG Permitting Thresholds;'' Prepared by EPA Staff; August 2009.

[11] ''NACAA Summary on Permitting GHGs Under the Clean Air Act''; Memorandum from Mary Stewart Douglas, National Association of Clean Air Agencies to Juan Santiago, EPA/OAQPS, September 3, 2009.

alternative thresholds, are based on the PTE of GHG sources. PTE is defined as the maximum capacity of a stationary source to emit a pollutant under its physical and operational design, including certain legal limitations, for example, on emissions or hours of operation. PSD and title V programs both use PTE for defining major sources. Our threshold analyses begin with actual emissions estimates, but we then adjust the numbers upward to account for potential-to-emit. PTE adjustments for industrial sources are generally based on industry-specific capacity utilization factors, while those used for commercial and residential sources are based on general sector-based information on heating equipment and appliance usage in these sectors. While these PTE adjustments are important for estimating affected facilities in all sectors, they are a particularly relevant concern for determining the number of facilities in the commercial and residential sector that may be affected, where $CO_2$ emissions are primarily due to space heating/appliance usage and combustion units are likely to be used at levels well below constant operation at maximum capacity. For example, our PTE adjustment for commercial and residential sources resulted in an upwards adjustment ranging from 85 to 90 percent in emissions from their actual emission values. The basis for our PTE adjustments is described in the ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation'' found in the docket for this proposal. We ask for specific comment on the reasonableness of these PTE adjustments as they apply to the different sectors and source categories, in particular, the commercial and residential sectors where there is limited information available on equipment capacity utilization.

There are multiple sources of uncertainty in our approaches for estimating emissions, and thus for estimating numbers of sources. For example, the PTE adjustment factors just described may overstate or understate the maximum emissions from sources particularly for the commercial and residential sectors. In addition, there are inherent uncertainties in developing source counts from nationally aggregated statistics, as was done for the estimates for commercial and residential sources which rely on the allocation of national level statistics for energy consumption. The allocation factors we used, based on U.S. Energy Information Administration statistical sampling procedures, are likely the best available to estimate the population of residential and commercial sources exceeding different GHG thresholds. Again, these uncertainties may result in either overestimates or underestimates. The uncertainty is less for industrial categories, where we generally utilized facility-based methodologies, but because it was necessary to use varying methodologies for different source types, as described in the Technical Support Document, the uncertainties will not be uniform across all categories. We request comment on all aspects of our threshold analysis, possible sources of error, suggestions for reducing uncertainties, and alternate approaches to estimating emissions from commercial and residential sources.

*B. Title V Implications*

The triggering of title V requirements for GHG would result in administrative burdens that stem from sources' obligation to apply for permits. These obligations apply differently depending on whether the source already has a title V permit. Most significant are the more than six million sources of GHGs that would become newly subject to title V requirements because they exceed the 100-tpy threshold for GHG but did not for previously regulated pollutants. Although there are generally not applicable requirements for GHGs that apply to such sources, these six million sources would be required to submit a title V permit application within 1 year. Permitting authorities would need to issue these permits within 18 months of receipt of a complete application, and these permits would need to include any requirements for non-GHGs that may apply to the source, such as provisions of an applicable SIP. For any such requirements, permitting authorities would also need to develop terms addressing the various compliance assurance requirements of title V, including monitoring, deviation reporting, six-month monitoring reports, and annual compliance certifications.

Adding to the burden described above would be the burden to add GHG terms to the 14,700 existing title V permits. While, in general, existing title V permits would not immediately need to be revised or reopened to incorporate GHG (because as noted above, there are generally not applicable requirements for GHGs that apply to such sources), permitting authorities may face burdens to update existing title V permits for GHG under two possible scenarios: (1) EPA promulgates or approves any applicable requirements for GHGs that would apply to such a source, which would generally require a permit reopening or renewal application, or (2) the source makes a change that would result in an applicable requirement for GHGs to newly apply to the source, such as PSD review, which would generally require an application for a permit revision. Permitting authorities will also need to process permit renewal applications, generally on a 5-year cycle, and such renewals would need to assure that the permit properly addresses GHG. Finally they would have to process title V applications for new sources (including all the PSD sources previously discussed).

Obviously, this massive influx of permit applications would overwhelm permitting authorities' administrative resources. Indeed, permitting authorities report that they currently are having difficulty keeping up with their existing permit workloads. The Title V Operating Permits System database, which tracks permit issuance, confirms that issuance of many permits is already delayed. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable.

As with PSD, we have quantified the extent of the administrative problem that would result in workload hours and cost on the basis of information concerning hours and costs for processing existing title V permits that is indicated on ICRs. However, we recognize that more than 97 percent of these new sources would be commercial and residential sources. We estimate that for permitting authorities, the average new commercial or residential permit would require 43 hours to process, which is 10 percent of the time needed for the average new industrial permit. For an average existing permit, which permitting authorities would need to process through procedures for significant revisions and permit renewals, adding GHG emissions to the permit would result in, we estimate, 9 additional hours of processing time, which is 10 percent of the amount of time currently necessary for processing existing permits. We estimate that the total nationwide additional burden for permitting authorities for title V permits from adding GHG emissions at the 100-tpy threshold would be 340 million hours, which would cost over $15 billion.

As noted in this preamble's discussion of PSD burdens, we also reviewed summary information from State and local permitting agencies, which showed significant burdens associated with adding GHGs in their title V programs in terms of staffing, budget, and other associated resource

needs.[12] Again, note that the permitting agencies based their estimates on numbers of permits that would be required from sources subject to the 100-tpy title V applicability threshold on an actuals–not PTE–basis. Based on that level, the agencies assumed a 40-fold increase in numbers of permits, and estimated that:

- The resulting workload would require an average of 57 more FTEs per permitting agency at an estimated cost of $4.6 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to almost 10 years, which is 20 times the current average permit processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- On average, permitting authorities would need 29 additional enforcement and judicial staff;
- Eighty percent of the permitting authorities indicated that their staff would need training in all aspects of permitting for sources of GHG emissions; and
- A quarter of the permitting authorities reported that they were currently under a hiring freeze.

It is important to reiterate that, as with PSD, the State and local information on projected permitting burden is based on the number of additional facilities subject to title V because their emissions of GHGs exceed the 100-tpy thresholds at actual emissions rates, not the PTE-based emissions rates. However, the title V applicability requirements are based on PTE. As noted elsewhere in this preamble, the State and local agencies estimated a 40-fold increase in numbers of title V permits based on the amount of GHG sources' actual emissions. By adjusting the summary estimates provided by the State and local agencies to account for GHG sources that exceed the 100-tpy threshold based on their PTE emissions, EPA estimated that the average permitting authority would need 570 more FTEs to support its title V permitting program.

*C. ANPR Comments*

We examined the ANPR comments received for further information on the additional administrative burdens that permitting programs would carry if PSD requirements for sources of GHG emissions were triggered at the current 100/250-tpy thresholds and title V requirements were triggered at the current 100-tpy threshold. Most industry stakeholders who commented on the ANPR believe that triggering title V and PSD applicability for GHG emissions sources would be disastrous and that a regulatory gridlock would ensue. Many of these industry commenters agreed with the U.S. Chamber of Commerce's study[13] which found that regulating GHGs under the CAA would cause 1,000,000 commercial buildings, nearly 200,000 manufacturing operations, and about 20,000 large farms to become CAA-regulated stationary sources. In fact, most of the industry commenters believed that these estimates underestimated the impacts. Commenters expressed that the implications of all these sources becoming CAA-regulated stationary sources would cause a large permitting backlog, as States do not have the staff or training to take on such a large burden. In addition, commenters stressed that many of these sources have never needed an air permit before and would have to obtain basic knowledge of the permitting regulations and how to comply with them, which would also impose more burdens on the permitting authorities. Many of the new sources would be small emitters not previously regulated under the CAA.

## VI. What is the legal rationale for this proposed action?

This section of the preamble discusses the legal rationale for phasing in the applicability thresholds for PSD and title V purposes as proposed, which are two doctrines that courts have relied on in interpreting and applying statutory requirements: The ''absurd results'' doctrine and the ''administrative necessity'' doctrine. These doctrines are related, apply in this case because of the same factual circumstances, and justify the same application—that is, the phased approach—of the PSD and title V applicability provisions. But they are independent justifications, and therefore will be discussed independently.

*A. ''Absurd Results'' Doctrine*

This proposed action establishing the first phase of the PSD and title V applicability thresholds, in lieu of applying the statutory 100/250 tpy thresholds literally for GHG sources, is supported by a judicial doctrine that may be termed the ''absurd results'' doctrine. Applying the threshold provisions literally for the period immediately after PSD and title V are triggered for GHG emissions would lead to results that contravene congressional intent and, in fact, undermine Congress's purposes for both permitting programs.

1. Overview

As discussed in detail below, the courts are reluctant to invoke this doctrine precisely because it entails departing from the literal application of statutory provisions, but they nevertheless do so when the literal application produces results that are inconsistent with other statutory provisions, run contrary to expressed congressional intent or actually undermine congressional intent, or are otherwise so illogical or contrary to sensible policy as to be beyond anything that Congress could reasonably have intended. This is one of the rare cases in which the doctrine applies because the extraordinary increases in PSD and title V permit applications that would result from a literal application of the 100/250 tpy threshold requirements would, at least during the near term—until EPA and the permitting authorities can develop streamlining methods and ramp up resources—extensively disrupt the two permitting programs and impose undue regulatory burdens in the aggregate on the sources newly subject to PSD and title V permit requirements. These results would create tensions with other explicit requirements of the PSD and title V provisions, run contrary to expressed congressional intent for the PSD and title V provisions, and, in fact, severely undermine both programs.

The applicability of the absurd results legal doctrine to this proposal should be reviewed with EPA's proposed action in mind: EPA proposes to establish a process for implementing the PSD and title V applicability requirements, including a first phase that would consist of establishing the specified thresholds and vigorously developing streamlining methods; then, after 5 years, preparing an assessment; and then, by the sixth year, promulgating a rulemaking for further action. In addition, during this first phase, we expect the permitting authorities to ramp up resources for permit issuance.

With respect to PSD, a literal application of the applicability thresholds in CAA sections 165(a)(1) and 169(2)(C) of 100 or 250 tpy for GHG emitters would create significant tensions with two other PSD provisions during at least the first phase in period after the triggering of PSD applicability by the light-duty vehicle rule, and before the development of streamlining

[12] ''NACAA Summary on Permitting GHGs Under the Clean Air Act''; Memorandum from Mary Stewart Douglas, National Association of Clean Air Agencies to Juan Santiago, EPA/OAQPS, September 3, 2009.

[13] ''A Regulatory Burden: The Compliance Dimension of Regulating $CO_2$ as a Pollutant''; Prepared for the U.S. Chamber of Commerce; September 2008. *See* Docket ID No. EPA–HQ–OAR–2008–0318–0402.1.

methods and the addition of permitting resources. First, a literal application would render it impossible for permitting authorities to meet the requirement in CAA section 165(c) to process permit applications within 12 months. During this initial period, the number of permit applications would increase by 150-fold, an unprecedented increase that would far exceed administrative resources. Permitting authorities have estimated that it would take 10 years to process a PSD permit application, on average, and the resulting backlog would affect the permit applications for all sources, not just the GHG emitters.

This backlog would grow by tens of thousands each year following the triggering of PSD applicability—again, for at least the first few years—and thereby undermine a second express PSD provision, section 160(3). This provision describes, as one of the purposes of the PSD program, ''to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.'' Because the PSD requirements apply on a preconstruction basis—that is, they require permits before sources may construct or modify—tens of thousands of sources seeking to construct or modify during at least the first few years after the triggering of PSD would instead face many years of delay. This delay would impede economic growth by precluding any type of source—whether it emits GHGs or not—from constructing or modifying for years after its business plan contemplates.

In addition, a literal application of the 100/250 tpy threshold in the PSD provisions during at least the first few years after PSD is triggered for GHG emitters would be contrary to, and in fact would undermine, expressed congressional intent in several important ways: As just noted, it would undermine congressional intent to authorize economic growth, albeit with environmental safeguards. In addition, the PSD requirements entail significant regulatory costs to affected sources because the sources must identify and implement BACT on a source-specific basis. The legislative history of the PSD provisions makes clear that Congress intended the PSD program to apply only to larger sources, and not to smaller sources, in light of the larger sources' relatively greater ability to bear the costs of PSD and their greater responsibility for the pollution problems. In enacting the PSD requirements during the 1977 Clean Air Act Amendments, Congress, focused as it was on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources. But because very small sources emit $CO_2$ in quantities as low as 100/250 tpy, a literal application of the threshold to GHG emitters, without streamlining, would sweep in large numbers of small sources and subject them to the high costs of determining and meeting individualized BACT requirements, while also overwhelming permitting authorities' capacity to process those applications. Thus, a literal application of the 100/250 tpy thresholds would sweep into the PSD program tens of thousands of smaller sources that Congress did not intend to include, and the resulting strain on administrative resources would preclude the hundreds of larger sources that Congress did intend to be subject to the program from obtaining permits at least for an initial period. In time, the development of streamlining methods and the ramping up of administrative resources would bridge the gap between the literal language and congressional intent, and make it possible to expand the PSD program in a sensible manner that would make sense from the standpoint of the sources and the permitting authorities. But at least for the initial period, these circumstances qualify as ''absurd results'' that merit avoiding a literal application of the threshold provision.

We reach similar conclusions for title V. A literal application of the applicability threshold in CAA sections 502(a), 501(2)(B), and 302(j) of 100 tpy for GHG sources would bring some 6.1 million sources into the title V program. For at least the first few years after title V is triggered, until streamlining methods are developed and administrative resources are ramped up, this would create significant tensions with other title V provisions. The extraordinary number of permit applications would render it impossible for permitting authorities to meet the requirements of section 503(c) to process title V permit applications within 18 months. Further, this number of permit applications would severely disrupt implementation of the rest of the carefully calibrated set of statutory requirements that Congress set out in title V. These requirements set out specific—and brief—time frames for EPA review and for public participation, and they simply could not be complied with at least initially for this number of permit applications.

A literal application of the 100 tpy threshold would also be inconsistent with express congressional intent concerning title V. The statutory provisions by their terms, supported by the legislative history, indicate that Congress designed the title V program to promote compliance by compiling into a single document all of the requirements applicable to the source under the Act. The legislative history indicates that some in Congress expected the title V permit program to approximate the size of the Federal water permit program. However, applying the 100 tpy threshold for GHG emitters would lead to permit applications in numbers—some 6.1 million—that are almost 100 times greater than what Congress expected. The large permit backlog and inevitable multi-year delays in permit issuance that would ensue would thwart Congress's purposes in enacting title V to promote compliance with CAA requirements. As with PSD, this disruption would affect all sources covered by the provisions, whether or not they emit GHGs.

Moreover, the great majority of the 6.1 million additional permittees would not be subject to any CAA requirements and, as a result, would be issued permits that do not include any applicable requirements. Because Congress designed title V to require permits to address applicable requirements, and because Congress envisioned a much smaller program, immediately sweeping these sources into the program is contrary to congressional intent. Yet, their inclusion in the program would overwhelm administrative resources for at least an initial period, until streamlining methods are developed, and preclude the timely issuance and reissuance of permits to sources that Congress clearly contemplated should be included in the program. Thus, a literal application of the title V threshold provisions would bring in millions of sources that Congress did not intend to cover, and thereby interfere with the administration of the program for the thousands of sources that Congress did intend to cover. As with PSD, in time, the development of streamlining methods and the ramping up of administrative resources would bridge the gap between the literal language and congressional intent, and make it possible to include more of these sources in the title V program in a manner that makes sense for both the permittees and the permitters. But for the initial period, as with PSD, these circumstances qualify as ''absurd results'' that merit avoiding a literal application of the threshold provisions.

In the cases that apply the ''absurd results'' doctrine, the courts go on to apply the statutory provisions in question in a manner that—while not in

accordance with their literal reading—effectuates congressional intent as much as possible. We believe that the process we propose in this notice, which includes a first phase that establishes thresholds at the specified levels while allowing time to develop streamlining approaches and ramp up resources, followed by a study and further rulemaking, is consistent with this caselaw.

2. Tailoring Approach

In discussing the absurd results caselaw and its applicability in this case, it is important to keep in mind EPA's proposed action. As discussed in detail elsewhere in this notice, EPA proposes a phased plan designed to achieve full compliance with the PSD and title V threshold requirements. The first phase entails the establishment of applicability thresholds at the 25,000 tpy $CO_2e$ levels, and significance levels at between 10,000 and 25,000 tpy $CO_2e$. In addition, the first phase entails development of streamlining methods—including potential revisions to the definition of potential to emit, general permits, and presumptive BACT—that allow us to craft the application of PSD and title V in ways that are achievable and effectively balance the burdens on both the permitting authorities and the regulated community with the reductions achievable. The first phase also includes the collection of information and further assessments in a report, to be completed within 5 years, and culminates in a rulemaking to be promulgated by the sixth year that will establish further action.

3. PSD and Title V Threshold Provisions

Several PSD and title V provisions are relevant for present purposes because of the specific requirements that they establish and the window that they provide into congressional intent. These provisions start with the PSD and title V applicability provisions. For PSD purposes, the key applicability provisions are found in CAA sections 165(a) and 169(1), which identify the new sources subject to PSD, and CAA § 111(a)(4), which describes the modifications of existing sources that are subject to PSD. CAA section 165(a), 42 U.S.C. 7475, provides:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (1) A permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;
>
> (2) The proposed permit has been subject to a review in accordance with this section * * *, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations; * * *
>
> (4) The proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility * * *.

The term ''major emitting facility'' is defined, under CAA § 169(1) to include:

> * * * stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from [28 listed] types of stationary sources. * * * Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

The thresholds in CAA section 169(1) of 100-tpy for sources in the 28 listed categories and 250-tpy for all other sources may be referred to as the 100/250-tpy thresholds.

As for modification of existing sources, CAA section 169(1)(C) provides that the term ''construction,'' as used in CAA section 165(a) (the PSD applicability section) ''includes the modification (as defined in section 111(a)(4)) of any source or facility.'' Section 111(a)(4), in turn, provides:

> The term ''modification'' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

As interpreted by EPA regulations, these provisions, taken together, provide that new stationary sources are subject to PSD if they emit at the 100/250-tpy thresholds air pollutants that are subject to EPA regulation, and that existing stationary sources that emit such air pollutants at the 100/250-tpy thresholds are subject to PSD if they undertake a physical or operational change that increases their emissions of such air pollutants by any amount.

For title V purposes, the key applicability provisions are found in CAA sections 502(a), 501(2)(B), and 302(j). These provisions provide that it is unlawful for any person to operate a ''major source'' without a title V permit, section 502(a), and define a ''major source'' as ''any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.'' CAA section 501(2)(B) and section 302(j). As noted elsewhere, these provisions, taken together and as interpreted by EPA, provide that stationary sources are subject to title V if they emit at the 100-tpy threshold air pollutants that are subject to EPA regulation.

Other provisions of particular relevance are the requirements in the PSD and title V programs for timely issuance of permits. For PSD, the permitting authority must ''grant[ ] or den[y] [any completed permit application] not later than one year after the date of filing of such completed application.'' CAA § 165(c). For title V, ''the permitting authority shall approve or disapprove a completed application * * * and shall issue or deny the permit, within 18 months after the date of receipt thereof * * *.'' CAA section 503(c). Title V goes on to include several provisions designed to support this 18-month requirement. First, the permitting authority must develop ''adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice * * * and for expeditious review of permit actions, including * * * judicial review in State court of the final permit action by [specified persons].'' CAA section 502(b)(6). Second, title V includes a ''hammer'' provision designed to reinforce timely permit issuance, which is that the permitting authority's program must include:

> To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in [CAA § 503] * * *) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay. CAA § 502(b)(7).

Third, the permit program must include ''[a]uthority and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public [certain permit-related documents]''. CAA section 502(b)(8).

In addition, PSD includes a set of provisions that specifically state ''the purposes of [the PSD program],'' which are to balance environmental protection and growth. CAA § 160. One of the purposes, in subsection (1), is specifically ''to protect public health and welfare,'' and another, in subsection

(3), is ''to insure that economic growth will occur in a manner consistent with the preservations of existing clean air resources.'' Title V does not have a parallel set of provisions describing its purpose, but it is clear from its provisions and its legislative history, discussed below, that its key goal is to gather into a single document the Clean Air Act requirements applicable to a source and impose conditions necessary to assure compliance with such requirements, and thereby promote the enforceability of CAA requirements applicable to the covered sources. CAA § 503(b)(1) requires that the source's permit application must assure ''compl[iance] with all applicable requirements'' of the CAA, and § 504(a) requires that ''[e]ach permit issued under [title V] shall include * * * such * * * conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act].'' *See* H.R. Rep. No. 101–490, at 351 (1990) (''It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.'').

In addition, both PSD and title V include detailed procedures for implementation. The PSD provisions most relevant for sources of GHG are that the proposed permit for each source must be the subject of a public hearing with opportunity for interested persons to comment, CAA § 165(a)(2), and each source must be subject to best available control technology, as determined by the permitting authority on a source-by-source basis, CAA § 165(a)(4), 169(3). Title V includes a comprehensive and finely detailed implementation schedule that mandates timely issuance of permits while building in EPA and affected State review, public participation, and timely compliance by the source with reporting requirements. Following the date that sources become subject to title V, they have 1 year to submit their permit applications. CAA § 503(c). As noted above, the permitting authority then has 18 months to issue or deny the permit. CAA § 503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA § 502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA, and notify affected States, for review. CAA § 505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA § 505(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA § 505(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. CAA § 505(b)(2). If a permit is issued, it must include a permit compliance plan, under which the permittee must ''submit progress reports to the permitting authority no less frequently than every 6 months,'' and must ''periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and [ ] promptly report any deviations from permit requirements to the permitting authority.'' CAA § 503(b).

4. ''Absurd Results'' Doctrine

The familiar *Chevron* two-step analysis provides the starting point for EPA's interpretation of these statutory provisions. Under *Chevron* step 1, an agency must determine whether Congress's intent in a particular provision on a particular question is clear; if so, then the agency must follow that intent. If the intent of a provision is not clear, then the agency may, under step 2, fashion a reasonable interpretation of the provision. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842–43 (1984).

Here, the applicability provisions for PSD and title V are clear on their face. However, the U.S. Supreme Court has held that the plain meaning of a statutory provision is not conclusive ''in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' * * * [in which case] the intention of the drafters, rather than the strict language, controls.'' *Ron Pair*, 489 U.S. at 242 (citations omitted).[14]

In describing these cases as ''rare,'' the U.S. Supreme Court seemed to be referring to the small percentage of statutory-construction cases that are decided on the basis of the doctrine. The D.C. Circuit, in surveying the doctrine over more than a century of jurisprudence, characterized the body of law in absolute numbers as comprising ''legions of court decisions.'' *In re Franklyn C. Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991). The U.S. Supreme Court cases include, among others, *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 132–33 (2004) (''any entity'' includes private but not public entities); *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 542–45 (2002) (''implying a narrow interpretation of * * * 'any claim asserted' so as to exclude certain claims dismissed on Eleventh Amendment grounds''); *Ron Pair*, 48 U.S. at 242; *Green* v. *Bock Laundry Machine Company*, 490 U.S. 504 (1989) (provision in Federal Rule of Evidence that protects ''the defendant'' against potentially prejudicial evidence, but not the plaintiff, refers to only criminal, and not civil, defendants); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23–24 (1976) (prohibition in Federal Water Pollution Control Act against discharging into navigable waters ''pollutants,'' which are defined to include ''radioactive materials,'' does not apply to three specific types of radioactive materials); *Lynch* v. *Overholser, 369 U.S. 705, 710, (1962)* (statutory construction is not confined to the ''bare words of a statute''); *Utah Junk Co.* v. *Porter, 328 U.S. 39, 44 (1946)* (''literalness may strangle meaning''); *Markham* v. *Cabell, 326 U.S. 404, 409* (1945) (''The policy as well as the letter of the law is a guide to decision.''); *United States* v. *American Trucking Associations, Inc.* 310 U.S. 534 (1940) (the term ''employees'' in the Federal Motor Carrier Act, is limited to employees whose activities affect safety); *C.V. Sorrels* v. *U.S.*, 287 U.S. 435, 446–49 (1932) (provisions of National Prohibition Act that criminalize possessing and selling liquor do not apply if defendant is entrapped; Court declines to apply the ''letter of the statute'' because doing so ''in the circumstances under consideration is foreign to its purpose''); *Holy Trinity Church* v. *U.S.*, 143 U.S. 457, 516–17 (1892) (''any alien'' does not include a foreign pastor; Court stated, ''It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers * * * If a literal construction of the words be absurd, the Act must be construed as to avoid the absurdity''); *United States* v. *Kirby, 7*

[14] Judge Learned Hand's formulation of the doctrine is often quoted in the caselaw:

> Of course, it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing. * * * But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

*Cabell* v. *Markham*, 148 F.2d 737, 738 (2d Cir.), aff'd 326 U.S. 404 (1945). See *Giuseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (opinion by Judge Hand) (''There is no surer way to misread any document than to read it literally'').

*Wall, 482, 486, 19 L.Ed. 278 (1868)* (the statute punishing obstruction of the mails is not to be applied to obstruction for the lawful purpose of arresting a mail carrier indicted for murder).

The D.C. Circuit has also handed down several decisions that applied the absurd results doctrine to avoid a literal interpretation or application of statutory provisions. *See Buffalo Crushed Stone, Inc.* v. *Surface Transportation Board*, 194 F.3d 125, 129–30 (D.C. Cir. 1999) (regulation of Surface Transportation Board providing that if a notice of exemption ''contains false or misleading information, the use of the exemption is void *ab initio*'' does not apply to a notice containing false information when declaring the notice void *ab initio* would undermine the goals of the governing statute; a conflict between the ''literal application of statutory language'' and maintaining the integrity of the regulatory scheme should be resolved by construing the text in accordance with its purpose); *U.S.* v. *Stewart*, 104 F.3d 1377, 1388 (D.C. Cir. 1997) *Environmental Defense Fund* v. *EPA*, 82 F.3d 451, 468–69 (D.C. Cir. 1996) (although Clean Air Act requires that a Federal action conform to the State implementation plan that is currently in place, EPA may instead require conformity to a revised implementation plan that State commits to develop; ''[t]his is one of those rare cases * * * [that] requires a more flexible, purpose-oriented interpretation if we are to avoid 'absurd or futile results.' ''); *In re Nofziger*, 925 F.2d 428, 434–35 (D.C. Cir. 1991) (provision authorizing payment of attorney fees to the subject of an investigation conducted by an independent counsel of the Department of Justice only if ''no indictment is brought'' against such individual does not preclude payment of attorney fees when an indictment is brought but is determined to be invalid).

To determine whether ''the intentions of the drafters'' differ from the result produced from ''literal application'' of the statutory provisions in question, the courts may examine the overall context of the statutory provisions, including whether there are related statutory provisions that either conflict or are consistent with that interpretation,[15] and including whether there is legislative history that exposes what the legislature meant by the terms in question. In addition, the courts may examine whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or indeterminate, and therefore so illogical or otherwise contrary to sensible public policy as to be beyond anything Congress would reasonably have intended. After concluding this examination, the courts uphold an application of the provisions that, albeit not the literal application, is one that is nevertheless as consistent with congressional intent as possible.

The U.S. Supreme Court applied the absurd results doctrine in *Green* v. *Bock Laundry Machine Company*, 490 U.S. 504 (1989). There, the Court considered Federal Rule of Evidence 609(a), which provides:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted * * * but only if the crime (1) [is of a specified type] and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the *defendant*.

(Emphasis added.) The Court recognized that read literally, Rule 609(a) applies in both criminal and civil litigation and gives an advantage to defendants. Specifically, the rule extends to both the criminal and civil defendants the protection of weighing the probative value of evidence of certain crimes against its prejudicial effect, but as for plaintiffs, the rule requires that evidence of those crimes be admitted without weighing against prejudicial effect. The Court found that for criminal litigation, this result makes sense because it is consistent with the greater protections generally afforded to defendants. However, for civil litigation, the Court found that this ''literal reading would compel an odd result'' because, among other things, civil defendants are not accorded greater protections than civil plaintiffs and, in any event, whether a litigant is designated plaintiff or defendant often is happenstance. The Court emphasized that ''[n]o matter how plain the text of the Rule may be,'' it could not accept this result, and concluded that ''as far as civil trials are concerned, Rule 609(a)(1) 'can't mean what it says.' '' 490 U.S. at 509–11 (citations omitted). The Court reviewed the legislative history, and concluded that notwithstanding the plain language, Congress ''intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1).'' *Id.* at 523–24.

In cases in which the ''absurd results'' doctrine of statutory constructions authorizes an agency to depart from the literal meaning of the statute, the agency must do so in as limited a manner as possible to effectuate underlying congressional intent. As the D.C. Circuit has stated:

> The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the ''unambiguously expressed intent of Congress,'' * * * and thus to overcome the first step of the *Chevron* analysis. But the agency does not thereby obtain a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent.

*Mova Pharmaceutical Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

5. PSD and Title V Applicability Requirements

The plain meaning of the PSD applicability provisions in CAA §§ 165(a)(1) and 169(1) is clear that once PSD is triggered for GHG emissions, a source will be subject to PSD if it either belongs to one of 28 specifically identified source categories and ''emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant,'' including GHGs, or does not belong to one of those source categories and has ''the potential to emit two hundred and fifty tons per year or more of any air pollutant,'' including GHGs. Similarly, the plain meaning of the title V applicability requirements in CAA §§ 501(2)(B) and 302(j) is clear that once the title V requirements are triggered, they would apply to a source that ''directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant,'' including GHGs.

As described in detail elsewhere, applying the plain meaning of these provisions once PSD and title V are triggered for GHG emissions would impose PSD and title V permitting requirements on an extraordinarily large number of sources: The number of sources subject to PSD permits would increase from less than 300 per year to some 41,000 per year, and the number of sources subject to the title V requirements would grow from less than 14,000 to some 6.1 million. For at least an initial period of time, before permitting authorities could develop streamlining mechanisms, these obligations would have severe effects. From the permitting authorities' standpoint, the number of permit applications would far exceed their

[15] A related line of cases addresses statutory provisions that directly, on their face, conflict with other statutory provisions. In these cases, as with the ''absurd result'' cases, the courts may decline to interpret literally the statutory provisions in question, and instead interpret them to give as much effect as possible to all of the relevant provisions. *See, e.g., Mountain States Telephone and Telegraph Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480 (1947); *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844 (D.C. Cir. 1977).

administrative capacity, and would inevitably result in delays in issuance of permits to all sources—whether emitting conventional pollutants or GHGs—that would be measured in many years. From the sources' standpoints, thousands of sources that are quite small and that have never been confronted with CAA obligations would incur the expenses of PSD permitting requirements, including, most importantly, indentifying and developing BACT controls on a source-by-source basis. As for title V, millions of sources would be required to submit permit applications that meet title V requirements, even though the great majority of them would not be subject to any applicable CAA requirements. During this initial period, permitting authorities could develop streamlining approaches and ramp up administrative resources so that afterwards, they would be better able to accommodate the large numbers of permit applications and sources would be better able to comply. But, again, during the initial period, severe problems would ensue.

We believe that these effects of a literal application of the PSD and title V applicability thresholds and their collateral consequences are well beyond anything that Congress envisioned when it drafted the PSD and title V requirements, and indeed undermine both permitting programs. As a result, these effects bring into play the ''absurd results'' doctrine.

a. PSD

(1) Tensions With Other Statutory Requirements

Turning first to PSD, an important indication that Congress would not have intended that the threshold provisions be applied literally under the present circumstances may be found in the tensions that this literal application would create with other PSD provisions. CAA § 165(c) is particularly important in this regard. It requires that the permitting authority grant or deny ''[a]ny completed permit application for a major emitting facility * * * not later than one year after the date of filing of such completed application.'' A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 tpy levels for GHG sources would render compliance with this provision impossible by requiring far more permit applications than permitting authorities could process under this 12-month deadline, for at least an initial period of time until streamlining methods are developed. As noted elsewhere, States have estimated that the number of PSD permits that would be required under a 100/250 tpy threshold on an actuals basis would result in an average processing time of 10 years.[16]

A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 tpy levels would also be directly inconsistent with the PSD-purpose provision in CAA § 160, in particular, § 160(3), which is ''to insure that economic growth will occur in a manner consistent with the preservation of existing clear air resources.'' As the legislative history makes clear, Congress enacted the PSD provisions to resolve issues arising when sources of criteria pollutants seek to build or expand in areas with air quality that meets the national ambient air quality standards, but that would deteriorate with the addition of such new or expanded sources. Congress designed the PSD provisions to provide a mechanism for allowing sources to construct or modify in those clean-air areas, but with safeguards that both protected health and welfare, and that also left enough room in the airshed for still more economic growth. *See, e.g.*, H. Rpt. 95–294, 95th Cong., 1st Sess., at 154 (legislation ''not only protect[s] public health and welfare but also assur[es] future air resources will be available for continuing the industrial and energy development so necessary for the growth of the Nation''). Because PSD is a preconstruction requirement, increasing permitting authorities' workload from 300 to 41,000 permits would severely undermine this purpose of facilitating economic growth, at least initially, until permitting authorities can develop streamlining methods and ramp up resources. Each year, many thousands of sources would face multi-year delays in receiving their permits, and as a result, for all practical purposes, they would be forced to place on hold indefinitely their plans to construct or modify.

(2) Inconsistency With Congressional Intent

The legislative history of the PSD provisions—enacted, again, in the 1977 Clean Air Act Amendments—also makes clear that a literal application of the applicability provisions would lead to results that are diametrically inconsistent with Congress's expressed intent. In reviewing the legislative history, it should be borne in mind that Congress was focused on sources of criteria pollutants—primarily sulfur dioxide ($SO_2$), particulate matter, nitrogen oxides ($NO_X$), and carbon monoxide (CO)—and not GHG emissions. This focus stems from the basic purpose of the PSD program, which is to safeguard maintenance of the NAAQS, combined with the limited awareness at that time of the problem of climate change. *See* S 95–127 (95th Cong., 1st Sess.), at 27.

Congress designed the PSD provisions to impose significant regulatory requirements, on a source-by-source basis, to identify and implement BACT and, for criteria pollutant, to also undertake certain studies. Congress was well aware that because these requirements are individualized to the source, they are expensive. Accordingly, Congress designed the applicability provisions to apply these requirements to industrial sources of a certain type and a certain size—sources within 28 specified source categories and that emit at least 100 tpy—as well as all other sources that emit at least 250 tpy, and, by the same token, to exempt other sources from these requirements. The legislative history shows that Congress's limitation of PSD to larger sources was quite deliberate, and was based on its determination to limit the costs that PSD permitting entails to the larger sources in certain industries. The D.C. Circuit has had occasion, in *Alabama Power,* to acknowledge this legislative history: ''Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air.'' *Alabama Power,* 636 F.2d at 353. The Court added, ''Though the costs of compliance with [the PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1).''. *Id.* at 354.

Although Congress required that CAA requirements generally apply to ''major emitting facilities,'' defined as any source that emits or has the potential to emit 100 tpy of any pollutant, Congress applied PSD to only sources at 100 tpy or higher in 28 specified industrial source categories, and at 250 tpy or more in all other source categories. This distinction was deliberate: According to Sen. McClure, Congress selected the 28 source categories after reviewing an EPA study describing 190 industrial source categories. 122 Cong. Rec. 24521 (July 29, 1976) (statement by Sen. McClure).

[16] As noted elsewhere, because the applicability provisions apply on a potential-to-emit basis, as well as an actuals basis, the number of permit applications would be much greater than the permitting authorities assumed, and therefore the processing times would be much longer than 10 years.

Congress also relied on an EPA memorandum that identified the range of industrial categories that EPA regulated under its regulations that constituted the precursor to the statutory PSD program, and listed both the estimated number of new sources constructing each year and the amount of pollution emitted by the ''typical plant'' in the category. The memorandum was prepared by B.J. Steigerwald, Director of the Office of Air Quality Planning and Standards and Roger Strelow, EPA's Assistant Administrator for Air and Waste Management (''Steigerwald-Strelow memorandum). The Steigerwald-Strelow memorandum makes clear that the 100 tpy cut-off for the 28 listed sources categories, and the 250 tpy cut-off for all other sources, was meaningful; that is, there were a large number of sources below those cut-offs that Congress explicitly contemplated would not be included in PSD. *Id.* at 24548–50.

Consistent with this, the legislative history on the Senate side also specifically identified certain source categories that Senators believed should not be covered by PSD. The Senate bill language limited PSD to sources of 100 tpy or more in 28 listed source categories, and to any other categories that the Administrator might add. Sen. Muskie stated that the Senate bill excluded ''houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources.'' 123 Cong. Rec. 18021 (June 8, 1977) (statement of Sen. Muskie). Sen. McLure's list of excluded source categories were ''[a] small gasoline jobber, or a heating plant at a community college, [which] could have the potential to emit 100 tons of pollution annually.'' 122 Cong. Rec. 24548–49 (July 29, 1976) (statement of Sen. McClure). The Senate Committee Report included a comparable list, and in describing it, concisely articulated the cost-conscious basis for the line-drawing: ''[the PSD] procedure * * * must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually.'' S. Rpt. 95–127 at 96–97.

The enacted legislation differs from the Senate bill by replacing the authorization to EPA to include by regulation source categories in addition to the listed 28 source categories with an inclusion of all other sources if they exceed 250 tpy, and with an authorization for the States to exempt hospitals and educational institutions. But Congress's overall intention remains clear, as the D.C. Circuit described in *Alabama Power:.* ''Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air * * * [With respect to] the heating plant operating in a large high school or in a small community college * * * [w]e have no reason to believe that Congress intended to define such obviously minor sources as 'major' for the purposes of the PSD provision.'' [17] 636 F.2d at 353–54. However, applying the 100/250 tpy threshold literally to $CO_2$ emissions would frustrate congressional intent by subjecting to PSD sources that Congress specifically intended not to include. This occurs simply because although Congress evaluated whether sources should be included in PSD by reference to the amount of the emissions of conventional pollutants, many sources combust fossil fuels for heat or electricity, and the combustion process produces quantities of $CO_2$ that are far in excess of the sources' quantities of conventional pollutants and, in many cases, Congress's carefully considered 100 and 250 tpy thresholds. As a result, many of the ''typical plant[s]'' identified in the Steigerwald-Strelow memorandum that Congress thought would be excluded from PSD due to the relatively small amounts of their conventional pollutants would in fact be included due to the $CO_2$emissions from their heating or electricity generating equipment.But the clearest and most important indication that applying the 100/250 thresholds literally in the case of GHG emissions would undermine congressional intent comes in considering the emissions profile of the small-sized boilers. Congress focused closely on identifying which sources with emissions in excess of 100 tpy should not be subject to PSD even though they are subject to CAA requirements generally. But Congress viewed a large set of sources as emitting below 100 tpy and therefore not included in the PSD program and, indeed, not even subject to debate as to whether they should be included in the PSD program. Chief among these sources, in terms of absolute numbers of sources, were small boilers. The Steigerwald-Strelow memorandum identified two categories of these boilers, differentiated by size. The first ranges in size from 10 to $250 \times 10^6$ Btu/hr, and has a ''typical plant'' size of $10^7$ Btu/hr, with ''BACT emissions from typical plant'' of 53 tpy, and a total of 1,446 sources in the category. The second category ranges in size from 0.3 to $10 \times 10^6$ Btu/hr, and has a ''typical plant'' size of $1.3 \times 10^6$ Btu/hr, with ''BACT emissions from typical plant'' of 2 tpy, and a total of 11,215 sources in the category. The memorandum discusses these two categories in the context of explaining which source categories exceed a size of 100 tpy—and therefore would be subject to PSD if a 100 tpy threshold were set—by stating, ''Fortunately, most truly small boilers and typical space heating operations would not be covered.'' 122 Cong. Rec. 24549 (July 29, 1976). However, if the $CO_2$ emissions of these small boilers are considered, then most of them would be subject to PSD. In general, most boilers of these small sizes are fired with natural gas, and a natural gas boiler greater than $0.5 \times 10^6$ Btu/hr emits at least 250 tpy $CO_2$. As a result, the small commercial and residential sources that include these boilers would become subject to PSD, and this would directly contravene Congress's intention to limit PSD to ''industrial plants of significant impact.'' 122 *Cong. Rec.* 24548–49 (statement of Sen. McClure). The legislative history also provides a window into the scope of the program that Congress anticipated and related administrability concerns. According to the Steigerwald-Strelow memorandum, the number of new sources each year whose ''BACT emissions from typical plant'' exceed 100 for the 28 listed source categories and 250 for all other source categories is less than 100 per year. Although the Steigerwald-Strelow memorandum does not attempt to estimate the number of modifications, it appears that based on this information, Congress had reason to expect the total size of the PSD program to be measured in the hundreds of permits each year. A program of this size would be manageable by EPA and the permitting authorities.

The D.C. Circuit based its holding in *Alabama Power* that potential-to-emit for purposes of the applicability thresholds should be defined as

[17] Note that although Congress specifically authorized the States to exempt ''nonprofit health or education institutions'' from the definition of ''major emitting facility,'' this statement by the D.C. Circuit should be taken as the Court's view that Congress did not design PSD to cover sources of the small size described.

emissions at full capacity with implementation of control equipment, in part on its view that with this definition, the number of sources subject to PSD would be manageable:

Though the costs of compliance with section 165 requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1). The numbers of sources that meet these criteria, as we delineate them, are reasonably in line with EPA's administrative capability.

*Alabama Power,* 636 F.2d at 354 (emphasis added). However, applying the thresholds literally to GHG emissions would increase the size of the PSD program far beyond what Congress had reason to expect and what the D.C. Circuit evidently had in mind. Returning to the Steigerwald-Strelow table, applying the thresholds literally would bring into PSD the great majority of the small boilers constructed each year, which numbered, in total, 12,661. Adding more sources from other source categories, and, most importantly, modifications, indicates that the size of the PSD program would very likely be at least an order of magnitude greater than what Congress intended. At least for an initial period of time, until streamlining methods could be developed, these numbers of sources would be well beyond the ''administrative capability'' that the D.C. Circuit described EPA as having.

(3) Absurd Results

Applying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind—and that in fact so undermines what Congress attempted to accomplish with the PSD requirements—that it should be avoided under the ''absurd results'' doctrine. As described above, Congress designed the PSD program as a mechanism to allow construction of new sources and expansion of existing sources in areas meeting the NAAQS, but only after those sources, on a source-by-source basis, undertook analyses to demonstrate that their emissions would not significantly deteriorate air quality and implemented controls representing BACT. Recognizing that PSD imposed significant costs on sources, Congress constructed a statutory scheme that it viewed as limiting PSD to large industrial sources that could bear the financial costs and that caused most of the pollution problem. These limits were the 100/250 tpy thresholds. Congress had reason to expect that with these thresholds, the program would approximate the size of the current PSD program, which numbers in the hundreds of sources each year. Throughout its deliberations, Congress focused primarily on emissions of conventional pollutants.

But applying the 100/250 tpy thresholds literally to sources of $CO_2$ would sweep aside this carefully designed construct by bringing in tens of thousands of sources of a different type and much smaller size than Congress had in mind: Commercial and residential sources whose primary—if not sole—source of emissions is $CO_2$ from small boilers that primarily provide heat. Moreover, applying the thresholds literally would bring in many additional sources in the source categories Congress expected PSD to apply to, but of a size Congress expected to be below the cut-off. Congress did not intend to apply PSD to these sources because of the expenses that compliance with PSD entails and because Congress did not view these sources as causing a sufficiently great part of the pollution problem. Including these sources would also expand the PSD program to well beyond what Congress had reason to expect, and what permitting authorities can administer.

The administrability problems lead the results of applying the thresholds literally beyond contravening congressional intent and into actually undermining congressional intent. At least for an initial period, until streamlining methods could be developed, the extraordinary number of sources subject to PSD would preclude the permitting authorities from processing permit applications for all sources, including those that Congress intended be subject to PSD. Because PSD is a preconstruction program, those sources would face many years of delay before they could construct or modify, which would undermine congressional intent to allow economic growth in PSD areas. These results are the types of ''absurd results'' from a literal reading of statutory provisions that courts have declined to sanction.

b. Title V

For title V, the application of the absurd results doctrine parallels that of PSD. First, a literal application of the 100 tpy threshold requirement in CAA §§ 502(a), 501(2)(B), and 302(j) would be in tension with a specific CAA requirement, that of CAA § 503(c), which imposes a time limit of 18 months from the date of receipt of the completed permit application for the permitting authority to issue or deny the permit. It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from some 14,000 permits to 6.1 million. Instead, permit applications would face multi-year delays in obtaining their permits.

Moreover, these delays would undermine the overall statutory design that promotes the smooth-running of the permitting process, and the very purpose of the title V program itself. As noted elsewhere, Congress intended through title V to facilitate compliance by establishing an operating permit program that requires the source to combine in a single permit all of its CAA requirements. Congress established a comprehensive process to implement the operating permit program. Through this process, following the date that sources become subject to title V, they have 1 year to submit their permit applications. CAA § 503(c). As noted, the permitting authority then has 18 months to issue or deny the permit. CAA § 503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA § 502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA, and notify affected States, for review. CAA § 505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA § 503(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA § 503(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. This set of applicant, permitting authority, and EPA actions and deadlines establishes the process for the prompt and efficient issuance of operating permits for the appropriate universe of sources.

The legislative history of title V, enacted by Congress in the 1990 CAA Amendments, indicates that Congress expected the provisions to apply to a much smaller set of sources than would become subject at a 100-tpy GHG threshold level. The Senate Committee report noted that under the title V provisions that would be enacted, ''the additional workload in managing the air pollution permit system is estimated to be roughly comparable to the burden that States and EPA have successfully managed under the Clean Water Act[,]'' under which ''some 70,000 sources receive permits, including more than 16,000 major sources.'' S. Rep. 101–228,

at 353. Applying title V to GHG emitters at the 100-tpy threshold would result in approximately 6.1 million sources becoming subject to title V, which is far in excess of the number that Congress contemplated.

Moreover, the great majority of these sources will not be subject to any CAA requirements, so that although they would need to apply for and receive a permit, there would be no applicable requirements to include in the permit and the exercise would not improve compliance. But at least for an initial period, until streamlining methods could be developed, the extraordinary numbers of these sources would sweep aside Congress' carefully constructed program, with its multi-step process and deadlines of as short as 45 days—and instead, backlog the permit authorities for many years. Multi-year delays in issuance of all permits would ensue, those for sources that have applicable requirements and that Congress clearly intended the program to cover, and for the millions of sources that are not subject to any applicable requirements. Thus, as with PSD, a literal interpretation of the title V threshold provisions would apply title V to millions of sources that Congress did not intend be covered, and the ensuing administrative burdens—at least initially—would impede the issuance of permits to the thousands of sources that Congress did intend be covered. This result is the type of ''absurd results'' from a literal application of statutory provisions that the courts have held should be avoided.

c. Application of PSD and Title V Thresholds

Because a literal application of both the PSD and title V threshold requirements produces absurd results, EPA may develop a different application that promotes consistency with other statutory provisions and is consistent with congressional intent. We believe that this proposal would achieve these objectives by establishing a threshold for the first phase at the level of 25,000 tpy $CO_2e$, and committing to vigorous efforts to streamline implementation of both programs' requirements and to complete a study and then conduct further rulemaking.

A first phase 25,000-tpy $CO_2e$ major source GHG threshold, combined with vigorous efforts to develop streamlining methods, is consistent with congressional intent for the PSD provisions for several reasons. The 25,000-tpy $CO_2e$ threshold reconciles the PSD provisions that, absent this regulation, would be in tension with each other, and thereby maintains the overall functioning of the PSD program. The threshold maintains the environmental purposes of the PSD program, while allowing economic growth, as set forth in CAA § 160. As discussed elsewhere in this preamble, a majority of stationary source GHG emissions in the U.S. come from a relatively small number of high-emitting sources that would remain subject to PSD because they emit at or above the 25,000-tpy $CO_2e$ threshold. By comparison, about 75 percent of stationary source GHG emissions come from all sources above 250 tpy. Accordingly, the 25,000-tpy $CO_2e$ threshold would, during this first phase, exempt from PSD numerous small sources that emit only about 7 percent of GHGs, and that smaller amount of emissions coverage would not jeopardize the environmental protection goals of PSD. Moreover, the program will remain of a manageable size, so that permitting authorities will be able to process permit applications and issue permits, which sources must have to construct or expand. As discussed elsewhere, the information available to us indicates that the 25,000-tpy $CO_2e$ level is the level closest to the statutory levels that permitting authorities can reasonably administer during this initial phase. The ''absurd results'' caselaw requires that if a statutory provision cannot be applied literally, then it should be applied as close to literally as possible, consistent with congressional intent. With this level of 25,000-tpy $CO_2e$, permitting authorities would be able to reasonably comply with the 12-month deadline requirement for acting on PSD permit applications under CAA § 165(c). Further, the first phase threshold of 25,000 tpy and the development of streamlining methods is consistent with congressional intent to limit the PSD program—with the high costs that result from its source-by-source applications—to sources that can bear the costs. The first phase would allow for the implementation of streamlining methods, which could facilitate the orderly development of the program by reducing the costs of compliance for sources of GHG emissions. In addition, the first phase threshold maintains the program at a manageable size so that permitting authorities will be able to continue to timely issue permits to sources seeking to construct or expand.

The first phase 25,000-tpy $CO_2e$ threshold, combined with the development of streamlining methods and the study and subsequent regulations, is also consistent with the purposes of the title V provisions. This first phase would assure a manageable size for the program so that permitting authorities could continue to issue permits to sources with applicable CAA requirements, as Congress intended. The implementation of streamlining methods—in particular, general permits—could facilitate the orderly development of the title V program to include a broader set of sources based on their GHG emissions.

*B. ''Administrative Necessity'' Doctrine*

1. Overview

Once EPA takes regulatory action to trigger PSD and title V requirements for GHG emitters, a literal application of the PSD and title V applicability requirements (*i.e.,* the 100/250-tpy PSD major stationary source threshold and a ''zero'' significance level threshold, and the 100-tpy title V threshold) would result in a volume of permit applications that is so high that the PSD and title V programs would become impossible for State and Federal authorities to administer. The PSD and title V permitting processes would become overwhelmed and essentially paralyzed.

Under these circumstances, the judicial doctrine of administrative necessity authorizes EPA to undertake a process for rendering the PSD and title V requirements administrable. As part of this process, EPA must consider ways to streamline the PSD and title V definitions and operative requirements so that the permitting authorities may more efficiently process the expected influx of GHG permit applications. These streamlining methods may include refinements to the definition of PTE and issuance of some form of general permits with presumptive BACT. *See* section VII.A of this preamble for a description of what these streamlining methods entail for PSD and title V programs, respectively.

However, the development, adoption, and implementation of these streamlining approaches would take several years, and, upon their completion, would still leave permitting authorities confronting a sufficiently large increase in workload that, absent a corresponding increase in resources, would continue to render the PSD and title V programs impossible to administer. *See* section VII of this preamble for an explanation of the procedures and timeframes necessary to develop these streamlining techniques.

As a result, under the doctrine of administrative necessity, EPA is authorized to phase in the PSD and title V requirements in as refined a manner as possible, so as to allow

administration of the PSD and title V programs. As part of the first phase, EPA proposes to establish the thresholds at the levels proposed, as well as undertake streamlining as much as possible and as quickly as possible, and explore with permitting authorities methods to ramp up resources for processing GHG permit applications. EPA also commits to conduct an assessment of the administrability issue within 5 years and, by the end of 1 year later, promulgate the second phase of the tailoring process, which would include the thresholds and streamlining methods determined at that time to be appropriate.

2. Chevron Standard for Statutory Interpretation

As noted above, the PSD requirements apply to the construction and modification of a ''major emitting facility,'' CAA §§ 165(a)(1), 169(2)(C), which is defined as a ''stationary source[ ] [in one of 28 listed categories of sources] of air pollutants which emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant'' or ''any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant,'' with certain exceptions. CAA § 169(1). The title V requirements apply to any ''major source,'' CAA § 502(a), which is defined to include ''any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.'' CAA §§ 501(2)(b), 302(j).

Although these applicability provisions are clear by their terms, the Courts have held that the *Chevron* approach of applying the literal language of the provisions may not apply when the administrability of the provisions is at issue.

3. Doctrine of Administrative Necessity

a. Administrative Necessity Doctrine in the Context of *Chevron*

The Courts have acknowledged the administrative necessity doctrine as an overlay on the *Chevron* doctrine of statutory construction, so that even when a statutory requirement expresses a clear congressional intent, if the provision is impossible for the agency to administer, then the agency is not required to follow the literal requirements, and instead, the agency may adjust the requirements in as refined a manner as possible to assure that the requirements are administrable, while still achieving Congress's overall intent. As discussed below, the D.C. Circuit set out the doctrine of ''administrative necessity'' in a line of cases that most prominently includes *Alabama Power* v. *Costle,* 636 F.2d 323 (D.C. Cir. 1980). The Court cited the doctrine most recently in *New York* v. *EPA,* 443 F.3d 880, 884, 888 (D.C. Cir. 2006).[18]

b. Alabama Power

The Court provided its most robust expression of the ''administrative necessity'' doctrine in the seminal decision, *Alabama Power Co.* v. *Costle,* 636 F.2d 323 (D.C. Cir. 1980) (*Alabama Power*), a case that resolved industry and citizens group challenges to many aspects of the regulations EPA promulgated shortly after enactment of the 1977 CAA Amendments to implement the newly enacted statutory provisions. One regulatory provision purported to exempt sources that qualified as major emitting facilities if their actual emissions were 50 tpy or less. EPA sought to justify this provision on grounds that some 2,400 major emitting facilities emit 50 tpy or less, and that the large burdens on the agency and industry of permit development and review would outweigh the small benefits of permitting. The Court invalidated this regulatory exemption as not authorized by the statute, but in so doing, recognized EPA's concerns about administrative burdens and, anticipating future agency efforts to adjust statutory mandates to administrative realities, went on to articulate the basis for the administrative necessity doctrine.[19] 636 F.2d at 356–57.

First, the D.C. Circuit described the basis for the administrative necessity doctrine as, in effect, an overlay on clear statutory intent. Specifically, in a section of the opinion titled, ''Exemptions Born of Administrative Necessity,'' the Court stated:

> Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them.

*Id.* at 357.

Second, the Court identified several types of administrative relief that may be available to an agency. One is ''[c]ategorical exemptions from the clear commands of a regulatory statute,'' which the court stated are ''sometimes permitted,'' but emphasized ''are not favored.'' *Id.* at 358. A second is ''an administrative approach not explicitly provided in the statute,'' such as ''streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.'' *Id.* A third is a delay of deadlines upon ''a showing by [the agency] that publication of some of the guidelines by that date is infeasible.'' *Id.* at 359 (quoting *NRDC* v. *Train,* 510 F.2d 692, 712 (D.C. Cir. 1974).

Finally, the Court explained it would evaluate whether the agency faced an administrative impossibility, and the acceptability of the agency's choices, based on the essential circumstances confronting the agency, including the volume and nature of the tasks required of the agency, its financial and personnel resources, and the time available to it. Specifically, the Court observed that the administrative necessity doctrine would apply based on the ''administrative need to adjust to available resources * * * where the constraint was imposed * * * by a shortage of funds * * *, by a shortage of time, or of the technical personnel needed to administer a program.'' *Id.* at 358. The Court added that another administrative constraint could be ''the degree of administrative burden posed by enforcement.'' *Id.* at 405. *See NRDC* v. *Train,* 510 F.2d 692, 712 (D.C. Cir. 1974) (recognizing constraints imposed by budgetary commitments, manpower demands, or inability to evaluate sufficiently the necessary scientific and technical determinations).

Even so, the Court went on to caution that ''administrative necessity'' is a high hurdle: ''[T]he agency [bears] a heavy

[18] It should be noted that numerous cases have held that an agency may consider administrative factors in choosing regulatory policies under statutory provisions that authorize choices. *See, e.g., National Mining Association* v. *EPA,* 59 F.3d 1351, 1364 (D.C. Cir. 1995); *Phillips Petroleum Co.* v. *EPA,* 803 F.2d 545, 562 (D.C. Cir. 1986); *National Wildlife Federation* v. *Gorsuch,* 693 F.2d 156, 182 (D.C. Cir. 1982). While these cases support the general proposition that administrative considerations are important, they differ from the ''administrative necessity'' doctrine because in those cases, the Agency's actions were within the ambit of the statutory language; whereas under the ''administrative necessity'' doctrine, the Agency's actions depart from the statutory language.

[19] The Court also explained that in that case, EPA's concern that large numbers of small sources would be subject to PSD was misplaced because it was based on an erroneous interpretation of the requirement that the threshold for determining whether a source was a major emitting facility (and thereby subject to PSD) was the source's PTE. EPA erroneously believed that PTE had to be calculated without reference to pollution controls, an interpretation that would have meant that many sources of a low level of actual emissions would be treated as major emitting facilities. The Court held, in another part of the *Alabama Power* opinion, that PTE must be calculated with reference to pollution controls, and went on to observe that this holding effectively mooted EPA's concerns that underlay its effort to exempt 50-tpy-or-less sources from PSD requirements.

burden to demonstrate the existence of an impossibility.'' *Id.* at 359. The Court particularly noted its reticence to uphold agency claims of administrative impossibility when those claims are made in advance of actual efforts to administer or enforce: ''The agency's burden of justification in such a case is especially heavy.'' *Id.* at 359.

In *Alabama Power,* the D.C. Circuit emphasized that its exposition of the administrative necessity doctrine was consistent with U.S. Supreme Court decisions holding that administrative considerations could factor into agency decisions. The D.C. Circuit noted that the Supreme Court, in *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), ''approv[ed] the adopting by the FPC of area rate regulation as the practical means to regulate thousands of natural gas producers,'' and quoted the Supreme Court as explaining, ''[c]onsiderations of feasibility and practicality are certainly germane to the issues before us. * * * We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purpose for which it has acted.'' *Alabama Power,* 636 F.2d at 359 (citing *Permian Basin Area Rate Cases,* 390 U.S. at 777). The Court in *Alabama Power* also cited *Morton* v. *Ruiz,* 415 U.S. 199, 230–31 (1973), in which the Supreme Court ''acknowledged the substantive authority of the Secretary [of the Bureau of Indian Affairs] to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute. *Alabama Power,* 636 F.2d at 359.[20]

It should be emphasized that the Court in *Alabama Power* discussed the ''administrative necessity'' doctrine in the context of PSD applicability, which, along with title V applicability, is the subject of this action. The Court discussed the doctrine extensively in the part of its opinion that followed its invalidation of EPA regulations that attempted to overlay an exemption for PSD applicability onto statutory requirements, where the Court stated it was anticipating future agency efforts to adjust statutory mandates to administrative realities. *Id.* at 356–57. Moreover, the Court made clear in another part of its opinion that the doctrine could be applied to another aspect of PSD applicability, concerning existing sources. There, the Court stated:

> EPA does have discretion, in administering the statute's ''modification'' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity.

*Id.* at 400.

c. Case Law After *Alabama Power*

Shortly after *Alabama Power,* the D.C. Circuit reiterated the validity of the ''administrative necessity'' doctrine in *EDF* v. *EPA,* 636 F.2d 1267 (D.C. Cir. 1980), which reviewed the legality of EPA's regulation of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act. As the Court noted, ''The statutory language is simple: ''no person may * * * use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.'' 15 U.S.C. 2605(e)(2)(A). Similarly, the prohibitions on manufacture, processing, and distribution refer to ''any polychlorinated biphenyl.'' *See id.* § 2605(e)(3)(A).'' *EDF* v. *EPA,* 636 F.2d at 1281. EPA's regulations exempted materials containing concentrations of PCBs less than 50 parts per million (ppm). EPA justified the 50-ppm cutoff as an exemption based on administrative necessity. The Court reiterated that such an exemption was at least potentially available. Quoting *Alabama Power,* the Court stated:

> Under the heading of ''administrative necessity,'' this court has recognized that an agency may depart from the requirements of a regulatory statute. * * * While the court in *Alabama Power* emphasized that ''categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored.'' *Id. at 358–360,* it also noted that there is ''substantive authority (for an agency) to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute.'' *Id.* at 358–359.

*EDF* v. *EPA,* 636 F.2d at 1283. However, on the facts before it, the Court found that EPA had not ''made [a] showing that it cannot carry out the statutory commands for concentrations of PCBs below fifty ppm,'' and therefore that ''EPA [had] fail[ed] to meet its heavy burden. Thus, administrative need, on this record, provides no basis for the fifty ppm cutoff.'' *Id.*

Some 3 years later, the D.C. Circuit handed down a decision concerning the ''administrative necessity'' doctrine in *Sierra Club* v. *EPA,* 719 F.2d 436, 463 (D.C. Cir. 1983). There, the Court reviewed EPA's efforts to justify a narrow regulatory definition of ''dispersion techniques'' on administrative necessity. CAA § 123 prohibits the use of tall stacks and ''other dispersion techniques'' to meet emissions limitations. The Court found that the term ''dispersion techniques'' should be defined broadly ''to encompass * * * the use of devices, alterations to the stack, or other techniques when they are significantly motivated by an intent to gain emissions credit for greater dispersion.'' *Id.* at 462. EPA's regulations defined the term narrowly to include only certain types of equipment, and not to require an inquiry into intent. The Court observed, that ''[s]ince the regulations do not regulate all the techniques contained in this definition, the regulations effectively create an exemption not indicated in the statute itself. Such categorical exemptions are generally not favored * * * but there are two situations in which they are allowed: Cases of administrative necessity and de minimis situations'' (citing *Alabama Power*). *Id.* Thus, the Court affirmed that the doctrine of ''administrative necessity'' could be used to allow an agency to depart from the requirements of the statute.

The Court went on to find, however, that in this case, EPA's justification for ''administrative necessity'' was not sufficient. EPA had explained that defining ''dispersion techniques'' more broadly to necessitate inquiring into a source's subjective intent as to whether other equipment or methods were designed to disperse emissions, as opposed to achieving some other end, would be ''difficult'' to enforce, a conclusion generally supported by a few State and local agencies that commented on the rule. The Court found that the Agency's narrow definition of ''dispersion techniques'' amounted to a

[20] Although *Alabama Power* presented the D.C. Circuit's most robust exposition of the administrative necessity doctrine, the Court first identified the doctrine, albeit in the relatively narrow application of a deadline extension, in the 1974 decision, *NRDC* v. *Train,* 510 F.2d 692 (D.C. Cir. 1974). There, the Court considered EPA objections that it would be unable to meet a statutory requirement that established a deadline for promulgating effluent limitations. While declining to grant extensions of the deadline in that case, the Court acknowledged that under certain circumstances, judicial relief in the form of a deadline extension would be warranted in light of administrative considerations. The Court observed that ''budgetary commitments and manpower demands'' needed to meet a deadline could be ''beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs;'' and that ''EPA may be unable to conduct sufficient evaluation of available control technology'' by the deadline. Under these circumstances, the Court stated, ''[t]he courts cannot responsibly mandate flat * * * deadlines * * *.'' The Court grounded its conclusion, that a court could consider administrative considerations in evaluating an agency's claimed inability to meet a statutorily mandated deadline, in a court's equitable powers to fashion appropriate relief. *Id.* at 713 (citations omitted). Although the *NRDC* v. *Train* decision concerned the agency's compliance with deadlines, which are a relatively narrow issue, the case established the proposition that an agency may, under certain circumstances, depart from a statutory mandate due to administrative considerations.

categorical exemption from statutory requirements, and one that was based on Agency predictions of future enforcement difficulties rather than actual experience. The Court reiterated its statements in *Alabama Power* under these circumstances, that the Agency's burden of showing impossibility is especially heavy, and that in this case, EPA's showing ''falls far short.'' *Id.* at 463. The Court added that EPA may be able to develop ''less taxing'' ways to define ''dispersion techniques,'' including developing classes of plant techniques that could be considered to be dispersion techniques. *Id.*[21]

In 1989, in *Public Citizen* v. *FTC*, 869 F.2d 1541 (D.C. Cir. 1989), the D.C. Circuit reiterated the validity of the ''administrative necessity'' doctrine, although on the facts, the Court held that the Federal Trade Commission's (FTC) claims of administrative necessity failed. There, the Court considered the Smokeless Tobacco Act, which, according to the Court, ''imposes a blanket requirement, subject only to one narrow and specifically mentioned exception for billboard advertising, that producers and distributors of smokeless tobacco products must include a warning label whenever they 'advertise * * * any smokeless tobacco product.' 15 U.S.C. 4402(a)(2).'' *Id.* at 1553. In the face of this provision, the FTC issued an exemption for utilitarian items (ranging from golf balls to T-shirts) distributed for promotional purposes, so that such objects would not need to include the warning label. The FTC attempted to justify the exemption on grounds of administrative necessity. The Court acknowledged the doctrine, stating that ''there exists a narrow range of inherent discretion in an agency to create case-by-case exceptions in order to come within the practical limits of *feasibility* in administering a statute.'' *Id.* at 1556 (citing *Alabama Power*) (emphasis added by Court). However, the Court went on to dismiss the FTC's claims of administrative necessity, stating that the FTC had not justified its application and suggesting that the FTC had improperly undertaken a cost-benefit analysis in the guise of an administrative necessity claim. *Id.*

d. Analogous Case Law Concerning Other Legal Obligations

There is another line of case law, which involves contempt-of-court proceedings, in which the Courts recognize that impossibility of performance is relevant to the lawful discharge of legal obligations, and this case law provides some analogous support to the administrative necessity doctrine. In contempt-of-court proceedings, as the Supreme Court has noted, ''a defendant may assert a *present* inability to comply with the order in question'' and may thereby be excused from the duty to comply. *U.S.* v. *Rylander*, 460 U.S. 752, 757 (1983) (citing *Maggio* v. *Zeitz*, 333 U.S. 56, 75–76 (1948); *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929)) (emphasis in original) (''*Rylander*''). In addition, as discussed below, this doctrine applies fully to administrative agencies, providing even closer analogous support for the doctrine of administrative necessity. Even so, it should be acknowledged that the extent of support is limited because the contempt-of-court line of cases involves a court's equitable discretion in enforcing court orders, and the administrative necessity line of cases involves the extent to which a Court will allow deviation from explicit statutory requirements.

In *Rylander,* which involved a corporate officer's failure to comply with a civil contempt order imposed for noncompliance with an earlier order enforcing an IRS summons, the Court stated that ''[w]hile the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.'' *Rylander,* 460 U.S. at 757 (finding that contemnor failed to meet the burden of production sufficient to establish an impossibility defense).

The D.C. Circuit, noting that ''[i]t is well established that impossibility of performance constitutes a defense to a charge of contempt,'' has recognized that the Court has an obligation to ''consider carefully a claim by the alleged contemnor that compliance was impossible. * * * Although both the fact and duration of noncompliance with [an] order are elements to be considered, the court must consider as well [a party's] inability, without fault on its part, to render obedience.'' *Tinsley* v. *Mitchell*, 804 F.2d 1254 (D.C. Cir. 1986) (quoting *SEC* v. *Ormant Drug & Chemical Co.*, 739 F.2d 654, 656–57 (D.C. Cir. 1984)) (remanding to District Court to adjudicate contemnor's claim of inability to pay fines).

Importantly, the doctrine is fully available to government agencies, as the D.C. Circuit affirmed in *Evans* v. *Williams*, 206 F.3d 1292 (D.C. Cir. 2000). There, in a class action challenging conditions at a public institution for the mentally retarded, the District of Columbia failed to comply with deadlines set in a consent decree, citing unanticipated ''financial problems of horrendous proportions.'' *Id.* at 1293. Discussing the district court's refusal to make retroactive a modification of the consent decree ameliorating the financial penalties for missing deadlines, the Court noted,

> We do not of course suggest that a party may be relieved from the obligation to comply with an injunction simply by making a motion for a modification. But here the District claimed that it could not comply, despite making a good faith effort to do so. If true, this should have relieved it from liability. *See Tinsley* v. *Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (''If a party lacks the financial ability to comply with an order, the court cannot hold him in contempt for failing to obey.'')

*Id.* at 1299. Finding that the district court based its order on irrelevant information regarding the District's financial circumstances, the Court reversed and remanded for further proceedings. *Id.*

The Courts have also recognized that a party may avoid compliance with a court order by showing that it made a good-faith effort to comply but fell short, and that under these circumstances, the party is not required to demonstrate that compliance is absolutely impossible. In *Washington Metropolitan Transit Authority* v. *Amalgamated Transit Union*, 531 F.2d 617 (D.C. Cir. 1976), the D.C. Circuit vacated a final contempt judgment and

[21] Shortly after *Sierra Club,* the D.C. Circuit considered another case that raised an ''administrative impossibility'' issue, *Northern Colorado Water Conservancy Dist.* v. *FERC,* 730 F.2d 1509 (D.C. Cir. 1984) (*NCWCD*). However, there the Court did not appear to follow the line of cases that included *Alabama Power.* In *NCWCD,* the Court found that the Federal Energy Regulatory Commission (FERC) improperly failed to comply with requirements under section 4(f) of the Federal Power Act to give written notice to local water authorities of preliminary permit applications filed by private developers for a hydroelectric power project. In failing to give notice, FERC had followed a longstanding, but unannounced policy, which it justified in part on grounds ''that strict adherence to the statute's language would be administratively impossible.'' FERC explained that the requirement to notify municipalities required administrative flexibility in light of the ''estimated 50,000 specialized local governmental units performing a myriad of services,'' many of which, ''such as water, utility or drainage districts, are not readily identifiable.''

The Court rejected FERC's contention that those administrative concerns justify FERC's practices. Without citing *Alabama Power* or any of its other decisions concerning the ''administrative necessity'' doctrine, the Court stated that those practices must nevertheless remain ''within a range of reasonableness with respect to Congress' instruction,'' that is, within the ambit of the statutory requirements, as well as be reasonably well articulated and generally made known to the public, and that in this case, FERC's practices failed on all those counts. 731 F.2d at 1521. Notwithstanding this case, the weight of the D.C. case law supports the availability of the administrative necessity doctrine to authorize agency departure from statutory requirements in limited circumstances.

fine against a labor union for continuing to strike in contravention of a restraining order; among other procedural failings, the district court made no findings of fact on the union's defenses of substantial compliance and inability to comply. *Id.* at 619–20. In directing the district court to provide adequate due process on remand, the court emphasized, ''[e]valuation of good faith efforts to comply, once raised, is necessary to determine the possibility of compliance. In our view good faith should also be considered in mitigation of penalty.'' *Id.* at 621 (citation omitted).

This aspect of the doctrine is also fully applicable to agencies. In *Chairs* v. *Burgess,* 143 F.3d 1432 (11th Cir. 1998), the Eleventh Circuit emphasized that good-faith compliance efforts by a State agency could support a claim for relief based on impossibility. There, the State of Alabama was required under a consent decree to remove State prisoners from a county jail within a certain timeframe. *Id.* at 1434. The county sought a court order to enforce the decree and requested that the Court hold the State in contempt. *Id.* In light of the fact that the State was then subject to 79 identical court orders, the Court accepted the State's defense of present inability to comply due to ''entirely inadequate'' resources in the State prison system. *Id.* at 1437. The Court vacated the district court's order, declaring: '' 'Inability,' as a defense to contempt, does not mean that compliance must be totally impossible. Instead, the inability that will absolve a party from being held in contempt requires only that the noncomplying party has made 'in good faith all reasonable efforts to comply' with the terms of a court order.'' *Id.* (citations omitted).

3. Step-by-Step Process for Implementing the Administrative Necessity Doctrine

We believe that the administrative necessity case law establishes a three-step process under which an administrative agency may, under the appropriate circumstances, in effect revise statutory requirements that the agency demonstrates are impossible to administer so that they are administrable. This section of the preamble describes the requirements for each step, along with a brief application of each step to PSD permitting thresholds and significance levels as well as title V permitting thresholds.

In brief, the three steps are as follows: When an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement, the first step the agency must take is to evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory requirements. The second step is that the agency must determine whether it can justifiably conclude that even after whatever streamlining of administration of statutory requirements (consistent with those statutory requirements) it conducts, the remaining administrative tasks are impossible for the agency because they are beyond its resources, *e.g.,* beyond the capacities of its personnel and funding. If the agency concludes with justification that it would be impossible to administer the statutory requirements, as streamlined, then the agency may take the third step, which is to phase in or otherwise adjust the requirements so that they are administrable. However, the agency must do so in a manner that is as refined as possible so that the agency may continue to implement as fully as possible Congressional intent.

*Step 1: Reduce administrative burdens by streamlining administration as much as legally permissible.* When an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement, the agency must first evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory requirements. *Sierra Club,* 719 F.2d at 463 (even if EPA's claims that its method for enforcement ''is in fact impossible, there nevertheless may be less taxing ways to enforce the law''); *Alabama Power,* 636 F.2d at 358 (''Courts frequently uphold streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress'').

As discussed in detail below, EPA believes that it may have several potentially useful tools available in the streamlining toolbox for the PSD permitting threshold level, the PSD significance level, and the title V permitting threshold. For the PSD permitting threshold level and significance level, there are at least three such tools: The first is interpreting the definition of ''potential to emit'' so that the amount of a source's emissions that counts in determining whether it qualifies as a major source and therefore is above the permitting threshold requirements is closer to the amount of its emissions when it is in actual operation, rather than the amount of emissions that the source would emit if it were operating continuously. Narrowing the definition of PTE is a potentially extremely important tool in this context because identifying the amount of a source's emissions as closer to its actual emissions in this manner would mean that very large numbers of residential and commercial sources would have significantly lower emissions and would fall below the statutory threshold requirements for triggering PSD. Second, EPA believes it may be able to develop programs involving general permits, under which large numbers of similarly situated sources would each be covered by essentially the same permit established through a regulatory action by the permitting authority. This approach could achieve economies of scale and thereby reduce administrative burden. Third, EPA believes it may be able to streamline the single most time-consuming element of the PSD permit program, which is the determination of BACT as required under CAA § 165(a)(4), by establishing presumptive BACT levels for certain source categories that comprise large numbers of sources. As for title V, as discussed below in detail, EPA believes that defining ''potential to emit'' to reflect more closely a source's actual operation and developing a program of general permits could streamline the administration of title V permits.

As also discussed below, these streamlining efforts cannot be implemented as soon as PSD and title V are triggered, or even shortly thereafter. However, EPA intends to develop these streamlining methods as vigorously and as quickly as possible and phase them into the program. These streamlining methods were described in the ANPR and EPA received comment on them, and EPA is continuing to develop the methods and to solicit further comment with this action.

*Step 2: Determine that the task that remains is impossible to administer.* The agency must determine whether it can justifiably conclude that even after whatever streamlining of administration of statutory requirements the agency is able to effectuate, the agency's remaining administrative tasks are impossible for the agency because they are beyond its resources. To make this determination, the agency must consider: (1) When it can complete streamlining administration of the statutory requirements and how well it can administer those requirements in the meantime; and (2) what administrative tasks would remain after it achieves streamlining and how well it can handle those tasks. To make this latter determination, the agency must compare its resources to the tasks at

hand. The agency must then determine whether it can administer the statutory requirements as mandated by Congress, or whether it may justifiably conclude that those requirements remain impossible to administer.

As discussed below, PSD and title V requirements will become applicable to very large numbers of sources immediately following a final rule regulating GHG emissions. EPA expects to complete such a rule, establishing emissions limits for motor vehicles, by the end of March 2010.

As discussed below, although EPA intends to aggressively develop streamlining methods to the extent feasible, EPA simply does not have time to do so prior to the date that we expect PSD and title V to become applicable. As a result, EPA and the States will have to implement PSD for those sources as soon as PSD is triggered. Preliminary information that we have obtained concerning State permitting authority resources, and data we collected concerning the numbers of sources that emit GHGs (using both a $CO_2$ and $CO_2e$ basis) at the 100- and 250-tpy levels, make clear that as of the date that PSD and title V applicability is triggered, the number of sources needing permits would overwhelm permitting authorities and thereby effectively paralyze the permitting.

Specifically, the total number of PSD permits that are issued in the U.S. is approximately 280 per year. A permitting authority's action on each PSD permit is resource-intensive because for each permit, the authority must apply source-specific BACT, apply other source-specific requirements, and allow public comment. However, EPA estimates that when the PSD requirements are triggered for sources of GHGs, more than 40,000 PSD permits both from newly constructed facilities that emit at greater than 250 tpy (using either a $CO_2$ or $CO_2e$ metric) and from modifications at existing major sources will be required. Under the PSD program as presently constituted, permitting authorities' actions on each of these permits will be resource-intensive, as described above.

This volume of permitting represents more than a 140-fold increase from the current volume—again, approximately 280 permits per year—of major PSD permits that are processed by permitting authorities nationwide. We estimate that this increase in volume of PSD permits would require an annual increase in labor hours of almost 44 times the current labor allocation for PSD programs. This increase in workload would overwhelm the permitting authorities' resources and paralyze the permit issuance process.

The problem for title V purposes is comparable. Specifically, the total number of existing title V permits in the U.S. is approximately 14,700. However, EPA estimates that when the title V requirements are triggered for sources of GHGs, approximately 6.1 million sources that emit at least 100 tpy (using either a $CO_2$ or $CO_2e$ metric) will be required to obtain a title V permit. These sources will be required to submit a permit application within 1 year, and the permitting authorities will be required to act on those applications, including allowing an opportunity for a public hearing.

We estimate that this additional volume of permitting would require an annual increase in labor hours of almost 250 times the current labor allocation for title V programs. Like the increase in PSD workload, this increase in title V workload, combined with the source-by-source nature of the permitting process and the requirements for public input, would overwhelm the permitting authorities' resources and paralyze the permit issuance process.

For both PSD and title V permits, permitting authorities would be required to hire and train staff in numbers that are multiples of their current staff, a task that cannot be accomplished—or, indeed, can barely be begun—by the time PSD and title V requirements become applicable to GHG emitters.

Step 3: Implement a scheme that is administrable, but in doing so, depart from the statute as little as possible.

If the EPA concludes with justification that it would be impossible to administer the statutory requirements, as streamlined, then the agency may phase in or otherwise adjust the requirements so that they are administrable. However, the agency must do so in a manner that is as refined as possible so that the agency may continue to implement as fully as possible congressional intent.

In this tailoring rulemaking, EPA is proposing, as the first phase, to establish a temporary ''major stationary source'' threshold for PSD purposes, a temporary ''significance level'' threshold for PSD purposes, and a temporary ''major source'' threshold for title V purposes, for sources that emit GHGs, to levels that capture a significant share of GHG emissions while rendering both permitting programs administratively feasible. The specific options proposed for temporary thresholds and the rationale for their selection are described below.

Moreover, and as explained in detail below, EPA intends to proceed aggressively to develop streamlining methods, and it is possible that permitting authorities will be able to augment their permitting resources. Even so, available information does not confirm that EPA and the permitting authorities will be able to rely on these steps within 6 years after PSD and title V requirements become applicable to GHG emissions. Accordingly, it is necessary to maintain the major stationary source threshold and significance level proposed and also necessary to reassess the administrative situation and conduct further rulemaking to address it within 6 years.

5. Consistency With Case Law

EPA's proposed application of the administrative necessity doctrine to phase in the major source permitting thresholds for PSD and title V purposes, and to establish the significance level for PSD purposes, is consistent with the case law.

It is clear under the D.C. Circuit case law that the administrative necessity doctrine is available under certain circumstances, to authorize an agency to ''depart from the requirements of a regulatory statute.'' *EDF* v. *EPA,* 636 F.2d at 1283 (citing *Alabama Power*). Thus, it is clear that the doctrine may be applied—under the appropriate circumstances—to authorize EPA to phase in the major source thresholds for PSD and title V permitting as well as to establish a PSD significance level. Indeed, the D.C. Circuit established the administrative necessity doctrine, in *Alabama Power,* in the context of efforts by EPA to establish thresholds for PSD permitting of new and existing sources. *Alabama Power,* 636 F.2d at 357, 400.

The D.C. Circuit has emphasized, however, that the agencies have a high threshold to justify the use of the doctrine, *EDF* v. *EPA,* 636 F.2d at 1283, and the Court did not uphold the attempts by the agencies in those cases to invoke the doctrine. *EDF* v. *EPA,* 636 F.2d at 1283; *Sierra Club* v. *EPA,* 719 F.2d at 463; *Public Citizen* v. *FTC,* 869 F.2d at 1556.

We believe that the facts here are much more supportive of an administrative necessity application than in those cases. EPA's application of the administrative necessity doctrine hews closely to the three-step process that we read the case law to establish.

*Step 1: Reduce administrative burdens by streamlining administration as much as legally permissible.* In some of the case law described above, the D.C. Circuit emphasized that the agencies had failed to consider means of solving

their alleged administrative problems in ways consistent with the statutory requirements. In *Sierra Club* v. *EPA,* the Court invalidated EPA's effort to narrow the definition of ''dispersion techniques'' to only certain types of equipment and thereby exempt from the definition certain categories of methods that were intended to disperse emissions. The Court based its holding in part on the grounds that EPA had failed to explore available, ''less taxing'' regulatory alternatives that would reduce the administrative burden of determining the purpose of changes in stack or plume parameters. *Sierra Club* v. *EPA,* 719 F.2d at 463–64. The Court offered examples of possible streamlining measures, such as quantifying the amount of plume rise that could be presumed to have an engineering rationale, or selectively exempting classes of improvements that have a trivial impact on the goals of the CAA or for which use as a dispersion technique was only theoretically possible. *Id.* at 464. Stating that ''[w]e see no evidence that EPA has adequately explored these regulatory alternatives,'' the Court overturned EPA's effective categorical exemption. *Id.*

The Court used similar reasoning in *EDF* v. *EPA,* where the Court found that EPA's proposed 50-ppm cutoff for regulating PCBs was not administratively necessary. *EDF* v. *EPA,* 636 F.2d at 155. There, although basing its dismissal of the claim primarily on EPA's failure to make a *prima facie* showing of impossibility, the Court emphasized that statutorily authorized alternatives were available to EPA. *See id.* at 154–156. ''While some cutoff may be appropriate,'' the Court noted, ''the Administrator did not explain why the regulation could not be designed expressly to exclude ambient sources, thus directly fulfilling congressional intent, rather than achieve that goal indirectly with a cutoff, thereby partly contravening congressional intent.'' *Id.* at 154.

Here, in contrast, EPA has begun the process of narrowing the administrative burden through means consistent with the statutory requirements by evaluating what streamlining approaches would be feasible but, as discussed below, this process is complex and EPA cannot complete it for several years. EPA is soliciting comment on those methods and any others that may occur to stakeholders or the public. In *NRDC* v. *Train,* the Court indicated that an agency's diligent, good-faith efforts to discharge its statutory responsibilities will factor in favor of the Court's resolution of an impossibility claim. *NRDC* v. *Train,* 510 F.2d at 333.

*Step 2: Determine that the task that remains is impossible to administer.* In *Alabama Power,* the D.C. Circuit described the administrative necessity doctrine as rooted in agency workload and resources: Specifically, the Court stated that the administrative impossibility doctrine would apply based on the ''administrative need to adjust to available resources * * * where the constraint was imposed * * * by a shortage of funds * * *, by a shortage of time, or of the technical personnel needed to administer a program.'' 636 F.2d at 358. The Court added that another administrative constraint could be ''the degree of administrative burden posed by enforcement.'' *Id.* at 405. However, the Court cautioned that ''the agency [bears] a heavy burden to demonstrate the existence of an impossibility.'' *Id.* at 359.

In several of the cases described above, the D.C. Circuit emphasized that the agencies had failed to meet their heavy burdens of establishing administrative impossibility. In *NRDC* v. *Train,* EPA neglected to specify the resource or methodological constraints that prevented the agency from meeting a mandatory deadline for promulgating effluent limitation guidelines. *NRDC* v. *Train,* 510 F.2d at 712–13. Although the Court inferred from the imminent deadline that the Agency would likely experience a burden on its resources in promulgating the guidelines for most source categories, the Court was reluctant to grant EPA an extension in response to a merely conclusory statement that compliance with the deadline would be impossible. *Id.* at 713.

A few years later, in *EDF* v. *EPA,* the Court based its dismissal of EPA's administrative necessity claim on the fact that the Agency did not provide sufficient data to support the claim that administering the statute as written was impossible. In that case, EPA failed to provide information relating to the amount of PCBs that would be left unregulated by its use of a 50-ppm cutoff, where the statute required ''any'' PCB to be prohibited. *EDF* v. *EPA,* 636 F.2d at 155. As a result, EPA could not show that carrying out the statutory requirements for concentrations of PCBs below 50 ppm would be administratively impossible. *Id.* ''Thus,'' the Court found, ''administrative need, on this record, provides no basis for the fifty ppm cutoff.'' *Id.* Furthermore, the Court noted in a footnote that EPA's claim that the burden to industry justified a categorical exemption was undermined by EPA's lack of ''firm data'' on the extent of the burden. *Id.* at 155, fn. 43.

Likewise, in *Sierra Club* v. *EPA,* EPA alleged only that it would be ''difficult'' to administer a proposed subjective intent test that would examine whether dispersion techniques were used for the prohibited purpose of achieving compliance with emissions limitations. Without more, the Court determined, EPA's showing fell ''far short'' of meeting the heavy burden of demonstrating the existence of an impossibility. *Sierra Club* v. *EPA,* 719 F.2d at 461–62.[22]

Thus, in the cases concerning administrative necessity, the agencies generally did not attempt to quantify the administrative workload and resource constraints that they thought merited departure from the statutory requirements and instead limited themselves to generally conclusory assertions. In *NRDC* v. *Train,* the Court recognized that EPA could cure its insufficient record and demonstrate the administrative impossibility of complying with the deadline once it specified the actual burden on its resources. *NRDC* v. *Train,* 510 F.2d at 713. In the event that EPA could demonstrate that ''manpower or methodological constraints'' threatened to delay the promulgation of guidelines for particular categories of sources, the Court held open the possibility of an exemption from the deadline. *Id.* at 714.

Here, in sharp contrast to that case law, EPA has developed specific factual evidence concerning the administrative difficulties of implementing PSD and title V at the statutory threshold levels. Moreover, those constraints are compelling; it is clear from just the evidence collected so far that at the time that EPA expects to trigger application of the PSD and title V programs to sources that emit GHGs—which, if based on a possible mobile source final rulemaking, would be near the end of March 2010—it will be flatly impossible for permitting authorities to administer the PSD and title V programs at the statutory threshold levels. The massive number of permits would overwhelm the limited resources available to the permitting authorities. EPA expects to collect as much specific information concerning administrability as possible through the comment period.

[22] In *Public Citizen* v. *FTC,* the D.C. Circuit dismissed FTC's claims of administrative necessity where the agency's rationale for its categorical exemption appeared to rely on an impermissible weighing of the relative costs and benefits of compliance, rather than on the impossibility of compliance. *Public Citizen,* 869 F.2d at 1556.

The administrative burdens that EPA confronts in administering the PSD and title V thresholds have no precedent in the case law. The closest situation appears to be *Alabama Power,* where the Court rejected EPA's interpretation of ''potential to emit'' as a matter of legal interpretation, and not on administrative necessity grounds, but where the Court noted that EPA's interpretation would have brought approximately 2,400 additional facilities into the PSD program, which entailed the case-by-case review and BACT determination for each permit application. *Alabama Power,* 636 F.2d at 356. Even so, the PSD and title V program burdens anticipated for GHG emitters at the statutory thresholds are exponentially greater than the burdens alleged in *Alabama Power.* The projected resource burden for administering the PSD program alone will be greater than 10-fold the burden alleged in *Alabama Power:* Each year, regulating GHGs under the CAA is estimated to trigger PSD requirements for approximately 41,000 sources that emit at levels greater than the 100/250-tpy threshold when they engage in new construction or significant modifications. As for title V, in total, some six million permits would be required, which would entail an enormous expenditure of administrative resources, as described elsewhere.

It should be acknowledged that the D.C. Circuit has stated that the administrative necessity doctrine is particularly difficult to assert when the agency had not yet tried to enforce the statutory requirements. *Sierra Club* v. *EPA,* 719 F.2d at 463. Although the Court did not spell out its reasoning for this distinction, a logical reason would be that actual efforts to implement the statutory provision would more clearly establish the extent of the administrative problems than would advance predictions. Even so, the Court left the door open to approving claims of administrative necessity in advance of actual implementation efforts. Here, EPA does not propose to attempt to administer the statutory thresholds once PSD and title V requirements are triggered for GHG emitters, but the impact of the statutory thresholds on permitting authority caseloads and resources are so massive as to be predictable with a sufficient degree of accuracy to support a claim of administrative necessity. EPA has gathered a substantial amount of evidence concerning those impacts and intends to gather more through the comment period on this notice. Under these circumstances, it is not necessary to await actual implementation. Attempting to do so—that is, allowing the statutory thresholds to apply, assessing the extent of the administrative problem, and then conducting rulemaking to raise the thresholds—would leave the PSD and title permitting process in disarray for years.

*Step 3:* Phase-in the statutory requirements to be administrable, but in doing so, depart from the statute as little as possible. In Alabama Power, the D.C. Circuit listed the types of departures from the statute that it would sanction, under the appropriate circumstances, on grounds of administrative necessity. One is ''[c]ategorical exemptions from the clear commands of a regulatory statute,'' which the Court stated are ''sometimes permitted,'' but ''are not favored.'' A second is an ''administrative approach,'' such as ''streamlined agency * * * procedures'' in lieu of, for example, case-by-case determinations, and a third is a delay of deadlines. 636 F.2d at 358.

Here, turning first to PSD, EPA is proposing to phase in the threshold for PSD permitting, which would have the effect of allowing sources that are above the statutory threshold of 100/250 tpy but below the regulatory threshold of 25,000 tpy $CO_2e$ to build new facilities or modify existing ones without being subject to PSD. Thus, this proposal is a type of exemption.

Although the Court has said that ''categorical exemptions'' are ''not favored,'' the Court has indicated that they are ''sometimes permitted,'' and the exemption at issue here is one that should be permitted. For one thing, it is time limited. In addition, during phase one of the phase-in period, establishing the thresholds at 25,000 tpy $CO_2e$ and [10,000 to 25,000] tpy $CO_2e$, and thereby exempting sources from PSD applicability at the time that they construct or modify, is the only way to address the administrative burdens that would otherwise result at the time that PSD is triggered. At that time, EPA will not have been able to develop any streamlining methods, which is the second type of relief that the D.C. Circuit identified in *Alabama Power.* Even so, this proposal is that, as quickly as possible, during the next 6 years, EPA will implement as extensive a streamlining of PSD requirements as possible (consistent with statutory requirements) and then will reassess the administrative burdens and conduct additional rulemaking concerning the thresholds and streamlining techniques. This approach has the potential to limit the extent of the exemption. It should be noted that a deferral of the permitting obligation, which is the third type of relief that the D.C. Circuit identified, would not be useful. For PSD purposes, because sources cannot construct or modify without first obtaining a permit, a deferral would prevent construction and modification activities. In addition, a deferral would simply create a backlog that would quickly become unmanageable at any foreseeable point in the future and would create unacceptable uncertainty for the regulated community. In particular, because sources cannot construct or modify without first obtaining a permit, the backlog would prevent construction and modification activities.

As discussed elsewhere, for PSD purposes, the 25,000-tpy and [10,000 to 25,000] tpy $CO_2e$ levels proposed for the major source permitting threshold and significance level, respectively, are the lowest levels that we believe permitting authorities will be able to administer for the upcoming 6-year period. By the end of the first 5 years, EPA will conduct a study and, within the following year, will conduct another rulemaking to revisit and possibly revise those thresholds, depending on the Agency's findings of the maximum extent to which permitting authorities can administer the statutory program. In this manner, the levels proposed are the least possible departure from the statutory requirements.

For the title V purposes, the first phase threshold level of 25,000 tpy $CO_2e$ must also be considered to be the narrowest possible departure from the statutory requirements because it is the lowest amount that is administrable and because there are no other choices. There is not enough time for EPA to develop streamlining measures or for the States to ramp up resources. Although sources have 1 year to submit permit applications, and, once they submit them, they receive the protections of the permit shield, failure to phase in the threshold level would leave permitting authorities confronting an influx of millions of permit applications that would begin within a year. Little can be done during that year to meaningfully streamline the program.

In addition, for title V purposes, the first-phase threshold must be considered a deferral of, and not an exemption from, permitting obligations because existing sources must apply periodically for a title V permit. That is, if, during the second-phase rulemaking, EPA lowers the threshold, sources that are able to avoid title V permitting obligations under the first phase may be required to obtain a title V permit.

*C. Step-by-Step Process*

In addition to the ''absurd results'' and ''administrative necessity'' case law, a separate line of cases may be relevant for this action: Cases that have held that agencies may approach problems one step at a time. In these cases, the Courts have dismissed challenges to agency actions that implement part of, but not the entirety of, a statutory mandate, on grounds that agencies may proceed in an incremental fashion. In these cases, the Courts emphasized that the agency's partial action was a step in an overall path toward achieving full implementation of the statutory mandate. We solicit comment on whether this caselaw is supportive of our action in this notice.

In *Massachusetts* v. *EPA,* 549 US 497, 524 (2007), the U.S. Supreme Court, in holding that EPA has authority under the Clean Air Act to regulate GHG emissions, noted that ''[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.'' Instead, they may permissibly implement such regulatory programs over time, ''refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.''

The D.C. Circuit, in *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455, 477–78 (DC Cir 1998), considered a challenge to the Federal Aviation Administration's (''FAA'') final rule for reduction of aircraft noise from sightseeing tours in Grand Canyon National Park. There, the 1987 Overflights Act required the FAA to develop a plan within 120 days for limiting aircraft overflights in order to achieve substantial restoration of natural quiet. The Overflights Act further required that the FAA implement the plan by regulation; and then, within 2 years after the date of the plan, submit to Congress a report discussing whether the plan had met the statutory goals or whether revisions to the plan were needed. The FAA did issue a final rule—the one that was challenged—but did not do so until 10 years after enactment, and that rule required only partial action for limiting overflights. At the same time that it issued the rule, the FAA proposed two additional rules, and stated that the set of three rules together would achieve substantial restoration of natural quiet in another 10 years. The Court upheld the final rule and declined to compel the FAA to take additional action on a faster time frame. The Court explained:

> We agree that it would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all. * * * But the FAA has not taken that course here. It has never defended the Final Rule as the sole means for restoring the natural quiet, but only as the first of three steps. Its contemplation was that the three rules together would achieve that goal [within 10 additional years].

*Id.*

Similarly, in *City of Las Vegas* v. *Nevada Dev. Comm'n,* 891 F.2d 927, 935 (DC Cir 1989), the Court upheld the Department of Interior's emergency regulation listing as endangered species the tortoise population in the Nevada portion of the Mojave Desert, even though the regulation excluded the population in the Sonoran portion. The Court found that ''agencies have great discretion to treat a problem partially,'' and held that it would not strike down agency action ''if it were a first step toward a complete solution.''

In these cases, the agencies were required to implement a statutory directive through rulemaking. The D.C. Circuit upheld partial action by the agencies when the Court considered it to be an initial step towards meeting the directive. This action is set in a somewhat different context. The statutory provisions at issue here—the PSD and Title V applicability thresholds —provide that when GHG requirements are triggered, GHG emitters must obtain permits. When the triggering event occurs, the agency need take no further action before regulatory consequences ensue; sources included within the PSD and Title V programs must obtain permits once these statutory provisions are triggered. However, as we have described, if sources are required to apply for permits in accordance with the literal requirements of the statute, the permitting authorities would not have the resources to process those permits, and severe adverse results would occur. This action would ameliorate that situation by establishing a process for compliance with the statutory requirements. As discussed elsewhere, this process consists of a first phase that entails establishing the applicability thresholds at the specified levels, developing methodologies for general permits and other streamlining approaches, collecting data, preparing an assessment, and then promulgating rulemaking for further action. This process would allow us to craft the application of PSD and title V in ways that are achievable and effectively balance the regulatory burdens with the reductions achievable. In this sense, this action bears similarity to the agency actions upheld by the D.C. Circuit as partial steps.

We solicit comment on whether this line of cases is relevant for our action in this notice.

In particular, we solicit comment on whether an approach that includes step-downs in the applicability thresholds, coupled with regular examination of whether the administrative situation is improving, is an appropriate way to achieve compliance while taking into account the administrative imperatives. If so, we ask for suggestions on how we could structure such an approach (*e.g.,* when future phases should begin, how we should determine the appropriate thresholds for each phase, *etc.*) In addition, we solicit comment on the level of detail with which we would be required to identify our path towards facilitating full administration of the PSD and title V applicability requirements in order for the Court to uphold our initial steps under this case law. We also solicit comment on whether this proposal establishes such a path with sufficient detail and, if not, what further actions we should include in the final rulemaking or commit to undertake in subsequent rulemaking.

*D. What were the ANPR comments received on GHG tailoring options for regulating GHG emissions under PSD and title V?*

Responses to the ANPR give us some perspective of the initial views of some of the permitting authorities, sources, and the public on permit GHG tailoring options. Many of the ANPR commenters, including representatives from States, environmental groups and industry, recommended that EPA limit permitting, at least initially, to higher-emitting sources. While there were few recommendations on specific permitting levels, suggestions ranged from 10,000 to 100,000 tons per year $CO_2$. A number of environmental groups stated that if the rationale for treating smaller sources differently relies on principles of administrative necessity, the cutoff point should relate to what is administratively feasible while maximizing the objectives of the CAA.

Most industry stakeholders, representing a broad profile of affected sources, stated that title V and PSD applicability for sources of GHG emissions at current permitting thresholds would be economically disastrous and would create regulatory gridlock. Alternatively, some environmental groups opposed any temporary permitting thresholds, stating that EPA does not have legal authority to change thresholds to limit applicability.

Some States and environmental groups recommended streamlining

through the use of general permits and presumptive BACT. This option was supported mostly by States, but one industry commenter also agreed that it was an alternative worth pursuing if EPA insisted on regulating GHG emissions under the current CAA. Some States noted that they have a successful history of using general permits and believe the use of general permits as well as presumptive BACT could be part of an effective and reasonable approach to reduce regulatory costs and administrative burdens. Other industry groups said that presumptive BACT and general permits are unaffordable and require too much negotiation, and EPA lacks authorization to use them.

States and industry commenters acknowledged that it would take a significant amount of time to define presumptive BACT or general permits for different categories, although some States said that, over time, they have developed similar approaches to permitting with success for non-GHG gases for certain source categories. Industry commenters argued that the case-by-case review of permit applications that the NSR program requires is the epicenter of NSR, and that a one-size-fits-all approach will not mesh with the diversity of different manufacturing industries of all sizes. Furthermore, even with the use of these streamlining approaches, industry claims that there will still be tens of thousands of previously unregulated sources who would need to undergo PSD permitting. To review comments received on the ''Regulating Greenhouse Gas Emissions Under the Clean Air Act'' ANPR (73 FR 44354, July 30, 2008), see Docket ID No. EPA–HQ–OAR–2008–0318.

## VII. Streamlining Options and Tools To Address the Administrative Burdens of PSD and Title V for GHGs

As noted in earlier sections of this preamble, we believe that the application of PSD and title V requirements to sources of GHG emissions at current statutory thresholds would be administratively impossible at the time that we expect PSD and title V requirements to be triggered for those sources, which we expect to be the end of March 2010. These requirements would also impose undue burdens on the sources. However, we recognize that there are several streamlining techniques with the potential to reduce over time the burdens on sources and the administrative burdens of the PSD and title V requirements. We have initially assessed the general availability and usefulness of the streamlining techniques that are consistent with the statutory requirements to address, manage and reduce the administrative burden on permitting authorities. In addition, if we are compelled to promulgate regulatory requirements that depart from the statutory requirements, we recognize that we must do so to the smallest extent possible and must remain as close as possible to congressional intent. Other of these streamlining techniques may depart from the statutory requirements, but they may be preferable to the extent that the departure is to a smaller degree than raising the applicability thresholds.

However, as we will discuss below, we do not believe that we can develop and implement any of these streamlining techniques in the near term in the manner necessary to make the programs administrable at the statutory PSD and title V permitting thresholds. Accordingly, at this time, we cannot rely on these techniques in lieu of phasing in the applicability thresholds in the manner that we propose. However, we believe that these streamlining techniques should be an integral part of a strategy during the first phase of the phase-in period—which includes evaluating the threshold we propose to establish—to address and reduce the burden on permitting authorities. Thus, during the first phase, we plan to aggressively pursue further development of these techniques, and we plan to implement as many of them for as many source categories as possible and to do so as soon as possible. The reassessment and additional rulemaking that we propose to undertake at the end of the first phase will take into account the extent to which these streamlining techniques, as well as the permitting authorities' ability to enhance their resources, promote administrability. Moreover, for smaller sources for which PSD and title V requirements would not apply due to the increase in the major source applicability thresholds, EPA will also assess and identify cost-effective opportunities available in this notice to achieve GHG reductions through means other than PSD (*e.g.,* energy efficiency and other appropriate measures).

In section VII.A of this preamble, we discuss streamlining techniques that either have been used or could potentially be used in the PSD and title V programs. Some techniques may have applications to both programs (*e.g.,* general permits), while some are applicable to only one program (*e.g.,* presumptive BACT for PSD). In sections VII.B and VII.C of this preamble, we describe the implementation of these techniques as they relate both to permitting GHG emitters under current PSD and title V permitting thresholds and to a broader GHG tailoring strategy that involves the applicability thresholds proposed with this action.

We solicit comment on the permit streamlining approaches discussed in section VII.A of this preamble and also request information and comment on any other tools or options that could address or reduce the administrative burden of implementing PSD and title V for major GHG sources and reduce the burdens on the sources.

### *A. Permit Streamlining Techniques for PSD and Title V*

We believe that a strategy to address the administrative burden associated with implementing the PSD and title V programs for sources of GHGs could include one or more of the following permit streamlining techniques or processes.

#### 1. Redefining ''Potential to Emit''

Both PSD and title V requirements apply to ''major'' sources, and ''major'' sources are defined as sources that emit, on a PTE basis, 100/250 tpy for PSD purposes and, in general, 100 tpy for title V purposes. PTE is basically defined as the maximum capacity of a source to emit any air pollutant under its physical and operational design, including legal limitations, if any, on, for example, emissions or hours of operation. Many source categories have no legal limits on their hours of operation and, as a result, are treated as if operating 24 hours per day, seven days per week—which totals 8,760 hours per year—and emitting during that entire time. As a result, basing the applicability thresholds on PTE, rather than on actual emissions, has the effect of sweeping enormous numbers of additional sources into the PSD and title V programs. For example, sources that do not in fact operate for part of the year, but that have no legal limitation on their operating hours, must calculate their PTE on the basis of the amount of emissions that would result if those sources did operate, and therefore emit, on a year-round basis.

However, sources in such situations may take legally and practically enforceable limits on their operational parameters, by, for example, agreeing to operate during only part of the year or during only a limited number of hours per day, or employing control devices. These limitations would lower the sources' PTE and thereby allow them to avoid classification as ''major.'' PTE limits are already frequently used in PSD and title V permitting programs. There, the permitting authorities

typically apply PTE limits as a source-specific limit that is crafted in a facility's minor source permit and tailored to the source's individual circumstances.

This approach of reducing PTE to more closely approximate a source's actual emissions—and, in the case of smaller sources, thereby allowing the PTE to fall below the ''major'' source threshold that triggers PSD or title V applicability—offers promise to significantly reduce the number of sources subject to PSD and title V, and thereby significantly ease administrability of those programs once GHG emitters become subject to them.

This approach may be particularly suitable to sources in certain categories of GHG-emitting, combustion-related, small sources that do not operate at anywhere close to the 8,760 possible hours over a given year that is generally assumed in the PTE calculation. These categories may include: Furnaces, which likely only operate during the winter season and parts of spring and fall; water heaters, which only combust fuel at periodic intervals necessary to maintain water temperature; and small stationary engines, which may operate only for limited and defined periods of time for certain businesses.

The permitting authorities typically apply PTE limits as a source-specific limit that is crafted in a facility's minor source permit and tailored to the source's individual circumstances.

However, creating PTE limits for very large numbers of GHG-emitting sources nationwide would require a more efficient approach than creating them through individual minor source permits, as permitting authorities have done to date. Otherwise, the sheer volume of permits and the process involved for each permit would themselves create administrative burdens that would be self-defeating. This could particularly be the case for the title V program, for which many sources may seek PTE limits as soon as the program becomes effective for GHG emitters, and as a result, permitting authorities would need to deal with a large number of sources at the same time.

In lieu of individual minor source permitting, we intend to evaluate and to consider adopting, or encouraging State permitting authorities to adopt, rules for source categories that we expect to include large numbers of sources whose actual GHG emissions are well below major source thresholds but which, absent such rules, have PTE above those thresholds.

There are several approaches through which EPA could take this action or encourage States to undertake similar actions. For certain source categories, it may be possible to define the source so that its PTE more closely tracks its actual emissions. To return to one of the examples provided earlier, it may be possible to define furnaces (which have the potential to operate year-round) to include the thermostats to which they are attached, which constrain them from operating in warmer weather. In this manner, the PTE of the furnace-thermostat source would take into account the operational constraints, so that PTE would more closely approximate actual emissions. This type of rule would not constitute any legal constraint within which the source must comply; rather, it would define the source as including specified pieces of equipment that, in turn, incorporate operational constraints.

For other source categories, it is conceivable that the only way to limit PTE would be to promulgate regulations that limit a source's operation. These regulations are often referred to as ''prohibitory rules.'' For example, the permitting agency could promulgate a regulation that would preclude certain sources from operating for more than a certain number of hours per year, while also providing a streamlined method to allow a source to operate for longer hours upon request to the permitting agency.

We have some experience with developing and issuing guidance on PTE calculation methodologies through 1990s guidance for States wishing to create PTE limits through prohibitory rules or other mechanisms for several categories that were subject to seasonal operational shutdowns or that did not operate at maximum capacity for each hour of each day, so that actual emissions were well below their unadjusted PTE. See the memorandum entitled ''Potential to Emit (PTE) Guidance for Specific Source Categories,'' from John S. Seitz, Director, OAQPS, OAR, EPA, to EPA Regions, April 13, 1998, found at EPA–HQ–OAR–2009–0517. These categories included grain elevators, industrial boilers, gas stations, emergency generators, printing operations, and cotton gins. The guidance document provided assumptions and calculations that States could use to develop prohibitory rules or other mechanisms to easily limit the PTE of sources in these categories.

We envision a similar approach to establish PTE calculation methods for various categories of sources that emit GHGs. The following steps would need to occur for full development and implementation of such a program:

*Step 1:* EPA identifies source categories that are generally conducive to this approach, considering the amount of their GHG emissions, complexity of operations, and emissions unit characteristics.

*Step 2:* EPA collects data from the industry and individual sources on typical operations, including emissions unit and process parameters.

*Step 3:* Acting through guidance or regulatory changes to the Federal PSD regulations, EPA develops PTE calculation methodologies and implementation procedures for the appropriate source categories.

*Step 4:* EPA solicits comment from permitting authorities and affected sources on PTE calculation methodologies and implementation procedures.

*Step 5:* EPA issues the final regulations or guidance.

*Step 6:* Permitting authorities adopt revisions that incorporate EPA's regulations or guidance.

*Step 7:* Sources comply with any applicable legal limits.

Based on our efforts in the 1990's, we believe that it would take EPA approximately 1 year to issue guidance for a given source category. We believe many States would be able to immediately apply this guidance. Some States may need to adopt the guidance in their SIP, which EPA must then approve, a process that could take approximately 3 years. Finally, for those rules that would not be self-implementing, sources would need time to meet the requirements of the rule. We ask for specific comment on stakeholders' experience with limiting PTE by rule rather than through individual permits, considerations in phasing in this approach to GHG sources, and identification of categories that might benefit from the use of rules limiting PTE.

2. Presumptive BACT

CAA section 165(a)(4) requires that sources subject to PSD implement BACT for each pollutant subject to regulation under the Act, and CAA section 169(3) requires that BACT emissions limits be determined ''on a case-by-case basis'' that reflects the use of state-of-the-art demonstrated control technology at the time of the permit action. Thus, BACT is required to be source-specific, changes over time, and requires continual updating. The permitting authority's decision as to what control requirements constitute BACT affords flexibility to consider a range of case-specific factors, such as available control options and collateral cost, energy, and environmental impacts.

However, full consideration of those factors requires significant data and analysis in order for permitting authorities to arrive at a case-by-case permitting decision that is appropriate for each individual source when it constructs or modifies. For all these reasons, determining BACT for a particular source can often be a complicated, resource-intensive, time-consuming, and sometimes contentious process. If the number of required PSD permitting decisions increases significantly, these challenges will be magnified, and BACT determinations will be a major factor contributing to uncertainty and delay for sources seeking PSD permits. Furthermore, the increase in workload of BACT determinations will require large investments of resources by permitting authorities, sources, EPA, and the public interested in commenting on these decisions.

In order to streamline the BACT process for the many new small sources that will be brought into the PSD program based on their GHG emissions, EPA will investigate ways to move from a system under which permitting authorities set BACT limits on an individual, case-by-case basis to a system under which they make BACT determinations for common types of equipment and sources, and apply those determinations to individual permits with little to no additional revision or analysis. The EPA has previously introduced this concept, known as ''presumptive BACT'', to streamline permitting for desulfurization projects at refineries as well as in other instances,[23] and some State permitting authorities have adopted similar approaches.[24] Based on our understanding of the types of sources that will become subject to PSD if GHG emissions are regulated at the statutory 100/250-tpy threshold, we believe the presumptive BACT process could offer significant streamlining benefits. These benefits arise because many of the sources that would become subject to BACT will likely have very similar emissions producing equipment, and there will be little variation across sources with respect to the cost, energy, and environmental considerations in the BACT decision.

The central component of a presumptive BACT approach would be the recurring technical determination, subject to notice and comment, of the presumptive BACT levels for various categories. Because of the limited data currently available about the number and types of sources that would become subject to the BACT requirement for GHGs, we cannot at this time predict how many or which categories might benefit from such an approach. We recognize that considerable work will be needed to determine what options exist for controlling GHG emissions from these categories of sources and the various types of emitting equipment they use.

As noted above, the CAA requirement for BACT, found in sections 165(a)(4) and 169(3), mandate that BACT determinations be made for each pollutant on a ''case-by-case basis.'' Accordingly, we need to explore whether we can develop a process that benefits from the efficiencies that presumptive BACT would provide while also allowing for individualization of permits. A possible approach would be to develop, through notice-and-comment rulemaking, a presumptive BACT level for sources in a particular source category, but require that permitting authorities allow public comment on individual permits as to whether there are significant case-specific energy, economic, and/or environmental impacts that would require adjustment of the presumed limit for that particular source. This phase in approach could streamline the BACT determination process to some extent, although the prospect that presumptive BACT determinations would, as a result of public comment, still have to be reviewed for numerous individual sources could well negate those streamlining benefits.

Accordingly, we believe that we also need to investigate a system under which presumptive BACT levels for a source category are developed through notice-and-comment rulemaking but applied to individual sources in that category without requiring permitting authorities to individualize the BACT determination or to allow for public comment on how presumptive BACT levels would apply to an individual source. The D.C. Circuit, in the *Alabama Power* case discussed above, stated that courts ''frequently uphold streamlined agency [regulatory] approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.'' 636 F.2d at 358. The Court recognized that such streamlining measures may be needed when time or personnel constraints or other practical considerations ''would make it impossible for the agency to carry out its mandate.'' *See id.* at 359. Given the significant increase in new sources that would likely be brought into the PSD program once GHGs are regulated, maintaining individual case-by-case BACT determinations may well be impractical and may well warrant a presumptive BACT approach that does not authorize individualized, source-specific determinations. This approach could well be an important tool to allow EPA, State and local permitting authorities to carry out the PSD program in as timely and efficient manner as necessary to promote (rather than hinder) control of GHG emissions from the many new, small source categories that would be required to have PSD permits based on their GHG emissions. This approach would preserve opportunities for public participation by taking comment during the determination of presumptive BACT levels for a source category. Although this type of presumptive BACT approach—one that does not permit individualized, source-specific determinations—would depart from a literal application of the statutory requirements for BACT, it may nevertheless remain closer to the congressional intent for the PSD program than maintaining the applicability threshold at a level higher than the statutory level. If this is the case, then EPA could be required to establish a presumptive BACT approach and lower the applicability thresholds from the first phase level proposed in this action.

Several other factors should be taken into account when considering a change from case-by-case BACT determinations to a presumptive BACT process for some specific source categories within the PSD program. As a general matter, we will need to consider how such presumptive BACT limits should be established and used, and what provisions in the CAA would set requirements or limits on their establishment and use. In particular, EPA recognizes the CAA section 169(3) requirement to set BACT limits after taking into account site-specific energy, economic, and environmental impacts (otherwise known as collateral impacts).

In addition, while case-by-case BACT determinations allow for the continual evolution of BACT requirements over time (as controls applied in prior

[23] *See* Memorandum, ''BACT and LAER for Emissions of Nitrogen Oxides and Volatile Organic Compounds at Tier 2/Gasoline Sulfur Refinery Projects,'' from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors (January 19, 2001).

[24] For example, Wyoming has a minor source permitting program that includes a BACT analysis, and they use a presumptive BACT process for issuing minor source permits to a particular source category—oil and gas production facilities. See Permitting Guidance for Oil and Gas Production Facilities, Wyoming Dept. of Environmental Quality, Air Quality Division (August 2007 revision).

permits are considered in each subsequent case-by-case BACT determination), EPA recognizes that application of presumptive BACT to a category of sources over many permitting decisions may diminish the technology forcing effects of PSD. EPA is interested in options that would help maintain advances in control technologies, such as a requirement to update and/or strengthen BACT at set intervals (such as after 3 years).

EPA seeks comment on all aspects of the use of presumptive BACT limits within the PSD program, including EPA's authority to do so, whether there is need for and value to such an approach, and suggestions for how such limits could be established, updated, and used consistently within the requirements of the CAA, or by departing as little as possible from those requirements. We also ask for comment on whether there are issues at traditional PSD major sources that arise for GHGs and that would not be addressed by a presumptive BACT approach. If so, we ask for comment on additional options for streamlining the BACT requirement to address these issues.

*3. General Permits and Permits-by-Rule*

A general permit is a permit that the permitting authority drafts one time, and then applies essentially identically (except for some source-specific identifying information) to each source of the appropriate type that requests coverage under the general permit. Congress expressly codified the concept of general permits when it enacted the title V program and States have been using general permits and similar processes for years in their own permit programs, particularly for minor source NSR and operating permits. Due to the case-by-case nature of PSD for ''traditional'' major sources and the differences among individual PSD sources, there has not been much interest or activity in general permitting for the PSD program. However, we believe this approach merits strong consideration for both PSD and title V programs due to the large number and similar characteristics of many of the sources that EPA expects will become newly subject to these permitting programs because of their GHG emissions.

A general permit provides a streamlined application and permitting process for sources that are similar in terms of operations, emissions units, and applicable requirements. By issuing a general permit, a permitting authority indicates that it approves the activities authorized by the general permit, provided that the owner or operator of the source registers with the permitting authority and meets the requirements of the general permit.

Permit-by-rule provisions may be very similar to general permit provisions, but they typically authorize a source owner to operate in accordance with certain requirements provided that the source owner registers with the permitting authority or certifies that they are complying with all applicable requirements. Thus, a source subject to the permit-by-rule would not need to wait for permitting authority approval, as is the case with the general permit, prior to operating under a permit-by-rule.

General permits are attractive in their ability to dramatically reduce permitting timeframes for affected source types. At the same time, general permits are highly conducive to automation and the development of web-based applications. For example, New Jersey's Department of Environmental Quality has fully automated its air general permitting process, allowing source owners to go online, apply for a general permit, build the permit themselves, issue it to themselves by printing it out, and pay for it by credit card. This type of one-stop processing has the potential to dramatically streamline the air permitting process for source types covered by general permits, and the resulting electronic records create spillover benefits for compliance tracking, inspection management, and pollution prevention outreach.

a. General Permits for the PSD Program

EPA has limited experience in developing general permits and permits-by-rule under the PSD program due to the predominance of the case-by-case BACT decision process described in section VII.A.2 of this preamble. In considering the use of general permits within the PSD program, EPA is considering how such general permits should be established and used, and what provisions in the CAA might limit their establishment and use. One option is to model PSD general permits on the general permits used in title V, as provided in 40 CFR 70.6(d). However, an important consideration in establishing PSD general permits is the requirement in CAA § 165(a)(2) that permits be issued after ''a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations.'' One option for addressing this public participation requirement at least to some extent is the approach followed for title V general permits in 40 CFR 70.6(d), which provides that permitting authorities may establish general permits after following notice-and-comment procedures required under 40 CFR 70.7(h) and then grant a source's request to operate under a general permit without repeating the public participation procedures. Other considerations for establishing general permits under the PSD program include the requirement to determine BACT on a case-by-case basis (as discussed in an earlier section of this preamble), and the other procedural requirements referred to in section VII.A.3 of this preamble concerning the Class I consultation and the analysis of air quality and other potential impacts under CAA section 165(e).

Because permitting authorities have had minimal experience in developing general permits and permits-by-rule for PSD, sufficient time would be needed to develop them as useful tools to reduce the administrative burden associated with the application of the PSD program to major GHG sources. Sufficient time would be needed for the following steps: (1) EPA must determine best candidate sources for general permits and permits-by-rule; (2) EPA must determine similar types of processes and source types and sizes to combine; (3) EPA must prioritize the development and use of general permits and permits-by-rule; (4) EPA must issue guidance or rulemaking (as needed) for each grouping of similar sources; (5) States must adopt the guidance or rulemaking in their SIPs, as needed; and (6) sources must implement the requirements. We estimate that EPA would require more than 3 years to develop and deploy general permits and permits-by-rule would require more than 3 years to develop and deploy for a candidate group of sources, and that additional time would be needed for the States and sources to take the indicated steps.

EPA seeks comment on the use of general permits within the PSD program, including both EPA's authority to do so and suggestions for how general permits would be established and used consistent with the requirements of the CAA and identification of source categories that could benefit from such an approach.

b. General Permits for the Title V Program

In contrast to the PSD program, in the title V program, general permits are specifically authorized under CAA section 504(d), which provides:

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general

permit shall comply with all requirements applicable for permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 503 of this Act.

EPA regulations describe general permits in 40 CFR § 70.6(d). These provisions specifically authorize the use of general permits covering numerous similar sources under the title V program. The general permit must also follow the public participation requirements of 40 CFR 70.7(h). The information development and review conducted as part of streamlining for an individual source can be used by the permitting authority to generate a general permit for similar sources or portions of sources. If a general permit were used, EPA and public review beyond that needed to issue the general permit would not be necessary when sources subsequently applied for the streamlined permit conditions established under the general permit. Even where a general permit is not issued, the availability of information obtained from the streamlining of one source may be useful as a model for future streamlining actions involving other similar sources. EPA notes that the part 71 regulations addressing title V permits issued by EPA (and delegated authorities) contain parallel provisions regarding general permits. See 40 CFR 71.6(d).

We believe general permits may have more near-term applications for the title V program than for the PSD program because of past experience of permitting authorities, however limited, in using this permit streamlining technique for title V. Certain States have already used general permits for a relatively narrow population of certain minor, mainly area-type sources with a simple set of applicable requirements that were relatively easy for both permitting authorities and sources to implement. These general permits allowed the sources a more focused ''roadmap'' to meeting their regulatory requirements with far less burden associated with applying for the permits and administering them in general. In response to the ANPR, some State commenters noted that they have a successful history of using general permits and believe the use of general permits could be an effective and reasonable approach to reduce regulatory costs and administrative burdens.

We agree that there are similarities between the way general permits have been used in the past, particularly under title V, and the challenges permitting authorities would face for permitting GHG emissions for sources that would not already have, or necessarily need, a more comprehensive title V permit. However, most permitting authorities lack experience with general permits and with GHG sources in general. As a result, we believe that the process of developing general permits for title V purposes would parallel in certain respects the process of developing them for PSD purposes. Specifically, title V permitting authorities would need sufficient time to (1) determine candidate sources for general permits, (2) determine similar permit elements for those sources and develop adequate templates and formats for the general permits for those sources, (3) conduct formal EPA and public review of the general permit, and (4) develop an adequate implementation plan for sources to apply for such permits and for permit review staff to process such permits. After this, sources would need additional time to comply with the general permits. We believe this process would take at least 2 to 3 years for a partial set of general permits to be fully developed and ready for deployment.

4. Electronic Permitting

Implementation of electronic permitting (e-permitting) systems is growing across the U.S., as more and more States implement new or upgraded systems. We believe these systems, possibly in conjunction with general permitting procedures, could assist in addressing some of the administrative burden created by adding GHG emissions sources to the PSD and title V programs.

Most States are currently using agency Web sites to deliver a range of air permitting program services, from enabling electronic submittal of permit applications to providing the public web access to permits and related documents. Permitting authorities find value in e-permitting systems because these systems can lead to improved customer service, decreased data entry errors, shortened permit review timeframes, and improved systems for managing permitting processes. In short, e-permitting systems can make better permits more quickly. Common State e-permitting activities include:

- Development of air permit application forms which can be accessed, completed, and submitted online;
- Development of specialized software or database applications to review submitted permit applications and to support the permit development process; and
- Posting issued permits and draft permit documents to air permitting Web sites.

New technology is expanding the opportunity for collaboration and joint development around information system tools. To enable permitting authorities to handle the administrative workload associated with the application of the PSD and title V programs to GHG sources, EPA could assess and identify best practices for e-permitting system implementation and support States in implementing effective and efficient systems using targeted e-permitting tools and resources. For example, EPA could work with States to develop effective GHG permitting strategies in the following areas:

- Permit application submittal which would involve processes for facilities to identify permits needed, determine the scope of information to include in permit applications, access and complete application forms, and submit those forms and supporting data to State and local permitting authorities.
- Application review and draft permit generation which would involve processes for State and local permitting authorities to conduct administrative and technical permit application reviews, develop permit conditions, and sometimes create draft permit documents. This category could also include a broad range of information technology tools and resources that could support permit writers in preparing better permits more quickly.
- Draft permit review and final permit issuance which would involve processes for State and local permitting authorities to manage completion of external reviews (including public and EPA review periods) and any related updates to the draft permit document, issuance of the final permit, and collection of permit fees.
- Post-issuance activities which would incorporate all activities related to permits that are managed by State and local permitting authorities after permits are issued (including public access to permits and related documents, permit appeals, permit modifications, permit renewals, and inspections and compliance monitoring).
- Workflow tracking and management which would incorporate all of the management procedures and tools that State and local permitting authorities use to track the permit development process, including internal permit authority timeline tracking and public access to workflow information.

5. ''Lean'' Techniques for Permit Process Improvement

In the business world, ''lean'' techniques refers to a collection of process improvement principles, methods, and tools designed to help organizations identify and eliminate non-value-added activity (''waste''), in order to meet customer needs better, more quickly, and more efficiently. Lean techniques have been adopted across numerous business sectors and been adapted to address both production and administrative processes. Lean process improvements could help permitting authorities to address administrative burdens that are created if numerous GHG sources are added to their air permitting programs.

In the context of air permitting, Lean improvement events typically focus on eliminating the following types of administrative process waste: Backlogs in permitting; errors in documents; unnecessary rework on documents; and delays associated with transmission of documents between the various parties that develop and approve them. Since 2003, State environmental agencies have increasingly used Lean manufacturing principles and methods to drive rapid, continuous improvement in air permitting and other agency processes.

*B. Implementation of Streamlining Techniques and Overall Approach To Administering PSD and Title V Programs*

As noted above, these potential streamlining options and tools will require time to develop, issue, and reach full deployment. Each technique would generally take from 3 to 4 years to fully develop and implement. Therefore, if we did not phase in the applicability thresholds for sources of GHG emissions as soon as PSD and title V requirements are triggered for them, there would be a significant time period when numerous GHG sources exceeding the statutory permitting thresholds for PSD and title V would need to obtain permits, and permitting agencies would be faced with overwhelming administrative burdens. Also, at this point in time we do not have enough information to predict the full potential applications and impact of these streamlining techniques for permitting GHG sources. Therefore, it is impossible to predict a specific time in the future when and if such streamlining techniques would reduce the administrative burden of permitting authorities sufficiently for them to administer PSD and title V programs for GHGs at the current permitting thresholds. Instead, we propose to commit to investigating and developing these techniques as vigorously and as soon as possible as part of an overall GHG tailoring strategy that involves phasing in the GHG major source permitting thresholds as soon as PSD and title V requirements are triggered for GHG emitters, but that further involves reassessing the situation, completing a study within 5 years, and then taking up to 1 additional year to finalize regulations adopting the lowest threshold that we conclude is administrable based on the study.

Even so, we have enough information now about some streamlining techniques, such as presumptive BACT in support of PSD permitting and general permits in support of title V permitting, to recognize that those techniques are quite likely to be beneficial to both permitting agencies and affected sources. We believe that within the framework we propose in this action there will be sufficient time to deploy the streamlining techniques and to evaluate their effectiveness in addressing administrative burden.

Therefore, in conjunction with our proposed action to tailor the GHG permitting thresholds, we are committing to a concurrent effort to investigate, evaluate, and support the implementation of permit streamlining techniques to address GHG sources. We believe that while the proposed temporary thresholds will allow the permitting authorities to implement their programs for PSD and title V, it is also necessary for us to pursue applicable streamlining techniques that may help our assessment of the temporary thresholds as part of the threshold evaluation study. We believe that at the end of the threshold evaluation period we will have a better understanding and a sufficient record of the effectiveness of different permit streamlining techniques and how these techniques may influence the need to consider alternative thresholds.

We request comment on which types of streamlining techniques, and for what source categories, would be of most value to permitting authorities and affected sources. We also request comment on the anticipated impact such techniques would have on permitting authorities' administrative capabilities to address GHG permitting and how such impact would affect the need for the temporary thresholds proposed under this action. We also request comment on the time periods needed to develop and implement any such streamlining techniques and on how such time frames can expeditiously meet CAA requirements in light of the administrative burden that would remain.

*C. Strategies for Obtaining GHG Reductions From Sources Under the Proposed GHG Permit Thresholds*

In addition to pursuing permit streamlining techniques that may ultimately have application to smaller GHG source categories (*e.g.,* those in the commercial and residential sectors), we also recognize that there are both current and future EPA programs that could be used to mitigate GHG emissions from these smaller sources. It may well be the case that, for the smaller sources, these approaches, which are summarized in this section, will result in more efficient and cost-effective regulation than would case-by-case permitting. We therefore intend to fully explore the use of all available tools for addressing these sources at the same time as we explore streamlining the permitting programs.

While EPA is proposing that during the first phase, GHG sources less than 25,000 tpy $CO_2e$ will not be subject to PSD and title V requirements for purposes of applicability, there are feasible, cost-effective opportunities for reductions from these sources through means other than PSD and title V during the first phase. The tailoring proposal does not restrict our ability to explore these opportunities during this first phase. EPA has strong interest in pursuing such opportunities and therefore requests your comments on the practicability of near-term regulatory and nonregulatory programs to address smaller sources.

The near-term opportunities for GHG emissions reductions in smaller-scale stationary sources include increased energy efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes that could reduce inputs of carbon or other GHG-generating materials. The use of alternative fuels and energy are also promising methods for achieving GHG reductions.

One key challenge in addressing sources emitting less than 25,000 tpy $CO_2e$ is their diversity. The source types may range from landfills to small stationary fuel combustion devices to waste water treatment plants and electronics manufacturing. In addition to including a range of processes, these source categories may include large (>25,000 tpy $CO_2e$) and small sources. EPA is soliciting public comment on a fair and systematic way to address the diverse number of categories where individual sources are comparatively small, but the source category could be addressed through some cost effective means.

Controls on sources at this scale would likely involve decisions on how proposed installations of equipment and processes for a specific source category can be redesigned to make those sources more energy efficient, for example, while taking cost considerations into account. However, these types of approaches have yet to be adopted widely, because of market barriers, insufficient financial and legal incentives, or other barriers. Below, EPA provides some examples of approaches that could be taken and existing programs that could provide useful platforms to address smaller sources.

We request comment on the types of strategies that may be appropriate for these sources, considerations—such as cost and feasibility—with respect to implementing programs for smaller sources, approaches to incentivize these types of programs, and ways to measure the effectiveness of such initiatives. We also request comment on whether these initiatives have the potential to be developed in such a way as to meet the essential PSD and title V program requirements for sources, even if the initiatives do not necessarily meet the letter of those requirements (such as the case-by-case determinations required under the PSD program), based on administrative imperatives.

For instance, EPA could design a hybrid approach where sources on the larger end of the below-25,000-tpy $CO_2e$ range could be required to analyze pathways to reduce GHG emissions by a certain percentage, but EPA or the States could use flexible criteria in requiring reductions from those sources, including the timeframe for achieving such reductions. These requirements could be supplemented by an incentive program, through which a State could use loan, grant, or emissions credit incentives to help such sources lower their GHG emissions profile, especially when the source is performing a modification. Any approach would have to be systematic, in that the criteria used would have to be responsive to the source volume of emissions, the reductions that might be achieved, cost-effectiveness, permanence and enforceability.

A further alternative would be the use of section 111(d) of the CAA to work with smaller sources to reduce emissions. In contrast to other provisions in the Act which require regulation of all sources above specific size thresholds, section 111 gives EPA significant discretion to identify the facilities within a source category that should be regulated. To define the affected facilities, EPA can use size thresholds for regulation and create subcategories based on source type, class or size. Emissions limits also may be established either for equipment within a facility or for an entire facility. EPA also has significant discretion to determine the appropriate level for the standards.

In addition to exploring regulatory options, EPA will continue to consider existing nonregulatory programs to achieve cost-effective emissions reductions. Some of the EPA's current programs, discussed below, are aggressively working to cost-effectively mitigate GHG emissions through energy efficiency in industry and consumer products and other voluntary programs that address several key $CH_4$ and other high-GWP sources. The source categories discussed below are not exhaustive, and are discussed as illustrative examples. It is also important to note that particular sources in these categories could fall above or below a threshold value of 25,000 tpy $CO_2e$.

Energy efficiency is one of the lowest cost means for addressing climate change. Since 1992, EPA, through the ENERGY STAR program, has achieved GHG reductions by helping U.S. businesses adopt cost-effective, energy-efficient technologies and practices. The program combines several elements, including: ENERGY STAR branding of commercial products with superior energy performance and promoting strategic energy management practices across the commercial and industrial sectors. We also work with States to leverage wider use of such ENERGY STAR products as commercial roofing materials, furnaces, and boilers in commercial settings. States can promote the purchasing of ENERGY STAR qualified products in residential multi-family housing and commercial buildings such as offices, hospitals, hotels, schools, and warehouses. These building types comprise the vast majority of sources that would have emissions below the proposed 25,000-tpy $CO_2e$ major source threshold.

Also for these building types, States can take advantage of EPA tools to encourage, track and reward improvements in building efficiency. Already, States are leveraging such tools as Portfolio Manager to make disclosure of building efficiency part of sale/lease transactions. Many States also use ENERGY STAR to incentivize adoption of energy-efficient equipment and buildings through regulated utilities and other energy efficiency program sponsors. Finally, EPA provides resources to help—or to enable States to help—manufacturers improve energy efficiency through a transferable platform that States can adopt which includes sector-targeted energy efficiency guidance, energy program development tools, and a national rating system that scores the energy performance of plants and enables documentation of energy improvement for those interested in demonstrating change in performance. For additional information on these programs, visit *http://www.energystar.gov*.

Methane and other high-GWP gases, including PFCs, HFCs, and $SF_6$, are potent GHGs that contribute to climate change. In an effort to reduce emissions of these gases, EPA is working cooperatively with a variety of companies and organizations in the energy, waste management, agriculture, and industrial sectors to implement voluntary programs that encourage cost-effective emissions reductions. These programs offer a range of technical and policy information products and exchanges and track emissions reductions in the following key sectors: landfills, oil and gas systems, animal waste, coal mines, industrial processes including aluminum production, semiconductor manufacturing, electric power transmission, magnesium production and processing, and the production of HCFC–22, and wastewater from domestic or industrial sources. Experience and lessons learned through these programs can be used by States and EPA for regulatory and nonregulatory initiatives. For additional information on the $CH_4$ and high-GWP programs, visit *http://www.epa.gov/methane/voluntary.html* and *http://www.epa.gov/highgwp/voluntary.html*. For more information on opportunities for GHG reductions at wastewater treatment facilities, visit *http://www.epa.gov/chp/documents/wwtf_opportunities.pdf*.

## VIII. Description and Rationale of Proposed Action

### *A. Proposed Permitting Thresholds for GHGs*

Based on the legal rationale of ''absurd results'' and ''administrative necessity'' described in section VI of this preamble, EPA is proposing with this action to establish the first phase of the thresholds for determining applicability under both the PSD and title V permitting programs and to set a significance level for GHGs under the PSD program. For both PSD and title V purposes, we are proposing to set the applicability threshold at 25,000 tpy $CO_2e$. In addition, for the PSD significance level, we are proposing a range from 10,000 to 25,000 tpy $CO_2e$. Upon finalization of this rule, and based

on comments received and the supporting record, we will establish a singular value for the GHG significance level.

EPA is also proposing in this action to commit to evaluating the impact, effectiveness, and need for these GHG permitting thresholds as well as other aspects of the administrative burden for permitting authorities in a study to be completed within 5 years from the promulgation date of the final version of this rulemaking. Based on the results of that study, EPA would propose and promulgate a rulemaking within a year later that would establish the second phase of the tailoring program. This rulemaking would reaffirm the first-phase GHG permitting thresholds or revise those thresholds, promulgate other streamlining techniques, and/or take action consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

This section of the preamble defines the GHG metric used for purposes of determining whether the proposed thresholds are exceeded, describes the policy and technical rationale for selecting the proposed applicability thresholds for PSD and title V, and discusses the proposed 5-year threshold evaluation study.

While the rest of this section discusses the details of our proposed approach, we note at the outset that there may be other ways to structure the first phase of permit program applicability for GHGs than the one we describe as our preferred approach. For example, we could address the administrative burden by defining the sources in the first phase subject to permitting for GHGs to include only sources that are or become subject to title V or PSD permitting obligations under the existing 100/250 tpy statutory thresholds on the basis of their emissions of a non-GHG pollutant. Under this approach, for example, a new source that triggered PSD for a non-GHG regulated NSR pollutant and that also emits GHGs, or an existing source going through a modification that triggered PSD for a non-GHG regulated NSR pollutant and which also increased its GHG emissions would have to do a BACT analysis for GHGs. This BACT process would be expected to identify control options which are technically feasible and cost effective for a particular source based on the tons emitted, thereby ensuring that the first phase of permitting would apply to the largest sources of GHG that are currently subject to CAA regulation based on emissions of non-GHG pollutants. Sources that do not trigger PSD or title V for a non-GHG pollutant would not be subject to these programs solely on the basis of their GHG emissions. Under such an approach, we may still need to establish a significance level for GHG emissions at sources that are subject to PSD due to their non-GHG emissions, but we could consider setting this based on the 10,000 ton $CO_2$ eq significance level proposed elsewhere in this package. We solicit comment on this approach, and on other potential variations on our proposal that commenters believe could address the administrative concerns in more effective ways.

*B. What is the definition of the GHG pollutant for the proposed permitting thresholds?*

1. Background on GHG Metrics

The selection of a GHG metric is an important consideration in developing the GHG permitting threshold options because it sets the basis for evaluating whether a particular source exceeds a given threshold. As noted in section IV.A of this preamble, one commonly utilized metric is to estimate and report emissions of GHGs as the collective sum of emissions of the six primary GHGs, with applicable GWPs applied to the non-$CO_2$ gases. When GWPs are applied to the mass emissions of one of the primary GHGs, the resulting weight is referred to as $CO_2e$ (*see* section IV.A of this preamble for a description of $CO_2e$). Another possible metric would consist of individual mass-based emissions for each GHG, without their GWP values applied. The choice of the GHG metric can have a significant impact on design and implementation of the GHG permitting threshold.

For example, if a source only evaluated its $CO_2$ emissions against a permitting threshold, it may fall below the threshold, but if it evaluated the sum of all its primary GHG emissions on a $CO_2e$ basis, it may fall above the threshold. Although there may be a variety of considerations for including one GHG metric over another, the choice of a GHG metric, whether it be the sum of the $CO_2e$ emissions or individual GHGs, for both PSD and title V programs, must include any of the individual GHGs that may be subject to regulatory action under the CAA, as discussed in section IV.D of this preamble.

One of the reasons EPA is undertaking this rulemaking is because it intends to propose and finalize a separate rule that regulates GHG emissions from light-duty motor vehicles and that would trigger PSD and title V permitting requirements for stationary GHG emissions sources. The light-duty motor vehicle rule will identify a GHG pollutant or pollutants subject to regulation. However, at the time of this proposal there is uncertainty as to exactly what GHG metric will ultimately be finalized in the light-duty motor vehicle rule. Also, as discussed in the ANPR, there may be other future regulatory actions or decisions by EPA that would determine what form of GHGs would be subject to regulation under the CAA, such as new source performance standards for certain source categories under CAA section 111. This uncertainty over the form of the GHG metric in future regulatory actions is an important factor in our selection of the GHG metric for the permitting threshold.

In order to better inform our consideration of different GHG metrics for the proposed GHG permitting thresholds, we also reviewed the GHG metrics used in two recent EPA proposals: the endangerment finding and the GHG mandatory reporting rule.

In the proposed endangerment finding for GHGs, the Administrator proposed to define the air pollutant as the ''[c]ollective class of the six greenhouse gases,'' and referred to the widespread use of $CO_2e$ as a means to evaluate the six primary GHGs as a group (74 FR 18886, April 24, 2009). The Administrator also identified this collective approach to defining GHGs, for the contribution test, as most consistent with the treatment of GHGs by those studying climate change science and policy, where it has become common practice to evaluate GHGs on collective $CO_2e$ basis. However, the Administrator also recognized in the proposed finding that each GHG could be considered a separate air pollutant and that defining the air pollutant as the group of six GHGs does not preclude setting standards that control emissions of individual GHGs, as constituents of the group.

Under EPA's GHG Mandatory Reporting Rule proposal, the emissions-based applicability thresholds for reporting are based on total $CO_2e$ calculated from the sum of a facility's emissions of the six primary GHGs plus other fluorinated GHGs, applying GWP values to non-$CO_2$ gases (74 FR 16448, April 10, 2009). However, annual reporting is required for both total $CO_2e$ and individual GHGs on a mass basis, with no GWPs applied for non-$CO_2$ gases.

We also note that both domestic regional cap-and-trade programs (*e.g.,* the Regional Greenhouse Gas Initiative) and international trading programs (*e.g.,*

the European Union Emission Trading Scheme) make use of the $CO_2e$ metric for purposes of offsets accounting and emissions trading that involves different GHGs. Under the United Nations Framework Convention on Climate Change (UNFCCC), the U.S. and other countries also report their annual emissions of the six GHGs in terms of $CO_2e$ units.

2. Rationale for GHG Metric Selection for Proposed Permitting Thresholds

As discussed elsewhere, EPA interprets the PSD and title V requirements to apply to each ''air pollutant'' that is ''subject to regulation'' under other provisions of the CAA. It is important to determine which GHGs to treat as the ''air pollutant'' that is subject to PSD and title V requirements and how to measure those GHGs. Taken together, this is termed the GHG metric. As noted above, in the proposed endangerment and cause or contribute findings under section 202(a) of the CAA, EPA proposed to define the ''air pollutant'' for the contribution analysis as the class of six GHGs $CO_2$, $CH_4$, $N_2O$, $SF_6$, HFCs, and PFCs); but EPA also took comment on the concept of defining each GHG as a separate air pollutant. In connection with the light-duty vehicle rule under CAA § 202(a) that EPA is proposing at the same time as this action, four of those six GHGs which are emitted by light-duty motor vehicles are proposed to be subject to controls under the light-duty vehicle rule (all but $SF_6$ and PFCs). As EPA explains in the light-duty vehicle rule and below, EPA has discretion under section 202(a) to establish controls at the GHG-specific level regardless of whether the final definition of ''air pollutant'' for the contribution analysis is the class of six GHGs or each GHG individually. In light of the ongoing relevant rulemakings, this proposal discusses several possible ways for identifying the GHG metric for PSD and title V requirements. First, the metric could address each GHG individually, or it could address them as a single GHG group. Second, the metric could include (whether individually or as a group) all six of the GHGs, or only those four GHGs subject to controls in the light-duty vehicle rule. Third, the metric could measure the GHGs (whether individually or as a group) on the basis of their actual tonnage or their equivalent tonnage based on global warming potential (GWP), which we refer to as $CO_2$ equivalent, or $CO_2e$.

We propose to identify the GHG metric as the group of six GHGs, on a $CO_2e$-basis. Using a $CO_2e$ basis, a source's emissions for any of the six primary GHGs that are ''subject to regulation'' under the Act, and therefore considered ''regulated NSR pollutants,'' are summed on a $CO_2e$ basis using their GWP values. The summed $CO_2e$ emissions would then be compared to the applicable permitting threshold to determine whether the source is subject to PSD and title V requirements. We solicit comment on whether we should identify the GHG metric in a different way, such as one of the options identified above.

a. Legal Rationale

Because PSD and title V apply to each ''air pollutant'' subject to regulation, it is necessary both to examine the definition of ''air pollutant'' and to determine which air pollutant or pollutants are proposed to be subject to regulation under CAA § 202(a).

PSD applies to a ''major emitting facility,'' under CAA § 165(a), and that term is defined under CAA § 169(1) as—

> any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any *air pollutant* from * * * stationary sources [in 28 listed categories]. * * * Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any *air pollutant.*

(Emphasis added.) Similarly, Title V requirements apply to ''major source[]s,'' under CAA § 502(a), and that term is defined under CAA § 501(2)(B) and CAA § 302(j) as—

> any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any *air pollutant* * * *.

(Emphasis added.) The term ''air pollutant,'' which, as just noted, is central to the applicability provisions of both PSD and title V, is defined under CAA § 302(g) as—

> any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.

As just noted, EPA treats sources emitting air pollutants as subject to PSD and title V requirements only if the air pollutants are ''subject to regulation'' under other provisions of the CAA. EPA's current interpretation of ''subject to regulation'' is found in the PSD Interpretive Memorandum, which defines the term as meaning subject to either a provision in the CAA or a regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant, and to exclude pollutants for which EPA regulations only require monitoring or reporting. Accordingly, under the PSD Interpretive Memorandum, the air pollutant that is subject to regulation is the air pollutant for which actual controls are required under other provisions of the CAA.

We believe that PSD and title V requirements will be triggered for GHGs if EPA completes the rulemaking that EPA is currently proposing for light-duty vehicles and vehicle engines. That rule is based on CAA § 202(a). Paragraph (1) of § 202(a) provides, in relevant part:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any *air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(Emphasis added.) This provision, by its terms, requires, as a pre-requisite for regulating an ''air pollutant'' from the described mobile sources, that EPA must make what has come to be called an ''endangerment finding'' for that ''air pollutant;'' and further requires that once EPA makes that endangerment finding, EPA must proceed to ''set standards [for new motor vehicles] applicable to the emission of [the] air pollutant'' for which the endangerment and companion cause or contribute finding was made. EPA has already proposed an endangerment finding for the air pollutant comprised of the collective group of six GHGs: $CO_2$, $CH_4$, $N_2O$, $SF_6$, HFCs, and PFCs, as well as a finding that new motor vehicle emissions of the 6 GHGs, viewed as a single group air pollutant, contribute to this endangerment. 74 FR 18886, 18904, 18907 (April 24, 2009).[25] Four of these GHGs are emitted by light-duty motor vehicles; as a result, concurrently with this rule, EPA is proposing to set emissions standards for those four GHGs. As noted in the light-duty vehicle rule and below, EPA can set standards for the specific GHGs emitted by light-duty motor vehicles versus for the single air pollutant that is comprised of the six GHG, and still comply with the requirement in section 202(a) regardless of how EPA finally defines ''air pollutant'' in the final endangerment and contribution findings. EPA is proposing to regulate the GHGs emitted by light-duty vehicles by establishing separate emission

[25] In the proposed endangerment finding, the Administrator also stated that if each of the four GHGs emitted by new motor vehicles were treated as separate air pollutants, she would find that each of the four contributes individually to the air pollution that endangers.

standards that limit emissions of $CO_2$, $CH_4$, and $N_2O$. EPA would also allow credit towards the $CO_2$ standard based on vehicle air conditioner controls that reduce emissions of HFCs.

In light of how the proposed endangerment and contribution finding identifies, and light-duty vehicle rule regulates, emissions of, the ''air pollutant'' under CAA § 202(a), EPA's task in this proposal is to identify the ''air pollutant'' for which PSD and title V will become applicable under CAA §§ 165(a)/169(1) and CAA §§ 502(a)/501(2)/302(j). This ''air pollutant,'' for PSD and title V purposes, is the ''air pollutant'' that is ''subject to regulation'' under CAA § 202(a), according to EPA interpretation.

We are proposing that the relevant ''air pollutant'' for purposes PSD and title V applicability is the single air pollutant that is comprised of the group of six GHGs, as proposed in the § 202(a) endangerment and contribution findings. These six GHGs as a class comprise the air pollutant that is the subject of the endangerment finding and companion contribution finding and constitute the air pollutant that is regulated by the light-duty vehicle rule through measures that address the components of that air pollutant that are emitted from the mobile sources. Thus, although the CAA § 202(a) proposal establishes controls only with respect to four GHGs, as a legal matter the proposal covers the entire set of GHGs that as a class are the single ''air pollutant'' in the proposed endangerment and contribution findings.

We also solicit comment on whether only the four GHGs actually controlled under the mobile source rule should be treated as the ''air pollutant'' subject to PSD and title V applicability. In particular, we solicit comment on whether such an approach would be consistent with our treatment of other ''air pollutants'' that are comprised of numerous individual substances (*e.g.,* VOCs or PM), and how it interacts with EPA's duty under section 202(a) to sets standards for emissions of the ''air pollutant'' for which a contribution finding is made under that section.

In addition, we further believe that the definition of ''air pollutant'' for PSD and title V purposes provides for sufficient flexibility that the form of the standard—that is, the metric—that EPA adopts for PSD purposes may differ from the form that EPA adopts for purposes of regulation under CAA § 202(a). Section 202(a) authorizes EPA to set ''standards applicable to the emission of [the] air pollutant.'' This provides EPA significant discretion in determining how to structure its new motor vehicle standards, as long as they are ''applicable to emission'' of the air pollutant. How EPA exercises its discretion under this provision, whether by separate standards, a collective standard, or some combination of these, as has been proposed, does not change the fact that each of these approaches has the same result—regulating the air pollutant which is the subject of the contribution finding under section 202(a). It is this overall result—regulation of the air pollutant—that determines the applicability of PSD and title V, not the particular form of the standards adopted under section 202(a). To reiterate, under 302(g), ''air pollutant'' means ''any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.'' We believe that as long as the same ''air pollution agent or combination of such agents'' is regulated for PSD and title V purposes as is regulated under CAA § 202(a), then the PSD and title V applicability requirements are met, whether or not the structure of the regulation is the same as employed under section 202(a). Accordingly, we believe that as long as the six GHGs that are the ''air pollutant'' being regulated under CAA § 202(a) are subject to PSD and title V applicability through some metric, then the precise metric through which they are subject to PSD and title V may differ from the precise manner in which they are regulated under CAA § 202(a). Thus, we believe we may treat the six GHGs as a group for PSD and title V purposes, and weight them by their GWP, even though they are generally regulated individually under the mobile source rule.

b. Policy and Programmatic Rationale

For individual GHGs, differing $CO_2$ equivalent factors (such as GWP values) are found in the literature. As noted earlier in this preamble, the U.S. and other countries report their annual emissions of the six GHGs in terms of $CO_2e$ units, following UNFCCC guidelines. The UNFCCC reporting guidelines for national inventories, as updated in 2006, require the use of GWPs from the IPCC SAR (IPCC 1996) for $CO_2e$ calculations, even though the IPCC has subsequently updated its GWP values.[26] Consistent with these most recent guidelines, we are proposing to use the same SAR-derived GWP values, which are based on the effects of GHGs over a 100-year time horizon, for purposes of calculating GHG emissions in tpy $CO_2e$ for this tailoring rule.

We recognize a number of advantages in the use of a cumulative $CO_2e$ measure (''cumulative'' here refers to the summation of emissions of $CO_2e$ for all applicable GHGs) using GWP over an individual, mass-based metric, including: (1) A cumulative $CO_2e$ metric, by incorporating the GWP values, addresses the combined radiative forcing of the GHGs emitted; (2) a cumulative $CO_2e$ metric by definition includes any of the six primary GHGs that are emitted and therefore would effectively include any one or combination of the six primary GHGs that might become subject to regulation, thus encompassing a greater variety of possible future regulatory approaches; (3) a cumulative $CO_2e$ metric would be consistent with the proposed mandatory reporting rule thresholds (thereby creating a ''common currency'' for recordkeeping for both industry and permitting authorities); and (4) a $CO_2e$ metric could allow more flexibility for designing and implementing control strategies that maximize reductions across multiple GHGs and would also likely align better with possible future regulations that allow for such flexibility.

We also considered a GHG permitting threshold metric based on individual GHGs on a mass basis, with no GWP applied. The main benefit of an individual-GHG-based metric is that it may provide some ability to better differentiate sources and project emissions that affect one particular GHG. Because of this differentiation, it also may allow for simpler program implementation with regards to establishing emissions limits, establishing BACT, compliance assessment, and measurement/monitoring methods. However, we believe that the benefits in using the cumulative group of GHGs outweigh any implementation advantages to using an individual-GHG-based metric. In particular, the cumulative-GHG, $CO_2e$-based metric addresses all GHGs and their radiative forcing potential and would provide some flexibility to a source to design and maximize GHG reductions across the facility. Conversely, an individual-GHG-based metric may limit a facility's flexibility to maximize GHG reductions across GHGs and is generally less consistent with the widespread treatment of GHGs in inventory, reporting, and emissions

[26] ''Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2007,'' U.S. Environmental Protection Agency, EPA 430–R–09–004, April 15, 2009. p. ES–3. *See also* the SAR GWPs (IPCC 1996) in table 1–2, p. 1–6. *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

offset protocols mentioned in section VIII.B.1 of this preamble.

We solicit comment on the benefits and limitations of our proposed GHG PSD and title V permitting threshold metric based on $CO_2e$. We also request comments on proposed alternative metrics (such as individual GHG basis) and the effect those alternative metrics would have on setting permitting thresholds for GHGs.

3. Possible Limitation of Proposed Metric for PSD and Title V Thresholds and for PSD Netting Purposes

a. PSD and title V applicability thresholds

This proposed metric may also warrant a limitation for PSD and title V threshold purposes. In rare instances, it is possible that a source may emit only a non-$CO_2$ GHG in very small amounts, on a mass basis, but one that carries a very large GWP. In this case, it is possible that the source may emit the GHG in amounts that fall below the PSD statutory applicability threshold of 100/250 tpy on a mass basis, and fall below the title V statutory applicability threshold of 100 tpy on a mass basis, but exceed the 25,000 $CO_2e$ PSD and title V applicability thresholds (which, as discussed above, are calculated on a GWP basis) proposed in this action. Under these circumstances, the source would trigger PSD and title V under our proposed rule even though its GHG mass emissions would not, in fact, exceed the statutory triggers.

We seek comment on whether we should address this case; that is, whether such a source should be subject to PSD or title V. Because the PSD and title V statutory thresholds are expressed on a mass basis—*i.e.,* tpy—we are concerned that the metric proposed with this action could have the effect of subjecting to PSD or title V requirements a source whose emissions fall below the statutory threshold limits on a mass basis. Accordingly, we seek comment on whether we should include some refinements to the $CO_2e$ metric, such as adding a 100- or 250-tpy metric that is mass-based. Under this refinement, a source would be subject to PSD and title V only if its GHG emissions exceeded the statutory threshold levels on an actual tonnage basis and if its GHG emissions exceeded the first phase threshold emissions proposed in this notice on a $CO_2e$ basis.

However, we are also concerned that efforts to address this circumstance—for example, by requiring separate tracking of individual GHG mass emissions in addition to $CO_2e$ for up to six gases—would be complex and confusing to administer. Similarly, as discussed above, we are concerned that implementing permitting only on an individual gas basis would have several disadvantages compared to our proposed $CO_2e$-based approach.

b. Netting

The same issue is also a concern as the proposal relates to PSD netting. By way of background, an existing source becomes subject to PSD when it makes a major modification, which generally occurs when the source is a major emitting facility and makes a physical or operational change that increases its emissions of a regulated air pollutant by a significant amount. In calculating the amount of the increase in emissions, the source must add to the increase the amount of any contemporaneous—generally, within the previous 5 years—increases and decreases that resulted from other changes the source made. If the total amount, so calculated, does not exceed the significance level, then the source is not subject to PSD for the change, and instead has ''netted out'' of PSD.

In rare instances, it is possible that a source of two or more different types of GHGs, with different GWPs, may make two or more contemporaneous changes that increase its emissions of one type of GHG and decrease its emissions of another type of GHG. The effect of those changes may be that the source will have decreased its emissions of its GHGs on a mass basis, but increased its emissions of GHGs on a $CO_2e$ basis above the significance level. Under these circumstances, we are seeking comment on whether that source should be treated as being subject to PSD due to its physical or operational change.

We could prevent the source in this example from becoming subject to PSD by requiring that for an existing source's physical or operational change to be treated as a modification that triggers PSD due to its GHG emissions, the change must, taking into account contemporaneous changes, increase GHG emissions on a mass basis by any amount, and increase GHG emissions on a $CO_2e$ basis by the amount of the significance level proposed in this action. However, we are concerned that efforts to address this circumstance would be even more complex and confusing to administer for netting than it would be for major source determinations.

We therefore solicit comment on how best to address these situations involving new source permitting and netting in light of our proposed choice of a GHG PSD and title V permitting threshold metric based on $CO_2e$. We are asking for comment on whether these rare circumstances should be addressed in light of the statutory language, and if so, how. Would a mass-based metric for each individual GHG be an appropriate way to address the issue and, if so, should it be implemented in addition to, or in place of, our proposed $CO_2e$ metric?

*C. What is the rationale for selecting the proposed GHG permitting thresholds for PSD?*

1. Major Stationary Source Applicability Threshold for Sources of GHGs

With this action, we are proposing to establish, for the first phase of the PSD GHG tailoring program, the PSD major source threshold at 25,000 tpy $CO_2e$ and the significance level at 10,000 to 25,000 tpy $CO_2e$, based on the legal doctrine of ''absurd results'' and ''administrative necessity,'' as described in section VI of this preamble. This first phase will be followed by a study and then promulgation of additional rulemaking that will establish the next phase of requirements. This section provides a more detailed discussion of the technical and policy basis for establishing these threshold levels.

a. Administrative Burdens Associated With the Statutory Threshold Level and the Proposed Permitting Threshold Level

As noted previously, for PSD purposes, if we do not establish a different ''major'' source level for GHG emitters, the effect would be that the statutory threshold level would apply, so that GHG sources in the 28 listed categories under CAA section 169(1) would be subject to a 100-tpy threshold, and all other GHG sources would be subject to a 250-tpy threshold. Under this scenario, tens of thousands of sources each year would undertake projects that would have to comply with the PSD program, which would overwhelm the permitting authorities and interfere with the issuance of permits to all sources, whether they emit GHGs or not.

Accordingly, EPA is proposing a PSD ''major'' source applicability threshold of 25,000 tpy $CO_2e$. The rationale for this level is to reduce the administrative burden to the point where it is no longer administratively impossible to implement the PSD program. Although requiring permitting authorities to permit sources of GHG emissions at 25,000 tpy $CO_2e$ and higher would increase the level of PSD permitting and therefore increase administrative burdens, compared to current permitting levels, EPA believes that this increase would not exceed the capacity

of permitting authorities to implement the PSD program.

EPA calculated the administrative burden of permitting GHG emitters at the 25,000-tpy $CO_2e$ threshold level as follows: As noted earlier in this preamble, EPA conducted a threshold data analysis that provided information on the numbers of facilities that could potentially be subject to PSD review under different $CO_2e$-based emissions thresholds and the administrative resources needed to process permits for these facilities. Through the process described in this section of the preamble, we estimate that, at a 25,000-tpy $CO_2e$ applicability threshold for PSD major sources, approximately 400 additional new or modified facilities would be subject to PSD review in a given year. These include approximately 130 new facilities and approximately 270 modifications at existing major sources that would be subject to PSD review as major modifications. Many, but not all, of these facilities would be subject to PSD review for other pollutants that they emit. These estimates compare to the 280 PSD permits that are currently issued in a typical year.

We acknowledge that our estimates for both new facilities and modifications are highly uncertain because they rely on growth trends in industries and businesses, which are inherently difficult to predict, especially under changing economic conditions.

We developed these estimates as follows: To estimate the number of new sources, we identified the various source or industry categories included in the threshold data analysis, along with the number of sources in each category. We then applied source- or industry-specific growth rates to estimate the number of new facilities that would be added in a year at a given major source threshold for a source or industry category. The methodology and results for estimating new sources is described in the Technical Support Document, in the docket for this rulemaking.[27]

To estimate the number of modifications at existing major sources, EPA first calculated the number of existing facilities that would be treated as ''major'' sources due to their PTE-based $CO_2e$ emissions rates. At a 25,000-tpy $CO_2e$ permitting threshold, EPA estimates that about 13,600 existing facilities would be classified as ''major'' sources. Second, EPA determined the current rate of PSD-permitted modifications occurring at major sources nationwide, which is approximately 2 percent of existing major sources. The basis for this modification rate is described in a technical support document found in the docket for this rulemaking.[28] Then, we assumed that GHG sources would modify at the same 2-percent rate. Based on this assumption, EPA estimates that approximately 270 modifications would result from a 25,000-tpy $CO_2e$ major source permitting threshold.

We calculated the additional administrative burden in workload hours and costs based on the per-permit hourly workload estimates and costs for PSD permitting from the PSD ICR.[29] Of the group of 130 new sources, we estimated the number of industrial sources and of commercial or residential sources. For the industrial sources, we assumed that permitting authorities would need to spend 301 hours, on a per-permit basis, for issuing permits that cover both the GHG and non-GHG emissions. This is the same amount of time that permitting authorities need to permit non-GHG emissions from industrial sources. We did not assume additional workload requirements for the GHG emissions because permitting authorities will have some experience with the emissions units, sources, and configurations at these facilities. Also, although there will be new and unique GHG sources to consider at some of these facilities, this experience should provide some administrative efficiencies in preparing and processing GHG-based permit applications for these facilities. Note that some of the 130 new sources would be sources that are subject to PSD only because of their GHG emissions. We estimate that the permitting authorities would need to spend the same amount of time and money on these permits, on a per-permit basis, as the authorities do on new sources of non-GHG emissions. For the commercial or residential sources, we assumed that permitting authorities would require 20 percent of the time for industrial sources, or 60 hours, because these sources tend to be less complex than industrial sources.

The next group of permittees is the 270 GHG sources that are subject to PSD each year because they undertake modifications. For modifications involving industrial sources, we assumed that permitting authorities would need to expend 301 hours, the same as for new sources; for modifications involving commercial or residential sources, we assumed 60 hours—the same, again, as for new sources.

All told, the increase in burden for permitting authorities from including sources of GHGs at a 25,000-tpy $CO_2e$ level, on a total national basis, would be approximately 112,000 staff hours at an additional cost of approximately $8 million. This workload amount represents an increase of about 1.3 times, or 32 percent, in the current burden for permitting authorities on a nationwide basis. We believe that this additional burden is manageable, but that it will necessarily pose some challenge to permitting authorities, and that to accommodate the additional burden, permitting authorities may need to expand their resources or seek efficiencies in processing permits. We believe that any threshold lower than 25,000 tpy $CO_2e$, would create undue administrative burdens. Thus, we believe that the amount of administrative burden attendant to a threshold level of 25,000 tpy $CO_2e$ is consistent with the administrative necessity case law, which, as described earlier, we read to limit us to depart from the statutory requirements to the smallest extent possible, consistent with congressional intent.

We request specific comments on our estimated burden at the 25,000-tpy $CO_2e$ threshold and on whether the additional workload would be manageable to permitting authorities.

We also request comment specifically on the assumptions we used for calculating the administrative burden from modifications. As noted earlier, our estimate for the number of modifications that would undergo PSD review as a result of a 25,000-tpy $CO_2e$ permitting threshold is based on the modification rate at existing major sources for currently regulated pollutants, which means that the estimate assumes that the modification rate for GHG sources is similar to that for sources of currently regulated pollutants despite the potential difference in types of projects and significance levels. We acknowledge that our estimates for modifications are highly uncertain because they rely on growth trends in industries and businesses, which are inherently difficult to predict, especially under changing economic conditions. Thus, there is significant uncertainty in applying this modification rate and therefore in predicting not only how many major sources will undergo

[27] ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation;'' Air Quality Policy Division, Office of Air Quality Policy and Standards; U.S. Environmental Protection Agency; July 7, 2009.

[28] ''Methodology for Estimating Modified Sources That Would be Subject to PSD Permitting for GHGs;'' Prepared by EPA Staff; August 2009.

[29] ''Summary of ICR-based Data Used to Estimate Avoided Burden and Evaluate Resource Requirements at Alternative GHG Permitting Thresholds;'' Prepared by EPA Staff; August 2009.

physical or operational changes in any given year, but also which of those changes would result in GHG emissions increases that would exceed a proposed GHG significance level. We are therefore requesting specific comment on our estimate of modification rates at major sources and soliciting any additional information and data that would improve our estimate of the number of modifications affecting GHG emissions at different types of source categories.

b. Administrative Burdens Associated With Other Permitting Threshold Levels

In addition to the 25,000-tpy threshold for $CO_2e$, we also considered major source applicability thresholds for PSD ranging from 1,000 to 100,000 tpy $CO_2e$. Using the basic analysis of new and modified facilities that would become subject to PSD review as described above, we estimated the number of new facilities and modifications at each of these thresholds. A summary of these results is shown in table VIII–1. The results shown in table VIII–1 are based on estimates of potential to emit, measured in short tons of $CO_2e$, from affected facilities at each threshold level. It should be noted that the use of short tons here, while consistent with the units used for existing major source thresholds for other pollutants identified in the CAA and permitting program rulemakings, differs from the units of metric tons used in EPA's GHG Mandatory Reporting Rule proposal. For consistency within the permitting programs, all data and discussion in this rule are based on short tons.

We believe that the number of new permits that would be subject to PSD at the 10,000-tpy-and-below $CO_2e$ major source thresholds would not be administratively feasible for permitting authorities. For example, we estimate that the 10,000-tpy $CO_2e$ threshold would cause an approximately three-fold increase in the number of PSD permits annually (830 compared to 280), resulting in an additional workload for permitting authorities of approximately 187,000 hours, or an increase of about 2.2 times over their current PSD workload. We believe that this increase in the number of PSD permits and workload would create insurmountable resource demands for permitting agencies in the near term, which would jeopardize the functioning of the PSD program. These time demands are due to not only the increase in number of permits but also the need to implement BACT determinations, GHG emissions evaluations, and other evaluations required under the PSD program for a wide variety of formerly unpermitted sources, including significant numbers and varieties of small manufacturing and commercial establishments. Permitting authorities would confront substantial challenges because the authorities have little experience with these sources and their GHG emissions.

We request comment on our assessment of the impact of major source GHG thresholds lower than 25,000 tpy $CO_2e$ on PSD program administration, including any additional information on the number of sources and modification projects that might be affected at these lower thresholds for different GHG source categories. We also request comment on our conclusion that the 10,000-tpy threshold (or a lower threshold) would be too low to sufficiently address the administrative concerns.

TABLE VIII–1—ESTIMATED NUMBER OF EXISTING FACILITIES AND ANNUAL NUMBER OF NEWLY CONSTRUCTED FACILITIES AND MODIFICATIONS POTENTIALLY SUBJECT TO PSD REVIEW AT DIFFERENT GHG MAJOR SOURCE THRESHOLDS

| Major stationary source threshold level (tpy $CO_2e$) | Number of existing facilities exceeding threshold | Number of new facilities that would exceed threshold (facilities/yr) | Number of modifications at existing facilities that would exceed threshold (modifications/yr) |
|---|---|---|---|
| 1,000 | 278,340 | 4,330 | 5,567 |
| 5,000 | 52,888 | 532 | 1,058 |
| 10,000 | 26,898 | 289 | 538 |
| 25,000 | 13,661 | 128 | 273 |
| 50,000 | 7,245 | 77 | 145 |
| 100,000 | 4,850 | 66 | 97 |

At the 50,000-tpy $CO_2e$ threshold, we estimate approximately 220 PSD permit actions due to GHG emissions. We do not believe that this level of permit activity would challenge the capacity of permitting authorities to properly administer the PSD program to the extent we described above for the 25,000-tpy $CO_2e$ threshold. As noted elsewhere in the legal discussion of the absurd results and administrative necessity doctrines, we are foreclosed from adopting higher thresholds when we believe a lower threshold would be possible to implement. We request comment on our assessment of the impact of major source GHG thresholds higher than 25,000 tpy $CO_2e$ on PSD program administration, including any additional information on the number of sources and modification projects that might be affected at these higher thresholds for different GHG source categories. We also request comment on our determination that this assessment supports a conclusion that the 25,000-tpy threshold is administrable and thus we do not need to adopt a threshold of 50,000 tpy. We note that the 50,000-tpy level does involve about 6,400 fewer major sources than the 25,000-tpy level, including about 1,600 sources that would have been newly defined as major (*e.g.,* landfills, hospitals, offices, hotels). In light of this, we specifically ask for comment on whether a 50,000-tpy level, which would exclude these sources, is administratively necessary.

c. Emissions Impacts

We also evaluated the amount of GHG emissions emitted by facilities that would be subject to PSD requirements at the proposed thresholds, although, strictly speaking, this information is not relevant to the administrative-necessity basis for selecting the proposed major source threshold level for $CO_2e$. The objective of the emissions evaluation was to generally assess the extent to which, on a national basis, GHG emissions sources would be covered at the proposed thresholds. The basis for this evaluation, with a detailed summary of the results, is provided in the docket for this rulemaking.[30]

We estimate that a 25,000-tpy $CO_2e$ threshold captures approximately 68

[30] "Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation; Air Quality Policy Division, Office of Air Quality Policy and Standards; U.S. Environmental Protection Agency"; July 7, 2009.

percent of national $CO_2e$ stationary source GHG emissions (including approximately 87 percent of $CO_2$). This emissions coverage is comparable to national stationary source $NO_X$ emissions coverage of 72 percent at the existing PSD major source permitting threshold of 250 tpy $NO_X$. Lowering the $CO_2e$ threshold to 10,000 tpy increases the amount of emissions covered by only 2 percent compared to the 25,000-tpy threshold but almost doubles the number of facilities covered. We estimate that a 10,000-tpy $CO_2e$ threshold would also affect approximately 7,000 commercial and multi-family residential sources. A 50,000-tpy $CO_2e$ threshold would virtually eliminate all of the commercial/residential sector from being affected for GHG but would fail to capture some high emitters within key GHG categories (for example, iron/steel, refineries, electric generation, pulp and paper, petrochemical) and would reduce emissions coverage by about 2 percent compared to 25,000 tpy $CO_2e$. A summary of the percentage of national stationary source GHG emissions associated with the affected facilities at different GHG emission thresholds is shown in Table VIII–2.

TABLE VIII–2—PERCENTAGE OF NATIONAL STATIONARY SOURCE GHG EMISSIONS FROM AFFECTED FACILITIES AT DIFFERENT GHG EMISSION THRESHOLDS

| Major stationary source threshold level (tpy $CO_2e$) | Number of existing facilities exceeding threshold | Percent of national stationary source GHG emissions (percent) |
|---|---|---|
| 1,000 | 278,340 | 73 |
| 5,000 | 52,888 | 71 |
| 10,000 | 26,898 | 70 |
| 25,000 | 13,661 | 68 |
| 50,000 | 7,245 | 65 |
| 100,000 | 4,850 | 64 |

Estimates of emissions coverage at different thresholds are not the same as estimates of the actual quantities of emissions that would be reduced through the PSD permitting program at these permitting thresholds; however, they do illustrate that at the proposed 25,000-tpy $CO_2e$ source threshold, the most significant contributors to stationary source GHG emissions would still be covered by the PSD program as major sources, and therefore any modifications or new additions at these source categories would potentially be subject to PSD requirements, including BACT.

2. Significance Levels

With this action, we are also proposing a temporary, first phase GHG PSD significance level threshold based on administrative necessity. As noted previously, there are no existing PSD significance levels set for any of the GHG pollutants.

Until we establish significance levels for these pollutants, those levels in effect remain at zero tpy, so that any physical or operational change that increases GHG emissions by any amount would constitute a modification and therefore would be subject to PSD. Thus, for any major source, any minor change that increases fuel combustion even slightly would increase GHG emissions and, as a result, potentially trigger PSD review. As with administrative burdens associated with the statutory major source PSD applicability threshold, the burdens associated with the hundreds of thousands of modification projects that would have to comply with the PSD program under these circumstances would be enormous, at least in the short term. They would overwhelm the permitting authorities as well as the regulated community, and would interfere with the issuance of PSD permits to sources of all types, whether emitting GHGs or not.

As a result, we believe that the same legal doctrines of absurd results and administrative necessity apply for establishing the significance level. We need to phase in a significance level for GHGs by establishing, in the first phase, a reasonable significance level based on administrative necessity, and then by conducting a study and promulgating further rulemaking to establish the requirements for the second phase.

To do so, we need information concerning the number of modification projects occurring at a facility level for different source categories that would exceed various possible significance levels for GHGs in any given year. However, it is very difficult to acquire or develop this information—and therefore there is great uncertainty in calculating specific administrative burdens associated with modifications—for several reasons. First, information is not available across sectors and source categories on the types and numbers of specific physical and operational changes that would result in emissions increases in amounts that can be estimated and that therefore can be compared to various GHG emissions significance levels. Second, there is general uncertainty in how many project modifications will occur within any given year because decisions on these projects are driven by facility- and sector-based growth patterns and business planning decisions. Lastly, some source categories and units that emit GHGs have not previously been subject to any type of permitting or reporting requirements; as a result, for these sources, there is very little historical record for use in estimating the number and types of projects that would occur at these sources and, in turn, establish an appropriate significance level for GHGs.

Absent comprehensive information on the types and numbers of modification projects nationally that result in increases in GHG emissions, we are proposing and soliciting comment on a range of possible significance levels for $CO_2e$. Our proposed range starts at 10,000 tpy $CO_2e$, which reflects, subject to the uncertainty noted above, our current estimate of what would constitute a GHG significance level below which permitting authorities would be unable to adequately administer PSD, and goes up to 25,000 tpy $CO_2e$, which is our proposed major source applicability threshold for GHGs under PSD. We believe that a 25,000-tpy $CO_2e$ significance level for GHGs would be the highest level we could consider because it is not reasonable to propose a significance level that is higher than the proposed major source threshold.

We selected the GHG significance level at the lower end of the proposed range by analyzing inventory

information for key source categories that would have a substantial number of modification projects potentially subject to PSD permitting requirements for GHGs. Most importantly, depending on the significance level for $CO_2e$, small fossil fuel-fired combustion units, which are numerous and ubiquitous, could have a substantial number of modifications that would be subject to PSD. Our threshold data analysis shows that almost 80 percent of the facilities that exceed the 25,000-tpy $CO_2e$ major source threshold do so because of fossil fuel combustion units that emit $CO_2$. Also, the U.S. national GHG inventory shows that approximately 80 percent of all GHG emissions result from fossil fuel combustion sources. The prevalence of combustion units across all affected sectors, and the dominant contribution of $CO_2$ fuel combustion-related emissions to their GHG emissions total, leads us to conclude that an administrative necessity-based significance level for $CO_2e$ should be based on modifications that involve these combustion units.

Thus, we analyzed sales data for two of the most affected categories of units: Boilers and stationary engines. Our analysis indicates that, on a yearly basis, almost 2,000 of these new combustion units would emit more than 10,000 tpy $CO_2e$. The exact number of PSD permits that would result from modifications involving these new emissions units would likely be less than 2,000, depending on whether these units are located at a major source facility, whether multiple units are aggregated at one facility or the units are placed at different facilities, and whether they are considered new additions/new capacity or one-for-one replacements. However, we believe these data on combustion unit sales suggest that the significance level should be at least 10,000 tpy $CO_2e$ because, while the estimated population of new units with the potential to trigger PSD is something below 2,000 per year, that is still likely well above the current number of modifications (fewer than 300) that are currently subject to PSD each year. Any lower level would risk enormous numbers of permit applications that would be administratively impossible to process, and therefore we do not propose a GHG significance level lower than 10,000 tpy $CO_2e$. Further support for the 10,000-tpy $CO_2e$ level is the fact that the combustion units in the industrial sector that emit GHGs at this rate tend to be larger units: boiler-type units with an approximate heat input rating of 15–20 MMBtu/hr (depending on fuel type); and stationary internal combustion (IC) or compression ignition (CI) engines with a rating of greater than 2,000 horsepower. Units of this size provide a good representation of combustion units utilized in the industrial sector that should be subject to PSD. At the same time it does not capture an enormous number of very small combustion units that would overwhelm permitting authorities from an administrative standpoint. For example, using the same sales information referenced above on combustion units, we estimate that approximately 29,000 new boilers and stationary engines would exceed a 250-tpy $CO_2e$ level. A summary of our significance level analysis for $CO_2e$ is provided in the docket for this rulemaking.[31]

Although our significance level range is driven by our analysis of $CO_2$ combustion units, we believe that the level of 10,000 tpy $CO_2e$ should be administratively feasible for other sources of GHG emissions. Our threshold data analysis shows approximately 3,000 facilities that would have the potential to emit amounts of non-$CO_2$ GHGs exceeding a 25,000-tpy $CO_2e$ major source threshold based on their non-$CO_2$ emissions alone. Although this estimate is not directly related to the number of possible modification projects that may exceed a 10,000-tpy $CO_2e$ significance level for non-$CO_2$ emissions alone, this estimate provides a relative sense of the number of facilities emitting non-$CO_2$ emissions at rates that approximate the 10,000-tpy $CO_2e$ level, only a portion of which may actually undergo modifications that would potentially be subject to PSD review. For example, if the 3,000 facilities are assumed to have a modification rate of 2 percent, as described above, and each modification results in emissions increases of at least 10,000 tpy $CO_2e$ (in, again, non-$CO_2$ GHG emissions), then approximately 60 modification projects would come under PSD review just for principally non-$CO_2$ sources. This alone would be an approximate 20- to 25-percent increase above the current level of 280 annual permits. We believe that an additional PSD permit increase of this magnitude, on top of the modifications resulting from $CO_2$ emissions from combustion-related projects, may stretch the capacity of, but may not necessarily create an unadministrable burden for, permitting authorities.

Although we believe 10,000 tpy $CO_2e$ represents a reasonable lower bound for the range we are proposing for the GHG significance level, we specifically request comments on whether: (1) A level lower than 10,000 tpy $CO_2e$ would still be administratively feasible; (2) a level higher than 25,000 $CO_2e$ is necessary to avoid an administratively overwhelming number of modification projects becoming subject to PSD permitting due solely to their GHG emissions; and (3) there are data suggesting an appropriate number we should select within the 10,000- to 25,000-tpy range. In suggesting alternative thresholds, we request that commenters submit any available information and data that would allow us to better characterize the number and types of modification projects that would become subject to the PSD program at different GHG significance levels and for different types of source categories.

We note that this basis contrasts with that of our prior significance levels determinations, which were based on *de minimis* emissions levels.

*D. What is the rationale for selecting the proposed first phase GHG permitting threshold for title V?*

With this action, we are proposing a temporary, first phase GHG title V major source threshold of 25,000 tpy $CO_2e$, based on the administrative imperatives that underly both the absurd results and administrative necessity legal doctrines.

As noted earlier, if we do not establish a different ''major source'' level under title V for GHG sources, those sources would become subject to the statutory 100-tpy threshold. Under these circumstances, we estimate that 6.1 million sources would have to comply with the title V permitting program. The resulting administrative burdens would be enormous in the short term and would overwhelm the permitting authorities, as well as posing severe burdens on the regulated community. Accordingly, we need to phase in title V applicability by establishing, in the first phase, an administrable permitting threshold, and then by conducting a study and promulgating further rulemaking to establish the requirements for the second phase.

The criterion for establishing the title V major source threshold is to reduce administrative burdens to the point at which the title V program can be implemented. Our analyses, discussed in detail later in this preamble, establish this threshold at 25,000 tpy $CO_2e$. Although this level would likely see an increase in the volume of title V permitting, compared to current permitting levels, and although this increase would pose some challenges to

[31] ''Summary of Administrative Necessity Basis for a $CO_2$-e Significance Level''; Prepared by EPA Staff; August 2009.

permitting authorities, EPA believes that this increase would not exceed the capacity of permitting authorities to implement the program.

The title V permitting program requires all existing major sources to obtain operating permits, as compared to the PSD program, which requires permits only for newly constructed major source facilities and major modifications at existing major sources. Therefore, to evaluate permitting thresholds for title V, we analyzed the number of existing facilities that would exceed a given GHG threshold. We considered alternative major source thresholds ranging from 1,000 to 100,000 tpy $CO_2e$.

Our estimates for the existing number of facilities whose emissions would exceed different GHG thresholds are summarized in table VIII–1 and discussed in more detail in the Technical Support Document in the docket for this rulemaking.[32] For comparison purposes, note that currently there are approximately 14,700 title V operating permits nationwide. We estimate that at a 25,000-tpy $CO_2e$ permitting threshold, about 13,600 existing facilities would be classified as ''major sources'' for their PTE-based $CO_2e$ emissions. As discussed later in this preamble, these 13,600 facilities present additional workload demands on permitting authorities, either because they are not currently required to obtain a title V permit (because their non-GHG emissions fall below the ''major source'' threshold) or because, although they already are required to obtain a title V permit (due to their non-GHG emissions), their permits would need to be revised to cover their GHG emissions. In contrast, at a 10,000-tpy $CO_2e$ threshold the number of existing facilities exceeding the threshold jumps to almost 27,000. At a 50,000-tpy $CO_2e$ threshold, the number of existing facilities exceeding the threshold falls to about 7,200. We believe, based on these estimates, that a 25,000-tpy $CO_2e$ major source threshold is appropriate because it renders the title V program administrable, albeit with additional workload requirements. As discussed later in this preamble, as we move below the 25,000-tpy $CO_2e$ threshold, we believe the administrative burdens related to the increasing number of facilities covered, as well as to the variation in the type of facilities covered, become insuperable. At both the 50,000- and 100,000-tpy $CO_2e$ thresholds, however, we do not believe that the potential level of permit activity would fill the capacity of permitting authorities to properly administer the title V program, and similar to PSD considerations, we believe it would potentially exclude some high-emitting facilities within key GHG source categories.

Although we believe a 25,000-tpy $CO_2e$ threshold would add an additional permitting burden to permitting authorities, we believe that this additional burden could be adequately administered. We expect that many of the 13,600 existing facilities that would exceed the proposed 25,000-tpy $CO_2e$ threshold—the majority of which consist of electric generating units and industrial facilities—already have a title V operating permit for other regulated pollutants, and thus would potentially require only a permit revision or modification to address GHGs. We believe that these permit revisions or modifications under title V would initially be limited due to the lack of new applicable GHG requirements to include in the permits, but would increase in complexity and content as facilities move through PSD permitting processes and as other possible stationary source requirements emerge.

In addition, with a 25,000-tpy $CO_2e$ threshold, some of the 13,600 existing facilities are not currently subject to title V requirements and therefore would require new title V permits. These facilities constitute primarily additional landfills (we estimate approximately 1,700 landfills may be added to the title V program) and some large commercial facilities, primarily large hospitals. These facilities number approximately 800, but the number of new permits they would need would be less than this because approximately 180 are currently subject to permitting under title V for pollutants currently subject to regulation under the Act. Permitting the newly subject sources would not solely involve GHG requirements but may also involve other pollutants emitted by the source.

We estimate that the combination of title V permit revisions, modifications, and new permits that would result from a 25,000-tpy $CO_2e$ applicability threshold would require an estimated additional 492 FTEs by permitting authorities nationwide, or an estimated 50-percent increase over current title V staffing levels, to meet the initial permitting requirements that would apply at the time title V applicability is triggered for GHG sources. We do not believe this 50-percent increase in resources would be administratively impossible to achieve, given that title V is self-funded, and that there are efficiencies gained in revisiting existing title V permits and sources with which the permitting staff are familiar.

In contrast, at a 10,000-tpy $CO_2e$ threshold, we estimate that an additional 1,357 FTEs (an estimated 135-percent increase over current title V staffing levels) would be required by permitting agencies nationwide (again, based on initial permitting requirements). In addition, there would be substantial influx of new title V permits—greater than 13,000—that would need to be processed and issued. This would include over 7,000 newly permitted commercial and residential sources covering a wide variety of source types, including office buildings, retail malls, hotels, apartment buildings and educational facilities. The new variety of sources included at the lower threshold also would require additional training for permitting staff to become familiar with the configuration and emissions from those sources. For these reasons, we believe that at threshold levels below 25,000 tpy $CO_2e$, even considering the capability of permitting authorities to eventually add additional staff funded through permitting fees, permitting authorities would not be capable of ensuring reasonable processing times for both new permits and revisions resulting from the additions of GHG emitters to the program.

We request specific comment on our estimated burden at the 25,000-tpy $CO_2e$ major source threshold for title V and on whether the additional workload would be manageable to permitting authorities. We also request specific comment on our assessments of the impact of title V major source GHG thresholds higher and lower than 25,000 tpy $CO_2e$ on title V program administration, including any additional information on the number of sources affected and the permitting burdens created at these thresholds. We further request comment on our conclusion that the 10,000-tpy threshold (or a lower threshold) would be too low to address the administrative necessity concerns, that the 25,000-tpy threshold is administrable, and that there is therefore no need to adopt a threshold of 50,000 tpy.

There are additional policy and programmatic considerations that, while not part of the administrative-necessity basis, also support establishing the major source GHG threshold for title V at 25,000 tpy $CO_2e$. Most importantly, this level would result in consistency between the PSD and title V permitting threshold for GHG sources. Historically, there has been a strong measure of

[32] ''Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation; Air Quality Policy Division, Office of Air Quality Policy and Standards; U.S. Environmental Protection Agency''; July 7, 2009.

consistency in the PSD and title V permitting levels since there is a generally applicable 100-tpy ''major source'' applicability threshold in title V and there is a 100-tpy ''major emitting facility'' applicability threshold applied in PSD for sources in 28 key industrial source classifications. In addition, there is a strong programmatic incentive for the programs to share a common permitting threshold. Because at least initially GHG requirements from the PSD permitting process would constitute the only applicable requirements to be included in the title V permits for many sources, a title V permitting threshold lower than the PSD threshold would create numerous ''empty'' or ''hollow'' permits, that is, permits that do not include any applicable requirements, and many previously unpermitted commercial sources would be required to obtain these hollow permits. Permits hollow in this respect may be viewed as unnecessary and wasteful by the permitting authorities and regulated community. Further, requiring such permits may be at tension with a primary purpose of title V to promote compliance and facilitate enforcement by gathering into one document the requirements that apply to a particular source. *See* CAA Section 504(a) (each title V permit must contain terms ''necessary to assure compliance with applicable requirements'' of the CAA), H.R. Rep. No. 101–490, at 351 (1990) (''It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.'').

*E. How will EPA assess the GHG permitting thresholds in the first phase of the tailoring program, and how will EPA develop the second phase?*

1. Assessment To Be Performed Within 5 Years Following Promulgation of the First Phase

We consider the actions proposed in this rulemaking to set higher GHG major source applicability thresholds for PSD and title V, and to establish a GHG PSD significance level, as interim measures that will need to be reassessed in terms of their administrative necessity. Therefore, as part of this proposed action, we are committing to evaluate the effectiveness of the first phase of the tailoring program, which consists of the proposed GHG thresholds, to enable PSD and title V permitting authorities to adequately administer their programs with the inclusion of GHG emissions sources. We are proposing to complete this evaluation within 5 years from the effective date of this final rulemaking. The results of this study will form the basis for further regulatory action that will constitute the second phase, which may include continuing or lowering the GHG applicability thresholds for PSD and/or title V set in the first phase, adoption of other streamlining techniques that more accurately reflect the administrative capabilities of permitting authorities to address GHG sources during the second phase, and/or taking other actions consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

We believe a 5-year period is necessary for the evaluation of the first phase of the tailoring program to provide an adequate period of time for permitting authorities to implement the proposed GHG permitting thresholds and for a sufficient record of implementation experience to be compiled. We also believe a number of important activities undertaken by EPA and the States over the 5-year evaluation period could potentially impact permitting authorities' administrative capabilities to address GHG emissions sources, and we need sufficient time to implement those activities and assess that impact. These activities will include the following:

- The first activity is the development of streamlining tools to specifically address GHG sources. As discussed in section VII.A of this preamble, several permit streamlining techniques may have applications for GHG emissions sources. However, EPA needs an estimated 3 to 4 years to fully develop some of these techniques. Because many of these techniques are source-specific, or at least source category-specific—*e.g.,* presumptive BACT determinations—EPA may not be able to develop them for all affected sources within the evaluation period. However, we anticipate that EPA may make sufficient progress on enough streamlining techniques to impact the administrative capabilities of permitting authorities to address GHG emissions sources.
- The second activity during the 5-year period involves the ability of permitting authorities to add more staff to their permitting programs, especially the title V program for which additional fees for GHG emissions may support the addition of new staff. Based on the summary of State data on impacts of GHG emissions permitting, it is likely that even under the best-case scenarios, at least a 3- to 4-year period is necessary for most permitting authorities to add and adequately train staff for permitting duties involving GHG emitters. Therefore, we expect that the impact of increased staffing on the administrative capabilities of permitting authorities will be better known by the fifth year of the threshold evaluation period.
- The third activity is the collection of more detailed emissions information resulting from implementation of the proposed GHG mandatory reporting rule. Many permitting authorities have not had any experience to date with quantifying or evaluating emissions and controls of GHG source categories. EPA's proposed GHG mandatory reporting rule will produce significant information about key GHG emissions source categories that will help permitting authorities and EPA better understand the characteristics and quantities of GHG emissions, particularly at the facility level. Reporting facilities will begin to submit data in the year 2011, and we expect a substantial record of emissions data to be collected during the evaluation period. We believe that these facility-level GHG data will be an important component to increasing permitting staff knowledge of GHG emissions sources and will have a positive impact on the permitting staff's ability to address GHG emissions in their programs. We also believe this information will provide additional insight into the level and types of GHG emissions occurring at different facility types that should support EPA's reevaluation of the first phase GHG permitting thresholds.
- The fourth activity during the 5-year assessment period is the development of background information on control technologies and costs for GHG emissions source categories. As discussed in more detail in section X of this preamble, one of the administrative constraints is the fact that permitting authorities must apply BACT to GHG sources subject to PSD, but that endeavor would be highly resource-intensive. The 5-year assessment period will allow EPA and the States to develop information to evaluate GHG control techniques and costs, which, in turn, will be the basis for BACT determinations involving GHG emissions sources.

The 5-year period will serve other purposes, too, including allowing EPA to analyze the impacts of permitting smaller GHG sources to develop methods to mitigate those impacts. To date, EPA has collected very little information on the site-specific configuration and GHG emissions characteristics of many of the smaller industrial and commercial source categories. As a result, it is difficult to fully assess the impact of GHG

emissions permitting on these sources. We believe the 5-year evaluation period will provide EPA the opportunity to develop a more comprehensive profile of these smaller GHG source categories, which will allow a better assessment of the impacts on the small business community and, in turn, ways to mitigate those impacts.

Although we believe there are sufficient reasons to justify a 5-year evaluation period, we ask for comment on whether the activities described above—or at least some portion of them sufficient to begin administering permit programs for significant numbers of sources below the proposed 25,000-tpy $CO_2e$ threshold—could be accomplished in a shorter time frame than our initial estimates. For example, we ask for comment on whether 3 years would be a sufficient evaluation period. We are especially interested in understanding the basis for such an alternative time period and what activities would need to occur during the period.

We further note that, for the proposed applicability thresholds as described above, we did consider a step-down approach for phasing in GHG permitting thresholds for PSD and title V programs. Under a step-down approach, applicability thresholds for GHGs would be lowered to predetermined step-down levels at specified intervals, such as every 2 years or more. However, we rejected the step-down approach on the basis that, without having established sufficient information on source-specific emissions and absent a record of experience with permitting GHG emissions sources on the part of permitting authorities, we were not in position to establish and support specific step-down thresholds. We believe that establishing further specific step-downs prior to evaluating the impact of the proposed GHG thresholds included in this rulemaking, as well as the impact of the proposed streamlining techniques, would prematurely determine what is administratively feasible for permitting authorities to undertake in terms of permitting GHG sources. Nonetheless, in light of the necessity of ultimately achieving compliance with the statute, we solicit comment on whether such an approach, coupled with regular examination of whether the administrative situation is improving, is an appropriate way to achieve compliance while taking into account the administrative imperatives. If so, we ask for suggestions on how we could structure such an approach (*e.g.,* when future phases should begin, how we should determine the appropriate thresholds for each phase, *etc.*)

2. Rulemaking Based on Threshold Evaluation for Second Phase of Tailoring Program

We propose to commit, by rule, that by 6 years after promulgation of the first phase of the tailoring program, and following completion of the threshold evaluation study, we will promulgate a follow-up rulemaking that will establish the second phase of the program. This rulemaking will either confirm the continued use of the GHG permitting thresholds implemented for the first phase, or promulgate alternative GHG permitting thresholds or other streamlining techniques. The results of the 5-year threshold evaluation study will form the basis for determining what thresholds or other techniques will be promulgated in the second phase rulemaking.

At this time, we cannot anticipate specifically what the second phase of this tailoring program will consist of. The situation that we confront is unprecedented. However, we believe the process of establishing the first phase and then assessing it, combined with the development of other streamlining techniques to the extent possible, will provide a sufficient basis for EPA to propose a rulemaking to establish the second phase. Of course, that rulemaking will provide ample opportunity for affected parties to comment on their experiences with the administrative burden at current GHG permitting thresholds and to make recommendations for any changes in the thresholds, for adoption of other streamlining techniques, and/or for actions consistent with the goal of expeditiously meeting CAA requirements in light of the administrative burden that remains at that time.

## IX. What would be the economic impacts of the proposed rule?

This section of the preamble examines the economic impacts of the proposed rule including the expected benefits and costs of the proposed rule on affected entities. This proposed rule lifts, for a period of 6 years, the burden to obtain a title V operating permit required by the CAA for smaller sources of GHGs and the burden of PSD requirements for smaller new or modifying sources of GHGs. Thus, this rule provides regulatory relief rather than regulatory requirements for these smaller GHG sources for a period of 6 years. For larger sources of GHGs, there are no direct economic burdens or costs as a result of this proposed rule, because requirements to obtain a title V operating permit or to adhere to PSD requirements of the CAA are already mandated by the Act and by existing rules and are not imposed as a result of this proposed rulemaking.

The regulatory impact analysis (RIA) conducted for this proposed rule provides details of the benefits or regulatory relief that smaller GHG sources will experience in terms of costs avoided as a result of this proposed rule and the potential for social costs in terms of foregone environment benefits during this 6-year period. Complete details of the regulatory impact analysis conducted for this proposed rule may be found in the document ''Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule,'' in the docket for this rulemaking.

This rulemaking provides permitting thresholds for sources of GHGs that exceed levels contained in the CAA. Specifically, sources with the potential to emit less than 25,000 tpy $CO_2e$ are not required to obtain an operating permit or PSD permit for a period of at least 5 years at which time a study will be conducted and the decision revisited after 6 years. In the 6 years following promulgation of this rule, the EPA estimates that, compared to baseline estimates that do not include the effects of this rule, over six million sources of GHG emissions will be allowed to operate without a title V operating permit and tens of thousands of new sources or modifying sources per year will not be subject to PSD requirements for GHGs. For this large number of smaller sources, this rule alleviates the regulatory burden associated with obtaining an operating or PSD permit or complying with NSR BACT requirements. Therefore, this proposed action may be considered beneficial to these small entities as it provides relief from regulation that would otherwise be required.

This decision does potentially have environmental consequences in the form of lesser emission reductions during the 6-year period of time. Given that sources between 250 and 25,000 tons per year account for an estimated 7 percent of the six directly emitted GHGs nationally from industrial, commercial, and residential source categories, while representing over 95 percent of the total number of sources potentially requiring an operating or PSD permit for GHGs under current permitting thresholds in the CAA, the EPA believes this is a prudent decision. Requiring such a large number of small sources to obtain permits for the first time would overtax the permitting authorities' abilities to process new permits without commensurate benefits. Moreover, as described in section VII.C

of this preamble, reductions from these small sources will still be occurring, notwithstanding the fact that permitting requirements would not apply to them. These smaller sources of GHG will be the focus of voluntary emission reduction programs and energy efficiency measures that lead to reductions in GHGs. The EPA will also reevaluate this decision after a 6-year period and complete a study of the implications of permitting smaller GHG sources for those sources and permitting authorities.

*A. What entities are affected by this rule?*

As previously stated, this proposed rule is essentially providing regulatory relief and does not include direct regulatory provisions for any industrial, commercial, or residential entities. An analysis is presented for smaller sources expected to experience regulatory relief from this rule. This proposal increases the threshold to obtain a title V operating permit to PTE levels of 25,000 tpy $CO_2e$ or greater annual emissions. New sources of GHG emissions with the potential to emit less than 25,000 tpy $CO_2e$ that would otherwise be subject to PSD are not required to obtain a PSD permit or to comply with BACT regulatory requirements as a result of this proposed rule. The significance levels for major modifications at sources of GHG emissions are also increased in this proposal allowing small sources to forego obtaining a PSD permit and to avoid BACT regulatory requirements, when the projected emissions increase from such modification is less than the PSD significant level (with the promulgated level to be selected from a proposed range of values between 10,000 and 25,000 tpy $CO_2e$). The industry, agricultural, residential and commercial categories anticipated to experience regulatory relief are shown in table IX–1. As table IX–1 shows, this proposal lifts permitting requirements for over six million potential title V sources and tens of thousands of potential PSD new sources that would be otherwise required by the CAA to obtain permits.

TABLE IX–1—ESTIMATED NUMBER OF AFFECTED SOURCES EXPERIENCING REGULATORY RELIEF*

| Sector | Number of sources experiencing regulatory relief | |
|---|---|---|
| | Title V | New PSD (annually) |
| Electricity | 161 | 20 |
| Industrial | 156,545 | 303 |
| Energy | 3,644 | 35 |
| Waste Treatment | 1,431 | 0 |
| Agriculture | 37,351 | 299 |
| Commercial | 1,354,760 | 12,034 |
| Residential— Multifamily | 610,340 | 6,397 |
| Residential— Single Family | 3,925,000 | 515 |
| Totals | 6,089,232 | 19,603 |

* Number of sources is determined on a potential to emit basis for small sources below 25,000 tpy $CO_2e$ threshold. Estimates for PSD sources are for newly constructed facilities and do not include modifications at existing facilities that may also be subject to PSD requirements.

*B. What are the estimated benefits to small sources due to regulatory relief?*

EPA estimated the benefits or avoided costs for sources that are likely to experience regulatory relief from this proposal. This analysis focuses upon the burdens that are being lifted for smaller sources as a result of this proposed rule. In addition, an accounting of the benefits from this proposal as measured by avoided costs for State, local, and tribal permitting authorities is provided. These avoided costs relate specifically to information collection costs or burden costs postponed for smaller sources of GHG emissions otherwise required to obtain an operating permit under title V or required to modify an existing permit to address GHG emissions. Avoided costs shown also include information collection requirements for additional PSD permits postponed for new or modifying smaller sources of GHGs, as well as the avoided costs to State, local and tribal permitting authorities.

1. What are estimated benefits or avoided burden costs for title V permits?

Table IX–2 shows that the estimated first-year information collection cost avoided as a result of this proposal by an industrial source required to obtain a title V operating permit is approximately $46.4 thousand (2007$) per permit. The EPA estimates that over 195 thousand sources will avoid incurring these permitting costs for a period of at least 6 years as a result of this proposal. The avoided burden cost to obtain a new commercial or multi-family residential operating permit is estimated to be approximately $5.0 thousand (2007$) per permit with over 5.9 million sources benefitting by not incurring these costs due to this proposed rule. In total, EPA estimates that more than $38 billion (2007$) in expenditures relating to title V permitting will be avoided by small sources of GHG for a period of 6 years as a result of this proposal. Much of this burden would have been incurred during the first year following the light-duty vehicle rule because sources have 1 year from the date of becoming subject to title V. However, some ongoing burden for new sources coming into the program would be incurred each subsequent year. State, local, and tribal permitting authorities will also benefit in terms of avoided permitting administrative costs by over $15 billion (2007$) as a result of the decisions proposed in this action. This burden would not all have been incurred during the first year following the light-duty vehicle rule, but much of it would generally have been incurred within the first 2 to 3 years. This is because under the part 70 regulations, permitting authorities are required to act on applications within 18 months of receipt. There would also be some ongoing burden in each subsequent year due to new sources coming into the program.

TABLE IX–2—REGULATORY RELIEF PROVIDED FOR SMALL GHG SOURCES AND PERMITTING AUTHORITIES

| Program/affected entities | Small GHG sources not covered during first phase < 25,000 tpy | | |
|---|---|---|---|
| | Per-permit cost (2007$) | Number of permits | Total cost (millions 2007$) |
| Source | | | |
| Title V: | | | |
| New Industrial | 46,350 | 195,895 | 9,079.7 |
| New Commercial/Residential | 4,986 | 5,956,513 | 29,699.2 |
| Subtotal Title V Permits | ..... | ..... | 38,778.9 |
| PSD Permits: | | | |
| New Industrial | 84,530 | 3,299 | 278.9 |
| New Commercial/Residential | 16,887 | 37,197 | 628.1 |
| Subtotal PSD Permits | ..... | ..... | 907.0 |
| Total Source Costs | ..... | ..... | 39,685.9 |
| Permitting Authority | | | |
| Title V: | | | |
| New Industrial | 19,688 | 195,895 | 3,856.8 |
| New Commercial/Residential | 1,978 | 5,956,513 | 11,781.9 |
| Subtotal Title V Permits | ..... | ..... | 15,638.7 |
| PSD Permits: | | | |
| New Industrial | 23,243 | 3,299 | 76.7 |
| New Commercial/Residential | 4,633 | 37,197 | 172.3 |
| Subtotal PSD permits | ..... | ..... | 249.0 |
| Total Permitting Authority Costs | ..... | ..... | 15,887.7 |
| Total Source and Permitting Authority Costs | 184.3 | ..... | 55,573.6 |

**Notes:** (1) Costs shown in ''Sources Not Covered During First Phase'' represent estimates of the regulatory burden relief proposed by this rule. Title V operating permit costs represent one time costs, but these permits are subject to renewals every 5 years. New and modified PSD permits reflect the estimated annual number of new and modifying sources requiring permits and the associated costs.
(2) Sums may not add due to rounding.
(3) All costs are shown in 2007 dollars.

2. What are avoided burden costs associated with regulatory relief for small PSD sources?

Table IX–2 summarizes the estimated burden costs avoided by sources and permitting authorities with this tailoring rule. The estimated avoided burden or reporting and recordkeeping cost associated with requiring new industrial sources to obtain permits is estimated to be $84.5 thousand for new or modified industrial sources and $16.9 thousand for new or modified commercial or multi-family residential sources (2007$). This represents avoided annual costs of over $900 million (2007$) for new and modifying small sources of GHG. State, local, and tribal permitting authorities are expected to avoid $249 million (2007$) annually in administrative expenditures associated with postponing PSD program requirements for small GHG sources.

*C. What are the economic impacts of this rulemaking?*

This proposed rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. Although sources above the thresholds proposed in this rule will become subject to permitting when the light-duty vehicle rule is promulgated, those impacts are not attributable to the present rulemaking. Rather they are mandated by the CAA and existing regulations and automatically take effect independent of this proposal.

In addition to considering the regulatory relief expected for affected entities as a result of this proposed rule, the EPA considered the impact of this rulemaking to small entities (small businesses, governments and non-profit organizations) as required by RFA and SBREFA. For informational purposes, the RIA includes the Small Business Administration (SBA) definition of small entities by industry categories for stationary sources of GHGs and potential regulatory relief from title V and NSR permitting programs for small sources of GHG. Since this rule does not impose regulatory requirements but rather lessens the regulatory burden of the CAA requirements to smaller sources of GHGs, no economic costs are imposed upon small sources of GHGs as a result of this proposed rule. Rather this proposal provides regulatory relief for small sources. These avoided costs or benefits accrue because small sources of GHGs are not required to obtain a title V permit and new or modifying small sources of GHGs are not required to meet PSD requirements for a period of 6 years. Some portion of the small sources may be small entities, and these entities will benefit from the regulatory relief proposed in this rule.[33]

*D. What are the costs of the proposed rule for society?*

EPA examined the social costs of this proposed rule. These social costs

[33] We note that some of the sources that remain subject to permitting above the proposed threshold in this rule may nonetheless be small businesses. Elsewhere in this preamble, we discuss our intent to convene a discretionary panel to examine the small business impacts of GHG regulation through PSD, although such impacts are not imposed as a result of this proposed action. The RIA provides a discussion of these impacts for informational purposes.

represent the foregone environmental benefits that would occur if regulatory relief were offered to small sources of GHG emissions as proposed. This proposal is one such regulatory relief since it increases the emissions thresholds for the title V and PSD programs, as they apply to sources of GHG emissions, to levels above those in the CAA. In this preamble section, the benefits or avoided regulatory costs of such relief are discussed, but there is also a social cost imposed by such relief because this rule may forego some of the possible benefits associated with title V and PSD programs for sources of GHG emissions below 25,000 tpy $CO_2e$ but above the statutory 100/250 tpy levels. These benefits are those attributed to title V and PSD permitting programs in general. These benefits are based upon the relevance of these programs to policymaking, transparency issues, and market efficiency, and therefore are very difficult to quantify and monetize. For title V, they include the benefits of improved compliance with CAA requirements that stem from (1) improved clarity regarding applicability of requirements, (2) discovery and required correction of noncompliance prior to receiving a permit, (3) improving monitoring, recordkeeping, and reporting concerning compliance status, (4) self-certification of compliance with applicable requirements initially and annually, and prompt reporting of deviations from permit requirements, (5) enhanced opportunity for the public to understand and monitor sources' compliance obligations, and (6) improved ability of EPA, permitting authorities, and the public to enforce CAA requirements. However, it is important to remember that a title V permit does not add new requirements for pollution control itself, but rather collects all of a facility's applicable requirements under the CAA in one permit. Therefore, the compliance benefits above are less when title V permits contains few or no CAA applicable requirements. During the first phase under this proposal, when the title V threshold is 25,000 tpy, we expect that the vast majority of sources excluded from title V would be sources that have no CAA applicable requirements for GHG emissions and few or no requirements for other pollutants because their emissions of those pollutants are so small. For this reason while it is extremely difficult to measure the degree of improved compliance, if any, that would be foregone, or to quantify the social costs that would be imposed, we expect that they would be negligible.

For PSD, the primary social cost imposed by the tailoring rule stems from the foregone benefit of applying BACT to the tens of thousands of small new sources and modifications that will be below our proposed thresholds during the first phase. This social cost potentially weighs against the cost savings described above that stem (in part) from avoiding the administrative and control costs of applying BACT to these sources. The BACT requirement assures that new and modified sources, when they increase their emissions are using state-of-the-art emission controls and affords the public an opportunity to comment on the control decision. It does not prohibit increases but it assures that such controls are applied. Delaying the BACT requirement for numerous small sources during the first phase of this proposed rule could allow increases from these smaller sources that are greater than they would be if BACT were applied. A detailed analysis of this difference is beyond the scope of this rule because we do not have detailed information on the universe of these tens of thousands of small PSD actions, the candidate BACT technologies for each of them, how permitting authorities would make the BACT decisions, and how the BACT limit would compare to what would otherwise be installed absent BACT.

It is not possible at this time to quantify the social costs of avoided BACT. However we note that the universe of possible emissions that would be regulated by sources excluded under the tailoring rule is small compared to those that would remain subject to PSD. The sources excluded in the first phase of this proposal comprise only 7 percent of total stationary source GHG emissions, while 68 percent remain subject to regulation. Furthermore, we expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs. Thus, while potential benefits would be foregone by excluding smaller sources from the permitting programs, these benefits are likely to be small. Under the tailoring rule, we will be working during the 6-year period to greatly improve our understanding of both the administrative costs of regulating and the social costs of not regulating smaller sources under PSD and title V, and we will be relying on that information to support our future threshold analyses called for under the proposal.

In reaching the decisions for this GHG tailoring rule, the EPA recognizes that GHG emissions can remain in the atmosphere for decades to centuries, meaning that their concentrations become well-mixed throughout the global atmosphere regardless of emission origin, and their effects on climate are long lasting and significant. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding proposal (Docket ID No. EPA–HQ–OAR–2009–0171). The EPA recognizes the importance of reducing climate change emissions for all sources of GHG emissions including those sources afforded regulatory relief in this rule and plans to address potential emission reductions from these small sources using voluntary and energy efficiency approaches. Elsewhere, we have discussed EPA's interest in continuing to use regulatory and/or non-regulatory tools for reducing emissions from smaller GHG sources because we believe that these tools will likely result in more efficient and cost-effective regulation than would case-by-case permitting.

## X. What implementation issues are related to this proposal?

In this action, EPA is proposing certain steps to ensure that smaller sources (meaning sources emitting GHGs at lower rates) will not become subject to PSD or title V upon EPA's completion of a rulemaking that regulates GHG emissions. Absent those steps, such a rule would trigger PSD and title V for many of these smaller sources. This is because both the CAA PSD provisions and the title V provisions are self-effectuating, that is, they each apply by their terms to require sources to undergo permitting requirements. In addition, federally approved State law provisions implement both the CAA PSD provisions and title V provisions. Those State law provisions consist of the various SIPs and State operating permit programs, respectively. In order to limit PSD and title V applicability to sources that emit at or above the thresholds proposed in this action, and to ensure that these limits apply at the time a rulemaking regulating GHG emissions is promulgated—which will trigger PSD and title V applicability—EPA is proposing to establish threshold levels on the basis that the administrative necessity doctrine overlays the CAA PSD and title V requirements, so that it

is the proposed threshold levels, and not the statutory threshold levels, that apply to sources of GHG emissions. Moreover, EPA is proposing a process, consisting of several components, for conforming the EPA-approved SIPs and title V programs to reflect those threshold levels. This section of the preamble provides a detailed description of this process, first for the SIP PSD provisions, and then for the title V State operating permit program provisions.

*A. CAA Provisions Concerning SIP Requirements for PSD Programs, State Submittal Requirements, and EPA Action*

Before describing EPA's proposed action for PSD SIP implementation, it is useful to review the relevant background concerning the CAA requirements for what SIPs must include, the process for State submittals of SIPs, and requirements for EPA action on SIPs and SIP revisions.

1. SIP Requirements for State PSD Programs and Adequate Resources

CAA section 110(a)(1) requires that States adopt and submit to EPA for approval SIPs that implement the national ambient air quality standards. CAA section 110(a)(2) contains a detailed list of requirements that all SIPs must include to be approvable by EPA. Of particular relevance for this action, subparagraph (J) of section 110(a)(2) of the CAA imposes the requirement that the SIP must ''meet the applicable requirements of * * * part C * * * (relating to prevention of significant deterioration of air quality * * *).'' Under this provision, States must submit SIPs or SIP revisions that meet the federally mandated requirements for PSD programs.

In addition, and also of particular relevance for this action, subparagraph (E)(i) of section 110(a)(2) of the CAA provides that SIPs must ''provide * * * necessary assurances that the State * * * will have adequate personnel * * * [and] funding * * * to carry out such implementation plan * * *.'' As applicable to PSD programs, this provision means that EPA may approve the SIP PSD provisions only if EPA is satisfied that the State will have adequate personnel and funding to administer the PSD program, including conducting the appropriate analyses for new and existing sources, issuing the permits, conducting enforcement, and taking other necessary administrative action.

2. SIP Requirements for State Submittals, EPA Action, and FIPs

As noted above, under CAA section 110(a)(1)–(2), States must submit for EPA approval SIPs that meet the requirements of section 110(a). If a State does not submit a SIP or SIP revision as required, EPA is authorized to make a finding that the State has failed to make a required SIP submittal, under CAA section 179(a), and if EPA makes such a finding, then, under CAA section 110(a)(2)(C), ''[t]he Administrator shall promulgate a Federal implementation plan [(FIP)] at any time within 2 years after'' the date of the finding, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision.

After a SIP or SIP revision has been submitted, EPA is authorized to act on it under CAA section 110(k)(3)–(4). Those provisions authorize a full approval or, if the SIP or SIP revision meets some but not all of the applicable requirements, a conditional approval, a partial approval and disapproval, or a full disapproval. If EPA disapproves a SIP or SIP revision, then EPA must promulgate a FIP at any time within 2 years after the disapproval, unless the State corrects the deficiency within that period of time by submitting an approvable SIP revision.[34]

Once EPA has approved a SIP, if EPA determines that its action in doing so was in error, then, under CAA section 110(k)(6), EPA may conduct a rulemaking to correct the error without requiring any further action, such as submission of a request or a SIP revision, from the State. Specifically, section 110(k)(6) provides:

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

EPA also has authority to revise its previous action on a SIP through EPA's inherent authority, under CAA section 301(a), to reconsider prior rulemaking actions, as well as under Administrative Procedure Act (APA) section 553(e), which requires EPA to give interested persons ''the right to petition for the issuance, amendment, or repeal of a rule.''

In addition, CAA section 110(k)(5) gives EPA authority to issue what is commonly called a ''SIP Call'' when EPA determines that the SIP is inadequate to meet CAA requirements. The SIP Call notifies a State of the inadequacies in its current SIP and requires that the State submit a revised SIP for EPA approval. Specifically, section 110(k)(5) provides:

> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to [meet certain section 110 requirements] or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

*B. What PSD-specific implementation considerations are there?*

Three different requirements of the CAA PSD provisions and the PSD SIPs are at issue for this action. The SIPs vary in certain ways with respect to these requirements, so that EPA must take different actions for different SIPs.

These three requirements concern the threshold level for applicability, the significance level, and the pollutants subject to PSD. The first two—threshold and significance levels—may be treated similarly and are discussed immediately below. The third is discussed after that.

1. Requirements for Thresholds and Significance Levels in PSD Provisions and PSD SIPs

a. *EPA's proposed action:* Revision of Federal regulations and limitation of approval of SIPs.

As discussed elsewhere in this action, the CAA PSD provisions apply to new sources at or above 100/250-tpy thresholds. CAA sections 165(a), 169(1). These requirements are included in EPA regulations in 40 CFR 52.21, which indicate what States should include in their SIPs. The CAA PSD provisions apply to existing sources that modify when those modifications increase emissions by any amount, CAA section 165(a), 169(2)(C), 111(a)(4), unless EPA promulgates higher levels—which we term ''significance levels''—based on reasons of *de minimis* emissions or administrative necessity. *Alabama Power* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980). This requirement is included in EPA regulations in 40 CFR 52.21. Until EPA acts to establish a significance level for GHG emissions, the level in effect remains at zero for any newly regulated pollutants.

[34] States are subject to sanctions for failure to submit, or for EPA disapproval of, SIPs for nonattainment areas, under CAA section 179. These sanctions provisions are not relevant for this proposal because they do not apply to PSD SIPs.

Most jurisdictions are covered by EPA-approved PSD SIPs. Based on a review of these EPA-approved PSD SIPs, virtually all of them establish the PSD permitting threshold at the 100/250-tpy level, although a few States have adopted lower permitting threshold levels. In addition, virtually all EPA-approved SIPs establish the significance level for any new pollutants that it covers—including GHG emissions, if covered—at zero. Only a few EPA approved SIPs take a slightly different approach by adopting significance levels at values other than zero and up to the permitting thresholds. Some jurisdictions are not covered by EPA-approved SIPs, and instead are covered by EPA regulations at 40 CFR 52.21 that EPA implements (in which case, the EPA regulations act as a FIP) or that the State implements through authority delegated to it by EPA. For these States, the PSD threshold level is 100/250 tpy and the significance level for new pollutants, including GHG emissions, is, in effect, zero.

As discussed elsewhere, this action proposes to establish the PSD thresholds for GHG emissions at 25,000 tpy $CO_2e$, and proposes to establish the PSD significance levels at [10,000–25,000] tpy $CO_2e$. EPA plans the following process to revise its regulations and to conform the EPA-approved SIPs to reflect these levels.

First, with respect to EPA regulations, EPA proposes to revise its regulations to establish the permitting threshold at 25,000 tpy $CO_2e$, at 40 CFR 52.21, and to establish the significance level at [10,000 to 25,000] tpy $CO_2e$, at 40 CFR 52.21, based on the administrative necessity doctrine discussed in section VI.C of this preamble.

Second, with respect to the EPA-approved SIPs, although EPA previously fully approved the permitting threshold level provisions and the significance level provisions in those SIPs, EPA proposes to limit its approval of those provisions in part. Specifically, EPA proposes to limit its approval of (i) the permitting threshold level provisions to the extent those provisions require permits for sources whose GHG emissions equal or exceed the 100/250-tpy $CO_2e$ levels but are less than 25,000 tpy $CO_2e$ for PSD thresholds; and (ii) of the significance level provisions to the extent those provisions apply to GHG emissions less than [10,000 to 25,000] tpy $CO_2e$. As discussed below, EPA's authority for these limitations of approval is based on its authority under CAA section 301(a), which incorporates the inherent authority of an agency to reconsider its actions, as well as under APA section 553. Even so, EPA is also proposing, in the alternative, to limit its approval through the error correction provisions of CAA section 110(k)(6).

EPA does not propose to take any further action on the permitting threshold or significance level provisions for which EPA is limiting its approval; that is, EPA is not proposing to disapprove those provisions. Thus, the limitation of approval for those provisions does not trigger an obligation on the part of the State to revise and resubmit for approval the affected PSD SIP provisions and does not trigger a FIP obligation.

The permitting threshold PSD SIP provisions that apply to sources with GHG emissions at 25,000 tpy $CO_2e$ or higher, and the significance level provisions that apply to sources with GHG emissions at [10,000 to 25,000] tpy $CO_2e$ or higher, remain fully approved.

As a drafting matter, EPA proposes to accomplish the limitations of approval by adding to the record of its action on each SIP, as found in the subparts to 40 CFR 51.21, the boilerplate statements that (i) EPA limits its approval of the PSD permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy $CO_2e$ for sources in the 28 categories identified in CAA section 169(1), and 250 tpy $CO_2e$ for all other sources, but that are less than 25,000 tpy $CO_2e$; and (ii) EPA limits its approval of the PSD significance level provisions to the extent those provisions treat as significant GHG emissions increases that are less than [10,000 to 25,000] tpy $CO_2e$.

b. Authority for limitation of approval.

EPA is limiting its approval through its authority under CAA section 301(a) ''to prescribe such regulations as are necessary to carry out [EPA's] functions'' under the CAA. This provision confers general regulatory authority upon the Administrator, and incorporates the Agency's inherent authority to reconsider prior rulemaking actions. Additional authority for EPA to limit its approval is found in APA section 553(e), which requires EPA to give interested persons ''the right to petition for the issuance, amendment, or repeal of a rule.''

An administrative agency has the inherent authority to reconsider its decisions, unless Congress specifically proscribes the agency's discretion to do so. The D.C. Circuit recently affirmed this authority in *New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008), where it explained that an agency normally can change its position and reverse a prior decision but that in the case before it, Congress limited EPA's ability to remove sources from the list of HAP source categories, once listed, by requiring EPA to follow the specific delisting process at CAA section 112(c)(9). *See, e.g.*, *Gun South, Inc.* v. *Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (holding that agencies have implied authority to reconsider and rectify errors even though the applicable statute and regulations do not provide expressly for such reconsideration); *Trujillo* v. *General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (''Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider''). CAA section 307(b)(1), a judicial review provision that applies to all SIP actions, provides some confirmation because it expressly contemplates the ''filing of a petition of reconsideration by the Administrator of any otherwise final rule or action.''

EPA recently applied this approach in connection with California conformity SIPs. EPA had approved the SIPs based on a mobile source model that was current at the time of EPA's approval. EPA proceeded to update the mobile source model, but under the previous SIP approvals, conformity decisions would continue to be made on the basis of those previous SIP approvals, and would not take into account the updates to the mobile source model. To rectify this problem, EPA conducted a rulemaking that revised the previous SIP approvals so that they were limited to the period before States submitted, and EPA found adequate, the mobile source budgets in new SIPs based upon the update of the mobile source model.

Similarly, in this action, EPA is proposing to limit its previous approval to, in effect, a portion of the State PSD program, which is the permitting requirements that apply to sources of GHG emissions at or above 25,000 tpy $CO_2e$ (for permitting thresholds) and [10,000 to 25,000] tpy $CO_2e$ (for significance levels), respectively. The reason is that in light of the requirement under CAA section 110(a)(2)(E) that SIPs provide necessary assurances of adequate personnel and funding, the previous approvals of the PSD programs were overly broad. Specifically, EPA approved PSD programs that applied to all sources of regulated NSR pollutants above the 100/250-tpy statutory levels. At the time of the EPA approvals, the sources emitting the pollutants covered by the PSD programs, so approved, may have been in sufficiently limited numbers so that State resources were adequate to fully administer the PSD

program. However, the breadth of the applicability requirements that EPA approved meant that if new pollutants were regulated in the future, and if those new pollutants were emitted at the levels of 100/250 tpy or higher by large numbers of sources, then the States' PSD programs would become much larger and State resources accordingly will not be adequate to administer the program. The SIP failed to provide necessary assurances that the State would have sufficient personnel and funding to cover this possible expansion of the PSD program. In fact, those events are unfolding now: EPA is in the process of regulating GHG emissions and thereby triggering PSD applicability for GHG sources, and, at the applicability levels in the SIPs, State PSD programs will become too large for States to administer with their current levels of personnel and funding. For these reasons, EPA is limiting its previous approvals, as described above.

c. Proposed alternative action: Error correction.

EPA is also proposing in the alternative to revise its approval of the SIP threshold and significance level provisions through a CAA section 110(k)(6) error correction. As noted above, CAA section 110(k)(6) authorizes EPA to correct its actions concerning SIPs and certain other actions through a simplified procedure. For the reasons described immediately above, EPA believes that the SIPs did not provide the necessary assurances, as required under CAA section 110(a)(2)(E), that the permitting authorities would have personnel and funding adequate to implement the extensive SIP PSD programs that could result from the broadly applicable PSD threshold provisions and significance level provisions as approved. Therefore, under this alternative proposal, EPA erred in approving those provisions. Rather, EPA should have approved those provisions only in part, and not taken action on the rest of the provisions.

As a result, EPA proposes to correct those errors, under the authority of CAA section 110(k)(6), by limiting its approval of the PSD threshold provisions to the extent they apply PSD requirements to sources of GHG emissions between 100/250 tpy $CO_2e$ and 25,000 tpy $CO_2e$, and the PSD significance level provisions to the extent they apply to sources that emit GHGs at a rate below [10,000 to 25,000] tpy $CO_2e$. In accordance with CAA section 110(k)(6), EPA is proposing to conduct its limitation of approval through notice-and-comment rulemaking under APA section 553, which is ''the same manner as [EPA conducted] the approval,'' and EPA is not requiring any further submission from the State.

d. State response.

For purposes of the federally approved SIP, this proposed action does not require States to submit any SIP revision. That is, if EPA finalizes this proposal, each federally approved PSD program will have a PSD threshold level for GHG emissions of 25,000 tpy $CO_2e$ and a significance levels for GHG emissions of [10,000 to 25,000] tpy $CO_2e$; and although each State PSD program—as established by the State law provisions that comprise the SIP—will have a lower threshold and significance level, those lower levels will not be federally approved and therefore not federally enforceable. To reiterate, EPA is not proposing to disapprove those provisions; rather, EPA will take no further action with respect to them. As a result, no further action by the State, including no SIP revision, is necessary for Federal purposes.

Even so, it should be noted that the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law. As a result, States may wish to consider revising those State law provisions. In addition, the fact that these provisions remain on the books under State law may create some confusion as to whether they are part of the federally approved SIP (again, with this proposed action, they would not be), and for this purpose too of avoiding this confusion, States may wish to consider revising those State law provisions.

On the other hand, if a State wants to implement PSD permitting requirements at a threshold level lower than 25,000 tpy $CO_2e$, or implement a significance level lower than [10,000 to 25,000] tpy $CO_2e$, for GHG emitters, the State may submit a SIP revision that identifies the lower thresholds and provides the necessary assurances, under CAA section 110(a)(2)(E), that it has adequate personnel and funding to permit at this level. If the SIP revision meets the CAA section 110(a)(2)(E) requirement, EPA will proceed to approve it. Permitting for this State would then cover such smaller sources. For reasons described elsewhere in this notice, the EPA has determined based on its national analysis that, absent additional streamlining measures, the PSD program will initially be impossible to implement at such lower levels. A State seeking to adopt lower levels should therefore be prepared to describe in its submittal the administrative burden that will be added at the proposed lower levels, and the measures it will take to make the program implementable at those levels.

It should be noted that EPA considered, but is not proposing or soliciting comment on, issuing a SIP call under CAA section 110(k)(5) to require States to either demonstrate that they have adequate personnel and funding to administer their PSD programs at the 100/250-tpy $CO_2e$ threshold level for GHG emitters, or to submit a SIP revision that raises the threshold to 25,000 tpy $CO_2e$ or some other level commensurate with their personnel and funding. EPA decided against this approach for several reasons. First, a SIP call under section 110(k)(5) takes significantly more time than actions taken under EPA's other authorities. For a SIP call, EPA first undertakes a notice-and-comment process in order to make the finding that a SIP is inadequate and to set a schedule for a new SIP submission by a State (which can be up to 18 months after EPA's determination). Then, EPA must provide notice and opportunity for comment regarding whether or not the Agency should approve the SIP revision submitted by a State in response to the SIP call. By contrast, the reconsideration of a SIP approval can be undertaken in much less time. Reconsideration of a SIP approval may lead to a more speedy and efficient resolution in a situation (such as the present) where there is no need for a further SIP submission to be developed and submitted to EPA by the State.

2. PSD SIP Provisions Identifying the Pollutants

A handful of EPA-approved SIPs fail to include provisions that would subject GHG emissions to their PSD requirements when EPA promulgates regulations that regulate GHGs and thereby trigger the applicability of PSD. For these SIPs, EPA intends to take separate regulatory action, as discussed in this section of this preamble.

a. Regulatory background.

By way of background, in 1978, after Congress enacted the PSD program in the 1977 CAA Amendments, EPA promulgated a rulemaking to implement the program. 43 FR 26380 (June 19, 1978). This rulemaking required that the PSD program apply to ''each pollutant subject to regulation'' under the CAA. *Id.* at 26403, 26406 (promulgating 40 CFR 51.21(b)(1)(i)).[35] In 2002, EPA

[35] After challenges by industry and environmental organizations, parts of this rulemaking were remanded by the D.C. Circuit in

Continued

promulgated a rulemaking that revised parts of the PSD and nonattainment NSR programs, which is generally known as the ''NSR Reform'' rulemaking, and there, EPA revised this terminology so that PSD requirements apply to ''regulated NSR pollutants.'' 67 FR 80186 (Dec. 31, 2002); *see* 40 CFR 52.21(b)(50).

After the 1978 rulemaking, most States submitted SIPs with provisions that incorporated the requirement to apply PSD requirements to ''each pollutant subject to regulation,'' or used comparable terminology, and EPA approved those provisions. Following the 2002 NSR Reform rule, many, although not all, of these States submitted SIPs that EPA has approved and that have replaced that terminology with the requirement that PSD requirements apply to ''NSR regulated pollutants.''

However, a few SIPs do not have provisions that apply the PSD requirements to ''regulated NSR pollutants'' or ''pollutants subject to regulation'' under the CAA, or use comparable terminology. Rather, these SIPs specifically list the pollutants to which the PSD programs apply, and do not include GHGs.

b. EPA's plan of separate regulatory action.

It is EPA's understanding that each of the SIPs that cover either ''NSR regulated pollutants'' or ''pollutants subject to regulation'' under the CAA, or that use comparable terminology, will apply the PSD requirements to sources that emit GHGs, at the appropriate threshold levels, when EPA promulgates rules regulating GHGs and thereby triggering PSD requirements. This is because these SIP provisions employ broad enough terminology to encompass newly regulated pollutants, such as GHGs.[36] As a result, for these SIPs, no further action by EPA in this proposal is necessary.[37]

However, the story is different for the few SIPs that do not have provisions that apply the PSD requirements to ''regulated NSR pollutants'' or ''pollutants subject to regulation'' under the CAA, and that instead specifically list the pollutants to which the PSD programs apply, and do not include GHGs. Although EPA approved them, these SIPs were, and remain, deficient because by subjecting to the PSD requirements only the pollutants specifically listed, they fail to reflect the EPA's longstanding requirements that PSD requirements apply to all pollutants subject to regulation under the CAA, which necessarily includes any newly regulated pollutants beyond those specifically listed.

Importantly, for present purposes, these SIPs do not require that GHG emitters obtain PSD permits. However, CAA section 165(a), by its terms, prohibits a source that is subject to PSD from constructing or modifying without a permit. As noted elsewhere, as a result of the proposed light-duty vehicle rule, expected to be promulgated at the end of March 2010, sources of GHG emissions in those States will be subject to the requirement of CAA section 165(a) to obtain a preconstruction PSD permit.

EPA recognizes the problems that arise from this situation. Accordingly, EPA intends a separate regulatory action in the very near future that will identify the SIPs in question and address them. EPA expects this regulatory action to be completed and to take effect by the time EPA promulgates the light-duty vehicle rule at the end of March 2010.

### *C. What title V-specific implementation issues are there?*

Some of the title V-specific implementation issues parallel the PSD SIP implementation issues. Thus, the process EPA is proposing, described below, to conform the EPA-approved title V programs to reflect the title V applicability threshold level for GHG emissions of 25,000 tpy $CO_2e$ parallels in certain respects the process described above for conforming the EPA-approved SIP PSD programs.

1. CAA Provisions Concerning Title V Requirements for State Programs, State Submittal Requirements, and EPA Action

Before describing EPA's proposed action for title V implementation, it is useful to review the relevant background concerning the CAA requirements for title V State operating permit programs, State submittals of those programs, and EPA action on State title V programs.

a. CAA requirements under title V for State permitting programs.

CAA section 502(d)(1) requires that each State adopt and submit to EPA for approval an operating permit program under State or local law that meets the requirements of title V. CAA section 502(b) contains a detailed list of requirements that all State permit programs must include to be approvable by EPA. Of particular relevance for this action, paragraph (4) of section 502(b) provides that the permit program must include ''[r]equirements for adequate personnel and funding to administer the program.'' This provision means that EPA may approve the State permit program only if EPA is satisfied that the State will have adequate personnel and funding to administer the program, including issuing the permits, conducting enforcement, and taking other necessary administrative action.

b. State permit program submittal requirements and Federal plans.

As noted above, under CAA section 502(d), States must submit for EPA approval State permit programs that meet the requirements of CAA section 502(b). If a State does not submit a permit program as required, or if EPA disapproves a program submitted, in whole or in part, then the Administrator ''shall, 2 years after the date required for submission of such a program * * *, promulgate, administer, and enforce a [title V] program * * * for that State,'' under CAA section 502(d)(3).[38]

c. EPA action on, and revision of action for, State permit programs.

After a State permit program has been submitted, EPA must approve or disapprove it in whole or in part. CAA section 502(d)(1). Those provisions authorize EPA to approve the program to the extent that it meets the requirements of title V.

*Alabama Power* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980), and EPA promulgated revised requirements in 1980. 45 FR 52676 (August 7, 1980). The requirement that the PSD program apply to ''each pollutant subject to regulation'' under the Act was not at issue in *Alabama Power* and was not revised in the rule revisions that followed that decision.

[36] It should be noted that if any State with these SIP provisions interprets their provisions to cover only pollutants regulated (or subject to regulation) at the time of SIP submission or approval, so that the provisions would not cover GHG emissions, then the State should so indicate during the comment period. EPA will take steps to resolve the proper interpretation of the provision. EPA proposes in this action that if EPA agrees that the SIP provision cannot be interpreted to cover sources of GHG emissions, then EPA will treat the State in the same manner as States that specifically list pollutants as subject to PSD requirements and do not include GHGs, as discussed below.

[37] It should be noted that in this action, EPA is not addressing in any way any other issue that may arise concerning any of these States that do not have approved PSD programs incorporating all of the requirements of the NSR Reform rule.

[38] In addition, if EPA disapproves a title V program due to failures by the State concerning an area in the State and air pollutants for which that area is in nonattainment, then mandatory sanctions apply, under CAA section 502(d)(2)(B)–(C). Sanctions regarding offsets would not be relevant for purposes of this action because GHGs are not criteria air pollutants under CAA section 108(a) and no areas are designated nonattainment for them.

Once EPA has approved a permit program, EPA retains the authority to revise its action through its inherent authority to reconsider prior rulemaking actions, as well as under APA section 553(e), which requires EPA to give interested persons ''the right to petition for the issuance, amendment, or repeal of a rule.'' [39]

In addition, CAA section 502(i)(1) gives EPA authority to issue what is commonly called a ''notice of deficiency'' (NOD) when EPA determines that the permitting authority ''is not adequately administering and enforcing a program, or portion thereof.'' The NOD notifies a State of the inadequacies in its current permit program and requires that EPA promulgate, administer, and enforce a permit program under title V within 2 years after issuing the notice unless the State has corrected the deficiency, under section 502(i)(4). *See also* CAA sections 502(i)(2)–(3) regarding sanctions.

2. What title V-specific implementation considerations are there?

Two different requirements of the CAA title V permit programs are at issue for this action. The permit programs are similar with respect to these requirements, so that EPA's action is the same for each of the permit programs. These two requirements concern the threshold level for applicability and the pollutants subject to title V permitting requirements.

a. Requirements for threshold level in title V Federal regulatory provisions and title V State plans.

(i) *EPA's proposed action:* Revision of Federal regulations and limitation of approval of SIPs.

As discussed elsewhere in this action, the CAA title V requirements, as interpreted by EPA, generally apply to existing sources that emit 100 tpy or more of any air pollutant.[40] CAA sections 502(a), 501(2)(B). These requirements are included in EPA regulations in 40 CFR 70.3.

Most jurisdictions are covered by EPA-approved State title V permit programs. It appears that each EPA-approved title V permit program establishes the permitting threshold at, in general, 100 tpy. Some jurisdictions are not covered by EPA-approved State programs, and instead are covered by regulations at 40 CFR 71 that EPA implements. For these jurisdictions, the PSD threshold level is 100 tpy.

As discussed elsewhere, in this action, EPA proposes to establish the title V permitting threshold for GHG emissions at 25,000 tpy $CO_2e$. EPA plans the following process to revise its regulations and to conform the EPA-approved State title V programs to reflect these levels. This action parallels EPA's action to revise its PSD regulations and conform the EPA-approved State PSD programs to the revised PSD regulations, discussed above. First, with respect to its EPA regulations, EPA proposes to revise its regulations to establish the permitting threshold for GHGs at 25,000 tpy $CO_2e$, at 40 CFR 70.2. Second, with respect to the EPA-approved State permitting programs, although EPA previously fully approved the permitting threshold level provisions in those programs, EPA proposes to limit its approval of the permitting threshold level provisions to the extent those provisions require permits for sources whose emissions of GHGs equal or exceed 100 tpy $CO_2e$ but are less than 25,000 tpy $CO_2e$. EPA's authority for this limitation of approval is based on CAA section 301(a), which incorporates the inherent authority of an agency to reconsider its actions, as well as on APA section 553.

EPA does not propose to take any further action on the permitting threshold provisions for which EPA is limiting its approval; that is, EPA is not proposing to disapprove those provisions. Thus, the limitation of approval for those provisions does not trigger an obligation on the part of the State to revise and resubmit for approval the affected permitting program provisions and does not trigger any Federal plan obligation.

The State permitting threshold provisions that apply to sources with GHG emissions at 25,000 tpy $CO_2e$ or higher remain fully approved.

As a drafting matter, EPA proposes to accomplish the limitations of approval by adding to the record of its action on each State permit program the boilerplate statement that EPA limits its approval of the State permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy $CO_2e$ but that are less than 25,000 tpy $CO_2e$.

(ii) Authority for limitation of approval.

As with its action concerning the PSD program, discussed above, EPA is limiting its approval under CAA section 301(a), which reflects its inherent authority to reconsider prior rulemaking actions, as well as under APA section 553(e). This authority is described in detail above in connection with EPA's proposed parallel action concerning PSD SIP provisions.

(iii) State response.

For purposes of the federally approved State permit program, this proposed action does not require States to submit any revision or take any further action. That is, if EPA finalizes this proposal, each federally approved title V program will have an applicability threshold level of 25,000 tpy $CO_2e$. Although the State permitting program—as established by the State law provisions—may have a lower threshold, that lower level will not be federally approved and will therefore not be federally enforceable. To reiterate, EPA is not proposing to disapprove those provisions; rather, EPA will take no further action with respect to them. As a result, no further action by the State, including no program revision, is necessary for Federal purposes.

Even so, the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law. As a result, States may wish to consider revising those state law provisions. In addition, the fact that these provisions remain on the books under State law may create some confusion as to whether they are part of the federally approved title V program (again, with this proposed action, they would not be), and for this purpose too of avoiding this confusion, States may wish to consider revising those state law provisions.

On the other hand, if a state wants to implement its operating permit requirements at a threshold level lower than 25,000 tpy $CO_2e$ for GHG emitters, the state may submit an operating permit program revision that identifies the lower thresholds and provides the necessary assurances, under CAA section 502(b)(4), that it has adequate personnel and funding. If the program revision meets the CAA section 502(b)(4) requirement, EPA will proceed to approve it.

It should be noted that EPA considered, but is not proposing or soliciting comment on, issuing a NOD under CAA section 502(i)(1) to require States to either demonstrate that they have adequate personnel and funding to administer their operating permit programs at the 100-tpy $CO_2e$ threshold level for GHG emitters, or to submit a permit program revision that raises the threshold to 25,000 tpy $CO_2e$ or some other level commensurate with state personnel and funding. EPA decided

[39] Title V does not include a provision for an error correction that is comparable to CAA section 110(k)(6), which concerns SIPs.

[40] Title V requirements also apply to sources defined as major sources under CAA section 112 on the basis of their emissions of HAP, and these sources may be covered by title V even though they emit less than the 100-tpy threshold that generally applies.

against this approach for several reasons. First, a NOD under section 502(i)(1) takes significantly more time than actions taken under EPA's other authorities. The first step in this process is publication of a NOD in the **Federal Register** that sets forth EPA's findings as to the deficiencies in the state program. This notice requires the state to take significant action within 90 days, and identifies several actions, such as program withdrawal and implementation of a Federal permitting program, that EPA may take if significant action is not taken by the state. If the state has not corrected the deficiency within 18 months after the finding described above, EPA will promulgate, administer and enforce a Federal program within 2 years of the finding. In contrast, the reconsideration of a permit program approval can be undertaken in much less time.

Reconsideration of a permit program approval may lead to a more speedy and efficient resolution in a situation (such as the present) where there is no need for a further permit program submission to be developed and submitted to EPA by the state.

b. Requirement that title V permit programs apply to any air pollutant.

It appears that most title V-approved state permit programs apply to 100-tpy-or-more sources of any pollutant. As discussed elsewhere, EPA interprets these provisions to cover only pollutants that are actually regulated under other CAA provisions. These title V programs will include sources of GHG emissions when EPA promulgates regulations for GHG emissions, which EPA expects at the end of March 2010. For those title V programs, no further action concerning these provisions is needed.

However, EPA believes that some title V programs may apply to 100-tpy-or-more sources of only pollutants specifically identified in the program provisions and that these title V programs do not include a provision that automatically updates title V applicability to include any new pollutant for which EPA promulgates controls. Thus, these title V programs would not include GHG emitters. These programs are similar, for title V purposes, to the SIPs described above that specifically list pollutants subject to PSD that do not include a provision that automatically updates PSD applicability to include any new pollutant for which EPA promulgates controls. Thus, these title V programs carry the same deficiency that the SIPs do. As with the SIPs, EPA intends to undertake separate regulatory action in the near future to address these title V programs, which EPA intends to be completed and take effect by the end of March 2010, when EPA promulgates the light-duty vehicle rule that triggers title V applicability for sources of GHG emissions.

*D. GHGs and Title V Permit Fees*

Under title V, section 502(b)(3) of the Act, permitting authorities (including State and local agencies, tribes, and EPA) are required to collect fees ''sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements.'' The final part 70 rule grants States wide discretion in collecting fees from individual sources through establishment of fee schedules in their permit programs, provided the total fees collected from all sources are sufficient to cover the title V costs. *See* § 70.9(a), and § 70.9(b)(1) and (b)(3). The initial permit program submittal to EPA is required to include a demonstration that the fee schedule will be sufficient to cover the program costs and an estimate of the program cost during the early years of implementation. *See* § 70.4(b)(7) and (8). Also, at any time, EPA may require States to provide a detailed accounting of fee schedule adequacy, including when serious questions are raised about adequacy. *See* § 70.9(b)(5) and § 70.9(c). Thus, title V and part 70 place primary responsibility on the permitting authorities to raise adequate fees and on EPA to perform oversight of this responsibility.

The activities related to regulation of GHGs that would increase permitting authority workloads can be grouped into the following two categories: (1) Changing existing permits to add any necessary provisions to address GHGs, and (2) issuing new permits to sources newly subject to permitting solely because their regulated GHGs exceed the major source threshold.

Thus, we need to consider the impact of this proposal and any future regulation of GHGs on the fee requirements of the permit programs, and if any revisions are needed to parts 70 and 71 in response to ensure collection of adequate fees to fund the permit programs.

1. How are the fee rates set in the permit programs?

The part 70 rule provided a shortcut to ease the level of detail otherwise required in States' fee adequacy demonstrations by providing a ''presumptive minimum fee,'' which was specified in section 502(b)(3)(B) of the Act. The final part 70 rule provides a rebuttable presumption that the fees charged by a state are sufficient to cover program costs if they collect an amount equal to or greater than the presumptive minimum fee multiplied by the actual tons of ''regulated pollutants (for presumptive fee calculation),'' as defined in § 70.2. The part 70 presumptive fee was initially set at $25/ton. This amount is adjusted for inflation, annually. *See* § 70.9(b)(2). The current presumptive minimum fee, effective through September 2009, is $43.75. EPA calculates the inflation-adjusted part 70 presumptive minimum fee in October of each year and places a memorandum announcing the fee on a Web site it maintains for this purpose. *See http://www.epa.gov/air/oaqps/permits/fees.html.* Also, EPA notes that it believes there are currently a minority of States that base their fees on the presumptive minimum, perhaps at most 17 out of 112 State and local part 70 permits programs.

Since the use of the presumptive minimum fee is not mandatory for States, States were free to set either lower or higher fees rates, based on a more detailed fee adequacy demonstration. *See* § 70.9(b)(5). States were not required to set emissions-based fees though most did in combination with other approaches. Emissions-based fees on state fee schedules range from less than $10 per ton in a rural State to over $100 ton in a large urban area. Examples of other fee schedule approaches include processing fees, such as fees for applications, renewals and modifications, charges for time and material, and fees that vary depending on source category, equipment types, regulated air pollutant, business size, and many other factors. *See* § 71.9(b)(3).

The part 71 permit program, administered by EPA and delegate agencies, charges a ''part 71 annual fee,'' for every actual ton of ''regulated air pollutant (for fee calculation),'' as defined in § 71.2. Also *see* fee schedule at § 71.9(c). The final rule for part 71 set this rate at $32/ton. Adjusted for inflation, the part 71 annual fee through calendar year 2009 is $45.25 per ton. The final rule based the $32/ton fee on a detailed fee demonstration performed by EPA, placed in the docket prior to promulgation of the final rule, showing slightly higher costs for EPA versus state implementation of a title V program. The annual inflation adjustment is performed in October of each year and is announced on the same Web site as the part 70 presumptive minimum.

2. Which pollutants are subject to permit fees?

The terms ''regulated pollutant (for presumptive fee calculation)'' under part 70 and ''regulated pollutant (for fee

calculation)'' under part 71 are defined essentially the same in both programs. These terms are both currently defined to mean any ''regulated air pollutant'' except: (1) Carbon monoxide, (2) any pollutant that is a regulated air pollutant solely because it is a Class I or II substance subject to a standard promulgated or established under title VI of the Act, or (3) any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act. The part 70 fee pollutant definition specifies which regulated air pollutants must be considered in presumptive minimum analyses, while the part 71 fee pollutant definition specifies which regulated air pollutants are the basis for fees for part 71 sources. The term ''regulated air pollutant'' in parts 70 and 71 means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a NAAQS has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act, including the following: (i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established in section 112(e), any pollutant for which a subject source would be major shall be considered regulated 18 months after the section 112(e) date; and (ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to the requirement.

Note that GHGs are not currently included in either definition for fee purposes because they are not ''regulated air pollutants,'' but GHGs may be covered in the future.

Also note that section 502(b)(3) of the Act, upon which these fee regulations are based, does not specifically require fees for GHGs, and it does not specifically require fees for every regulated air pollutant, even those that may cause the source to be defined as a major source; it just requires adequate fees to cover costs. Thus, we believe the Act provides us with some discretion in how we treat GHGs for permit fee purposes. This discretion also would potentially include revising the part 70 and 71 rules to address workload associated with GHGs.

3. Proposal for Fees in State Part 70 Programs

The permitting of GHGs has the potential to create overwhelming resource burdens on State part 70 programs. These burdens would be significantly reduced under this proposal, through raising the title V major source thresholds for GHGs, which will reduce the number of sources subject to permitting. Nonetheless, as noted above, there will be some remaining additional activity associated with GHG permitting that will likely require States to increase revenue to cover the expected increase in level of activity. At this time, we believe that the best approach to address this situation is for States to assess their increased workload and determine whether their current fee regulations need to be amended to cover any expected revenue shortfall. If so, States have a wide variety of possible options regarding what pollutants and sources to cover, and what fee structure to adopt.

The EPA is not proposing at this time to amend its regulations to establish a presumptive fee approach that would involve specifically charging fees for GHGs. We are also not proposing at this time to calculate a new presumptive minimum fee under the existing presumptive fee approach to take GHGs into account, or to mandate revisions to fee regulations for GHGs in States that did not adopt the presumptive fee approach. We believe that the best approach at this time is to allow each State to determine how best to satisfy the fee adequacy requirement under the existing process, for EPA to monitor the situation, and be prepared to exercise oversight authority if necessary.

Due to the large quantity of GHGs emitted relative to criteria pollutants, for example at a combustion source where GHGs may be from several hundred times to over one thousand times the emissions of other combustion pollutants, EPA has decided not to propose to amend its regulations to establish a presumptive fee approach that would treat GHGs similarly to current fee pollutants. Such an approach would result in greatly excessive revenues because agency workloads are not necessarily proportional to emissions for sources and GHG emissions are orders of magnitude larger than other emissions for many source categories. Thus we have rejected that approach as an option. Similarly, we considered and rejected proposing to require a different, significantly reduced presumptive minimum fee for GHG [*e.g.*, by revising § 70.9(b)(2)]. This is not required by the Act, provided States can raise revenues in the aggregate that are adequate to cover program costs. We also believe we would need better data to establish the appropriate basis for the GHG presumptive minimum. We expect our data will improve over time as EPA and permitting authorities gain experience with GHG permitting programs, but at present there are large uncertainties in our estimates of the additional GHG workload at the 25,000 ton $CO_2$ level, the level of effort needed to incorporate future regulations for GHGs into permits, and the additional revenue that would come in from fees paid for emissions other than GHG from newly covered sources under existing fee schedules. Also, for similar reasons, we have decided not to issue NODs under § 70.10(b) for State failure to adequate implement and enforce their part 70 programs on the basis of failure to date to revise their fee schedules to cover any existing or anticipated workload for GHGs (for example, the workload associated with planning for future regulation, conducting emissions inventories of GHGs, and similar activities directly or indirectly related to part 70 permitting).

Although we do not believe it is necessary to revise our part 70 regulations to implement the fee requirements for GHGs, EPA intends to closely monitor State programs to ensure that incorporating GHGs into permits do not result in fee shortfalls serious enough to imperil the implementation and enforcement of the part 70 program. EPA has adequate authority under § 70.9(b)(5) to perform audits of State fees at any time, at our own initiative or whenever any serious questions are raised about fee adequacy, and we have done so in the past. During any such audit, EPA would focus its review on the program support test of § 70.9(b)(1) in order to assure that fees are adequate to support the program. There is also authority in § 70.4(i)(3) for EPA or the State to initiate a program revision when relevant Federal or State regulations are modified or supplemented, such as when EPA takes a future action to regulate GHGs or when EPA has reason to believe that a State is not adequately administering its program, which could occur if a fee audit uncovers a need to increase a State's fees. This provision specifically authorizes EPA to request additional documents or information, such as a revised fee demonstration. We also have authority to take action for a State's

failure to adequately administer and enforce a part 70 permits program under § 70.10(b). This process includes the issuance of a NOD and could result ultimately in withdrawal of the part 70 program and imposition of a Federal part 71 program in its place, if appropriate and timely part 70 program revisions are not made (*e.g.*, NODs on questions of fee adequacy: (1) 69 FR 10167, March 4, 2004, *http://edocket.access.gpo.gov/2004/04-4822.htm*; and (2) 71 FR 67061, November 20, 2006, *http://www.epa.gov/EPA-AIR/2006/November/Day-20/a19555.htm*). There are other examples where EPA has performed oversight of fee adequacy over State or local part 70 programs that did not ultimately result in the issuance of an NOD (*i.e., see* a December 13, 2001, letter from EPA Region 10 to a concerned citizen, *http://www.epa.gov/region7/programs/artd/air/title5/t5memos/aktrust.pdf*; and a September 23, 2002, letter from EPA Region 3 to a concerned citizen, *http://www.epa.gov/air/oaqps/permits/response/maryland.pdf*.

For these reasons we are proposing a recommendation that each State, local, or tribal part 70 program review its expected resource needs for implementing GHGs and its fee schedule with the aim of determining if its fee revenues will be adequate to cover the direct and indirect costs of implementing its program once GHGs are brought into the program. If they would not be adequate, States using the presumptive fee approach should be proactive in raising fees on current ''regulated pollutants (for presumptive fee calculation)'' or developing other alternative approaches to meet the shortfall. We may officially require submittal of fee analyses for GHGs at any time in the future, but we do not believe we need to do so at this time.

This approach is consistent with how we have treated past Federal regulations that could have potentially affected title V program resources and fees, including final rules that resulted in new applicable requirements in permits and that changed the number of sources required to get permits (*e.g.*, we did not require new fee demonstrations in response to promulgation of a large number of part 63 emissions standards, nor in response to part 63 standards that required title V permits for minor sources). In those situations, we did not alter the Federal fee regulations or require changes to the fee regulations in State programs, but the requirement for adequate revenues still applied.

4. GHGs and Part 71 Fees

Similar to the explanation for part 70 above, after GHGs become regulated for CAA purposes, we note that increased burdens will likely fall on part 71 permitting authorities (EPA and delegate agencies), resulting in the need for EPA to review the part 71 fee schedule to ensure there are adequate fees to cover program costs. We are also not proposing at this time to establish a presumptive fee approach that would treat GHGs similarly to current fee pollutants nor to adjust the fee schedule of § 71.9(c) with respect to these expected burdens for similar reasons we explained above for part 70. EPA has not determined that existing part 71 fee structure will be inadequate to fund the part 71 program costs in the next few years with GHG permitting included.

We will examine the increases in part 71 burden due to GHG-related permitting activity and in fees collected from part 71 sources to assess whether part 71 fees remain adequate. Section 71.9(c)(7) requires EPA to revise the fee schedule by rule if it does not reflect the costs of program administration, while § 71.9(n)(2) requires the Administrator to review the fees schedule every 2 years and to revise it if necessary.

*E. Implementation Assistance and Support*

In addition to the development of permit streamlining techniques during the threshold evaluation period to address administrative capacity issues, EPA also plans to compile and make available technical and background information on GHG emission factors, control technologies, strategies and measurement and monitoring methodologies for key GHG source categories. This information will be particularly helpful to permitting authorities in making BACT determinations for GHG for sources that trigger PSD during the phase-in period. We plan to make the information available at such time as necessary to support permitting agencies in their BACT determinations (*e.g.*, on or before EPA completes an action that triggers PSD for GHGs). In addition, we will pursue using this information to develop presumptive BACT levels for selected source categories.

We intend to focus our support effort on the largest emitting GHG source categories, those that would likely exceed the temporary major source GHG threshold adopted as part of this action. At this time, we believe that power plants, petroleum refineries, pulp and paper mills, iron and steel facilities and portland cement plants are some of the source categories for which such information would initially prove most useful to permitting agencies. A key objective of this support effort will be to help permitting authorities find cost effective ways to achieve GHG controls under the BACT requirement. In addition, the information may be useful to permit applicants in preparing BACT analyses as well as providing other stakeholders with an understanding of how GHG emissions may be mitigated.

As an example, the information would include EPA's industrial energy management resources for energy intensive industries available through its ENERGY STAR program (*see http://www.energystar.gov/index.cfm?c=in_focus.bus_industries_focus*). We intend to work closely with stakeholders in developing the support effort and information. This will help assure that, to the extent possible, the information developed supports consistency and certainty in BACT determinations. In planning this effort, EPA seeks comment on the following: (1) Given time and resource constraints, which specific source categories or sectors, including emission units, should EPA prioritize, (2) what specific information (*e.g.*, emission factors, control technologies, collateral impacts, cost information, *etc.*) and what format would be most helpful to permitting agencies in carrying out the provisions of the PSD and title V programs as they would apply to GHGs, and (3) what other types of support or assistance can EPA provide to initially help air pollution control agencies with the permitting of GHGs?

## XI. Statutory and Executive Order Reviews

*A. Executive Order 12866—Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. 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 recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is provided in the docket for this action and the analysis is briefly summarized in section IX of this preamble.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. Instead, this proposed action would significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule. Based on our GHG threshold data analysis, we estimated that over 40,000 new and modified facilities per year would be subject to PSD review based on applying a GHG emissions threshold of 250 tpy using a $CO_2$e metric. This is compared to 280 PSD permits currently issued per year, which is an increase of more than 140-fold. Similarly, for title V, we estimated that over six million new sources would be affected at the 100-tpy threshold for GHGs using the $CO_2$e metric. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable without this rule. Despite this reduction of burden, the OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.*, 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336 respectively. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act*

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

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect, on all of the small entities subject to the rule.

We believe that this proposed action will relieve the regulatory burden associated with the major PSD and title V operating permits programs for new or modified major sources that emit GHGs, including small businesses. This is because the proposed action would raise major source applicability thresholds for these programs for sources that emit GHGs at rates below 25,000 tpy $CO_2$e. As a result, the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity.

We have therefore concluded that this proposed rule would relieve regulatory burden for a substantial number of small entities, and thus I certify that it will not have a significant economic impact on a substantial number of small entities. However, EPA recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning GHG emissions. Accordingly, EPA will use the discretion afforded to it under the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs. EPA is not required to consult in this manner when it has certified that a rule will not have a significant economic impact on a substantial number of small entities, but we believe that engaging in such consultation before finalization of this rule will help us to better understand and address the potential PSD regulatory concerns of small entities that might experience such impacts.

*D. Unfunded Mandates Reform Act*

This proposed action does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Although this proposed action would result in a small increase in the burden imposed upon permitting authorities by requiring States to revise their SIPs to incorporate the changes, the revisions would ultimately reduce the PSD and title V program administrative burden that would otherwise occur in the absence of this rulemaking. Thus, this proposed action is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. EPA has determined that this proposed action contains no regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. However, in developing this proposed action, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments. As stated in sections XI.E and F of this preamble, EPA consulted with State, local, and tribal officials early in the process of developing the proposed regulation to permit them to have timely and meaningful input into its development by publishing an ANPR (73 FR 44354, July 30, 2008) that included PSD GHG tailoring options for regulating GHGs under the CAA. As a result, EPA received comments from these entities and took them into consideration when developing this proposal.

*E. Executive Order 13132—Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. These proposed amendments would ultimately simplify and reduce the burden on State and local agencies associated with implementing the PSD and title V operating permits programs, by providing that a source whose GHG emissions are below the proposed levels will not have to obtain a PSD permit or

title V permit. Thus, Executive Order 13132 does not apply to this action.

Consistent with EPA policy, EPA nonetheless consulted with State and local officials early in the process of developing the proposed regulation to permit them to have meaningful and timely input into its development by publishing an advance notice of proposed rulemaking (ANPR) [73 FR 44354, July 30, 2008] that included PSD GHG tailoring options for regulating GHGs under the CAA. As a result of the ANPR, EPA received several comments from State and local government agencies on differing PSD GHG tailoring options presented in the ANPR which were considered in this proposal.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

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

Subject to the Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. There are no tribal authorities currently issuing major NSR permits; however, this may change in the future.

EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development by publishing an ANPR that included PSD GHG tailoring options for regulating GHGs under the CAA. [73 FR 44354, July 30, 2008]. As a result of the ANPR, EPA received several comments from tribal officials on differing PSD GHG tailoring options presented in the ANPR which were considered in this proposal.

Although Executive Order 13175 does not apply to this proposed rule, EPA specifically solicits additional comment on this proposed action from tribal officials.

*G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks*

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. We do not believe this action creates any environmental health or safety risks.

The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to GHGs.

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

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action will not create any new requirements for sources in the energy supply, distribution, or use sectors.

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

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629, 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 U.S.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because any impacts that it will have will be global in nature and will not affect local communities or populations in a manner that adversely affects the level of protection provided to human health or the environment.

*K. Determination Under Section 307(d)*

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

## XII. Statutory Authority

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

## List of Subjects

*40 CFR Part 51*

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

*40 CFR Part 52*

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

*40 CFR Part 70*

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons,

Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Dated: September 30, 2009.

**Lisa P. Jackson,**

*Administrator.*

For reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

## PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

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

## Subpart I—[Amended]

2. Section 51.166 is amended:

a. By revising paragraphs (b)(1)(i)(*a*), and (b)(1)(i)(*b*);

b. By adding paragraph (b)(1)(i)(*d*);

c. By revising paragraph (b)(23)(i); and

d. By adding paragraphs (b)(57) and (b)(58).

The revisions and additions read as follows:

### § 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(1)(i) * * *

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant (except for greenhouse gases (as defined under paragraph (b)(57) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated pollutant (except for greenhouse gases (as defined under paragraph (b)(57) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section); or

* * * * *

(*d*) Notwithstanding any provision to the contrary in this section, any stationary source which emits, or has the potential to emit, at least 25,000 tpy $CO_2$e of greenhouse gases, as defined under paragraph (b)(58) of this section.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions. 15 tpy of $PM_{10}$ emissions.

$PM_{2.5}$: 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under paragraph (b)(49) of this section

Ozone: 40 tpy of volatile organic compounds or nitrogen oxides

Lead: 0.6 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide ($H_2S$): 10 tpy

Total reduced sulfur (including $H_2S$): 10 tpy

Reduced sulfur compounds (including $H_2S$): 10 tpy

Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): $3.2 \times 10^{-6}$ megagrams per year ($3.5 \times 10^{-6}$ tpy)

Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tpy)

Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tpy)

Municipal solid waste landfill emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tpy)

Greenhouse gases: [10,000 to 25,000] $CO_2$e

* * * * *

(57) *Greenhouse gas,* or *GHG,* means carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), sulfur hexafluoride ($SF_6$), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

(58) *Carbon dioxide equivalent,* or *$CO_2$e,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The $CO_2$e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy $CO_2$e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

* * * * *

## PART 52—[AMENDED]

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

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

4. Section 52.21 is amended:

a. By revising paragraphs (b)(1)(i)(*a*) and (b)(1)(i)(*b*);

b. By adding paragraph (b)(1)(i)(*d*);

c. By revising paragraph (b)(23)(i); and

d. By adding paragraphs (b)(59) and (b)(60).

The revisions and additions read as follows:

### § 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(1)(i) * * *

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant (except for greenhouse gases (as defined under paragraph (b)(59) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning

plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant (except for greenhouse gases (as defined under paragraph (b)(59) of this section), except as provided under paragraph (b)(1)(i)(*d*) of this section); or

* * * * *

(*d*) Notwithstanding any provision to the contrary in this section, any stationary source of air pollutants which emits, or has the potential to emit, 25,000 tpy $CO_2e$ of greenhouse gases, as defined under paragraph (b)(60) of this section.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions
$PM_{10}$: 15 tpy
$PM_{2.5}$: 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under paragraph (b)(50) of this section
Ozone: 40 tpy of volatile organic compounds or nitrogen oxides
Lead: 0.6 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide ($H_2S$): 10 tpy
Total reduced sulfur (including $H_2S$): 10 tpy
Reduced sulfur compounds (including $H_2S$): 10 tpy
Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): $3.2 \times 10^{-6}$ megagrams per year ($3.5 \times 10^{-6}$ tpy)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tpy)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tpy)
Municipal solid waste landfill emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tpy)
Greenhouse gases: [10,000 to 25,000] $CO_2e$

* * * * *

(59) *Greenhouse gas,* or *GHG,* means carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), sulfur hexafluoride ($SF_6$), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

(60) *Carbon dioxide equivalent,* or *$CO_2e$,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The $CO_2e$ for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy $CO_2e$ can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

* * * * *

5. Section 52.53 is revised to read as follows:

**§ 52.53 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Alabama's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

6. Section 52.72 is revised to read as follows:

**§ 52.72 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Alaska's plan for the attainment and maintenance of the national standards. The State included in the plan a regulation prohibiting idling of unattended motor vehicles. However, the plan stated that this regulation was included for informational purposes only, and was not to be considered part of the control strategy to implement the national standards for carbon monoxide. Accordingly, this regulation is not considered a part of the applicable plan.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

7. Section 52.123 is amended by adding paragraph (l) to read as follows:

**§ 52.123 Approval status.**

* * * * *

(l)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

8. Section 52.172 is revised to read as follows:

**§ 52.172 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Arkansas' plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Further, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

9. Section 52.223 is amended by adding paragraph (f) to read as follows:

**§ 52.223 Approval status.**

* * * * *

(f)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

10. Section 52.323 is revised to read as follows:

**§ 52.323 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Colorado's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

11. Section 52.373 is amended by adding paragraph (c) to read as follows:

**§ 52.373 Approval status.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

12. Section 52.422 is amended by adding paragraph (c) to read as follows:

**§ 52.422 Approval status.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

13. Section 52.472 is amended by adding paragraph (g) to read as follows:

**§ 52.472 Approval status.**

* * * * *

(g)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

14. Section 52.522 is revised to read as follows:

**§ 52.522 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Florida's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D, for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for those sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

15. Section 52.572 is revised to read as follows:

**§ 52.572 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Georgia's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

16. Section 52.623 is revised to read as follows:

**§ 52.623 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Hawaii's plan for attainment and maintenance of the national standards. The State included various provisions in its plan to provide for the attainment of State ambient air quality standards. As described in the Governor's letters of January 28, May 8, and May 22, 1972, these provisions were included for information purposes only and were not to be considered a part of the plan to implement national standards. Accordingly, these additional provisions are not considered a part of the applicable plan.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

17. Section 52.673 is revised to read as follows:

**§ 52.673 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Idaho's plan for the attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

18. Section 52.722 is amended by adding paragraph (d) to read as follows:

**§ 52.722 Approval status.**

* * * * *

(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

19. Section 52.773 is amended by adding paragraph (k) to read as follows:

**§ 52.773 Approval status.**

* * * * *

(k)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as

significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

20. Section 52.822 is amended by adding paragraph (b) to read as follows:

**§ 52.822 Approval status.**

* * * * *

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

21. Section 52.873 is amended by adding paragraph (d) to read as follows:

**§ 52.873 Approval status.**

* * * * *

(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

22. Section 52.923 is amended by adding paragraph (c) to read as follows:

**§ 52.923 Approval status.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

23. Section 52.986 is amended by adding paragraph (c) to read as follows:

**§ 52.986 Significant deterioration of air quality.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

24. Section 52.1022 is revised to read as follows:

**§ 52.1022 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Maine's plan, as identified in § 52.1020, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

25. Section 52.1073 is amended by adding paragraph (h) to read as follows:

**§ 52.1073 Approval status.**

* * * * *

(h)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

26. Section 52.1123 is amended by adding paragraph (c) to read as follows:

**§ 52.1123 Approval status.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

27. Section 52.1172 is revised to read as follows:

**§ 52.1172 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Michigan's plan for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the

Administrator finds the plan satisfies all requirements of Part D, Title I of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

28. Section 52.1223 is revised to read as follows:

**§ 52.1223 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Minnesota's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

29. Section 52.1272 is revised to read as follows:

**§ 52.1272 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Mississippi's plan for the attainment and maintenance of national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

30. Section 52.1323 is amended by adding paragraph (n) to read as follows:

**§ 52.1323 Approval status.**

* * * * *

(n)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

31. Section 52.1372 is revised to read as follows:

**§ 52.1372 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Montana's plans for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

32. Section 52.1422 is revised to read as follows:

**§ 52.1422 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Nebraska's plan for the attainment and maintenance of the national standards. No action is taken on the new source review regulations to comply with section 172(b)(6) and section 173 of the Clean Air Act as amended in 1977, and 40 CFR 51.18(j).

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

33. Section 52.1472 is amended by adding paragraph (d) to read as follows:

**§ 52.1472 Approval status.**

* * * * *

(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

34. Section 52.1522 is amended by adding paragraph (c) to read as follows:

**§ 52.1522 Approval status.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

35. Section 52.1573 is revised to read as follows:

**§ 52.1573 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves New Jersey's plans for attainment and maintenance of the national ambient air quality standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below in § 52.1581. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

36. Section 52.1622 is revised to read as follows:

**§ 52.1622 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves New Mexico's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Further, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

37. Section 52.1673 is amended by adding paragraph (b) to read as follows:

**§ 52.1673 Approval status.**

* * * * *

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

38. Section 52.1772 is amended by adding paragraph (c) to read as follows:

**§ 52.1772 Approval status.**

* * * * *

(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

39. Section 52.1822 is revised to read as follows:

**§ 52.1822 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves the North Dakota plan for the attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed

25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

40. Section 52.1873 is revised to read as follows:

**§ 52.1873 Approval status.**

(a) With the exceptions set forth in this subpart the Administrator approves Ohio's plan for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all the requirements of Part D, Title 1 of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by January 1, 1981 for the sources covered by CTGs between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

41. Section 52.1922 is revised to read as follows:

**§ 52.1922 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Oklahoma's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

42. Section 52.1972 is revised to read as follows:

**§ 52.1972 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Oregon's plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

43. Section 52.2023 is amended by adding paragraph (l) to read as follows:

**§ 52.2023 Approval status.**

* * * * *

(l)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

44. Section 52.2072 is revised to read as follows:

**§ 52.2072 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Rhode Island's plan, as identified in § 52.2070 of this subpart, for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by January 1, 1981 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January as additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

45. Section 52.2122 is amended by adding paragraph (c) to read as follows:

**§ 52.2122 Approval status.**

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(c)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

46. Section 52.2172 is revised to read as follows:

**§ 52.2172 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves South Dakota's plan as meeting the requirements of section 110 of the Clean Air Act, as amended in 1977. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D of the Clean Air Act, as amended in 1977.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

47. Section 52.2222 is amended by adding paragraph (d) to read as follows:

**§ 52.2222 Approval status.**

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(d)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

48. Section 52.2273 is revised to read as follows:

**§ 52.2273 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Texas' plan for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

49. Section 52.2323 is revised to read as follows:

**§ 52.2323 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Utah's plan as meeting the requirements of section 110 of the Clean Air Act as amended in 1977. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title 1, of the Clean Air Act as amended in 1977, except as noted below.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

50. Section 52.2372 is revised to read as follows:

**§ 52.2372 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Vermont's plan as identified in § 52.2370 for the attainment and maintenance of the national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January, 1978 and January, 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

51. Section 52.2423 is amended by adding paragraph (t) to read as follows:

**§ 52.2423 Approval status.**

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(t)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

52. Section 52.2473 is revised to read as follows:

**§ 52.2473 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Washington's plan for the attainment and maintenance of National Standards under section 110 of the Clean Air Act. The regulations included in the SIP (see Table 52.2479) are applicable statewide unless otherwise noted in the regulation itself. Furthermore, the Administrator finds that the plan as identified in § 52.2470 satisfies requirements of Part D, Title 1, of the Clean Air act as amended in 1977, except as noted in the following sections. Continued satisfaction of the requirements of Part D for the ozone portion of the SIP depends on the adoption and submittal of RACT requirements by July 1, 1980 for the sources covered by CTGs issued between January 1978 and January 1979 and adoption and submittal by each subsequent January of additional RACT requirements for sources covered by CTGs issued by the previous January. New source review permits pursuant to section 173 of CAA will not be deemed valid by EPA unless the provisions of section V of the emission offset interpretive rule published on January 16, 1979 (44 FR 3274) are met.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

53. Section 52.2522 is amended by adding paragraph (j) to read as follows:

**§ 52.2522 Approval status.**

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(j)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

54. Section 52.2572 is revised to read as follows:

**§ 52.2572 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Wisconsin's plans for the attainment and maintenance of the National Ambient Air Quality Standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds the plans satisfy all requirements of Part D, Title I, of the Clean Air Act as amended in 1977, except as noted below. In addition, continued satisfaction of the requirements of Part D for the Ozone portion of the State Implementation Plan depends on the adoption and submittal of RACT requirements on:

(1) Group III Control Techniques Guideline sources within 1 year after January 1st following the issuance of each Group III control technique guideline; and

(2) Major (actual emissions equal or greater than 100 tons VOC per year) non-control technique guideline sources in accordance with the State's schedule contained in the 1982 Ozone SIP revision for Southeastern Wisconsin.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

55. Section 52.2622 is revised to read as follows:

**§ 52.2622 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Wyoming's plans as meeting the requirements of section 110 of the Clean Air Act, as amended in 1977. Furthermore, the Administrator finds that the plans satisfy the requirements of Part D, Title I, of the Clean Air Act.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2$e. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2$e.

56. Section 52.2672 is revised to read as follows:

**§ 52.2672 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Guam's plan for the attainment and maintenance of the National Standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of

GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

57. Section 52.2722 is revised to read as follows:

**§ 52.2722 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves Puerto Rico's plans for the attainment and maintenance of national standards under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all requirements of Part D, Title I, of the Clean Air Act, as amended in 1977.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

58. Section 52.2772 is revised to read as follows:

**§ 52.2772 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves the U.S. Virgin Islands plan for attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

59. Section 52.2822 is revised to read as follows:

**§ 52.2822 Approval status.**

(a) With the exceptions set forth in this subpart, the Administrator approves American Samoa's plan for the attainment and maintenance of the national standards.

(b)(1) Insofar as the PSD permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they subject to PSD requirements sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on the PSD permitting threshold provisions to the extent they subject to PSD requirements sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

(2) Insofar as the PSD significance levels concern sources of GHG emissions, EPA limits its approval of such provisions to the extent those provisions treat as significant GHG emissions increases that equal or exceed [10,000 to 25,000] tpy $CO_2e$. EPA takes no action on the PSD significance level provisions to the extent they treat as significant GHG emissions increases less than [10,000 to 25,000] tpy $CO_2e$.

## PART 70—[AMENDED]

60. The authority citation for part 70 continues to read as follows:

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

61. Section 70.2 is amended to read as follows:

a. By adding definitions in alphabetical order for *carbon dioxide equivalent* and *greenhouse gas;*

b. By revising paragraph (2) of the definition for *major source;* and

c. By adding paragraph (4) to the definition for *major source.*

**§ 70.2 Definitions.**

* * * * *

*Carbon dioxide equivalent,* or *$CO_2e$,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The $CO_2e$ for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy $CO_2e$ can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

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*Greenhouse gas,* or *GHG,* means carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), sulfur hexafluoride ($SF_6$), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

* * * * *

Major source * * *

(2) A major stationary source of air pollutants (except for greenhouse gases, except as otherwise provided in this section) as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

* * * * *

(4) A stationary source that directly emits, or has the potential to emit, 25,000 tpy $CO_2e$ or more of greenhouse gases that are subject to regulation under the Act.

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62. Appendix A to Part 70 is amended as follows:

a. By revising the introductory text;

b. By adding paragraph (d) under Alabama;

c. By adding paragraph (c) under Alaska;

d. By adding paragraph (e) under Arizona;

e. By adding paragraph (d) under Arkansas;

f. By adding paragraph (jj) under California;

g. By adding paragraph (c) under Colorado;

h. By adding paragraph (c) under Connecticut;

i. By adding paragraph (d) under Delaware;

j. By adding paragraph (d) under District of Columbia;

k. By adding paragraph (c) under Florida;

l. By adding paragraph (c) under Georgia;

m. By adding paragraph (d) under Hawaii;

n. By adding paragraph (c) under Idaho;

o. By adding paragraph (c) under Illinois;

p. By adding paragraph (d) under Indiana;

q. By adding paragraph (k) under Iowa;

r. By adding paragraph (e) under Kansas;

s. By adding paragraph (c) under Kentucky;

t. By adding paragraph (c) under Louisiana;

u. By adding paragraph (c) under Maine;

v. By adding paragraph (d) under Maryland;

w. By adding paragraph (c) under Massachusetts;

x. By adding paragraph (c) under Michigan;

y. By adding paragraph (d) under Minnesota;

z. By adding paragraph (c) under Mississippi;

aa. By adding paragraph (x) under Missouri;

bb. By adding paragraph (c) under Montana;

cc. By adding paragraph (j) under Nebraska, City of Omaha, Lincoln-Lancaster County Health Department;

dd. By adding paragraph (d) under Nevada;

ee. By adding paragraph (c) under New Hampshire;

ff. By adding paragraph (e) under New Jersey;

gg. By adding paragraph (g) under New Mexico;

hh. By adding paragraph (e) under New York;

ii. By adding paragraph (e) under North Carolina;

jj. By adding paragraph (d) under North Dakota;

kk. By adding paragraph (d) under Ohio;

ll. By adding paragraph (c) under Oklahoma;

mm. By adding paragraph (c) under Oregon;

nn. By adding paragraph (c) under Pennsylvania;

oo. By adding paragraph (c) under Puerto Rico;

pp. By adding paragraph (c) under South Carolina;

qq. By adding paragraph (c) under Rhode Island;

rr. By adding paragraph (c) under South Dakota;

ss. By adding paragraph (f) under Tennessee;

tt. By adding paragraph (d) under Texas;

uu. By adding paragraph (c) under Utah;

vv. By adding paragraph (c) under Vermont;

ww. By adding paragraph (c) under the Virgin Islands;

xx. By adding paragraph (c) under Virginia;

yy. By adding paragraph (j) under Washington;

zz. By adding paragraph (f) under West Virginia;

aaa. By adding paragraph (c) under Wisconsin; and

bbb. By adding paragraph (c) under Wyoming.

## Appendix A to Part 70—Approval of State and Local Operating Permits

This appendix provides information on the approval status of State and Local operating Permit Programs. An approved State part 70 program applies to all part 70 sources, as defined in that approved program, within such State, except for any source of air pollution over which a federally recognized Indian Tribe has jurisdiction. EPA limits its approval of the State permitting threshold provisions to the extent those provisions require permits for sources of GHG emissions that equal or exceed 100 tpy $CO_2e$.

Alabama

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Alaska

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Arizona

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Arkansas

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

California

* * * * *

(jj) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Colorado

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Connecticut

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Delaware

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

District of Columbia

* * * * *

(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Florida

* * * * *

(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Georgia

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits

for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Hawaii

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Idaho

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Illinois

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Indiana

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Iowa

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(k) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Kansas

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Kentucky

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Louisiana

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Maine

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Maryland

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Massachusetts

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Michigan

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Minnesota

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Mississippi

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Missouri

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(x) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Montana

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Nebraska; City of Omaha; Lincoln-Lancaster County Health Department

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(j) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Nevada

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(d) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

New Hampshire

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New Jersey

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(e) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

New Mexico

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(g) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

New York

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North Carolina

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North Dakota

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Ohio

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Oklahoma

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Oregon

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Pennsylvania

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Puerto Rico

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Rhode Island

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

South Carolina

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

South Dakota

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Tennessee

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(f) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Texas

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Utah

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Vermont

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Virgin Islands

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Virginia

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(c) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2e$. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2e$.

Washington

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(j) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits

for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

West Virginia

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(f) Insofar as the State permitting threshold provisions concern sources of GHG emissions, EPA limits its approval of such provisions to the extent they require permits for sources of GHG emissions that equal or exceed 25,000 tpy $CO_2$e. EPA takes no action on such provisions to the extent they require permits for sources of GHG emissions that are less than 25,000 tpy $CO_2$e.

Wisconsin

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Wyoming

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## PART 71—[AMENDED]

63. The authority citation for part 71 continues to read as follows:

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

64. Section 71.2 is amended to follows:

a. By adding definitions in alphabetical order for *carbon dioxide equivalent* and *greenhouse gas;*

b. By revising paragraph (2) of the definition for *major source;* and

c. By adding paragraph (4) to the definition for *major source.*

### § 71.2 Definitions.

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*Carbon dioxide equivalent,* or *$CO_2$*e, means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The $CO_2$e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy $CO_2$e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

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*Greenhouse gas,* or *GHG,* means carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), sulfur hexafluoride ($SF_6$), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

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*Major source* * * *

(2) A major stationary source of air pollutants (except for greenhouse gases, except as otherwise provided in this section), as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

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(4) A stationary source that directly emits, or has the potential to emit, 25,000 tpy $CO_2$e or more of greenhouse gases that are subject to regulation under the Act.

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[FR Doc. E9–24163 Filed 10–23–09; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Tuesday,
October 27, 2009

# Part III

# Department of Commerce

## National Oceanic and Atmospheric Administration

## Small Takes of Marine Mammals Incidental to Specified Activities; Open-water Marine Survey Program in the Chukchi Sea, Alaska, During 2009–2010; Notice

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XP00**

### Small Takes of Marine Mammals Incidental to Specified Activities; Open-water Marine Survey Program in the Chukchi Sea, Alaska, During 2009–2010

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

**ACTION:** Notice; issuance of an incidental take authorization.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Shell Offshore Inc. and Shell Gulf of Mexico Inc., collectively known as Shell, to take, by harassment, small numbers of 12 species of marine mammals incidental to an open-water marine survey program, which includes shallow hazards and site clearance work and strudel scour surveys, in the Chukchi Sea, Alaska, during the 2009/2010 Arctic open-water season.

**DATES:** Effective August 19, 2009, through August 18, 2010.

**ADDRESSES:** A copy of the application containing a list of the references used in this document, two addenda to the application, NMFS' Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), and the IHA may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

**SUPPLEMENTARY INFORMATION:**

## Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''... an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorization for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

## Summary of Request

On December 15, 2008, NMFS received an application from Shell for the taking, by Level B harassment only, of small numbers of several species of marine mammals incidental to conducting an open-water marine survey program during the 2009/2010 Arctic open-water season in the Chukchi Sea. Shell plans to conduct site clearance and shallow hazards surveys and a strudel scour survey in the Chukchi Sea. These surveys are a continuation of those conducted by Shell in the Chukchi Sea in 2008. Shell's December 2008, application also requested MMPA coverage for site clearance and shallow hazards surveys, an ice gouge survey, and a strudel scour survey in the Beaufort Sea and an ice gouge survey in the Chukchi Sea for the 2009/2010 season. However, in an addendum to the IHA application submitted to NMFS on March 10, 2009, Shell indicated that it cancelled all survey programs for the Beaufort Sea and the ice gouge survey for the Chukchi Sea in 2009. Shell submitted a second application addendum on May 19, 2009, indicating that Shell will utilize an array of 4 x 10 $in^3$ guns (40 $in^3$ total discharge volume) instead of the 2 x 10 $in^3$ array (20 $in^3$ total discharge volume).

Site clearance and shallow hazards surveys will evaluate the seafloor and shallow sub-seafloor at prospective exploration drilling locations, focusing on the depth to seafloor, topography, the potential for shallow faults or gas zones, and the presence of archaeological features. The types of equipment used to conduct these surveys use low level energy sources focused on limited areas in order to characterize the footprint of the seafloor and shallow sub-seafloor at prospective drilling locations.

## Description of the Specified Activity

### *Chukchi Site Clearance and Shallow Hazards Surveys*

Site clearance and shallow hazards surveys of potential proposed locations for exploration drilling will be executed as required by the Minerals Management Service's (MMS) regulations. These surveys gather data on: (1) bathymetry; (2) seabed topography and other seabed characteristics (e.g., boulder patches); (3) potential geohazards (e.g., shallow faults and shallow gas zones); and (4) the presence of any archeological features (e.g., shipwrecks). Site clearance and shallow hazards surveys can be accomplished by one vessel with acoustic sources. A detailed overview of the activities of this survey was provided in the Notice of Proposed IHA (74 FR 26217, June 1, 2009). Since publication of that notice, Shell updated two pieces of information. First, the *R/V Mt. Mitchell* will be utilized as the source vessel for the site clearance and shallow hazards surveys. The *R/V Mt. Mitchell* is a diesel powered vessel, 70 m (231 ft) long, 12.7 m (42 ft) wide, with a 4.5 m (15 ft) draft. Second, the specific prospects within Outer Continental Shelf (OCS) Lease Sale (LS) 193 have been identified. Shell will conduct the surveys at the Burger and Crackerjack prospects and, if time and weather conditions permit, at SW Shoebill. Additional information is also

contained in Shell's application and application addenda, which are available for review (see **ADDRESSES**).

*Chukchi Strudel Scour Survey*

During the early melt, the rivers begin to flow and discharge water over the coastal sea ice near the river deltas. That water rushes down holes in the ice (''strudels'') and scours the seafloor. These erosional areas are called ''strudel scours''. Information on these features is required for prospective pipeline planning. Two proposed activities are required to gather this information: aerial survey via helicopter overflights during the melt to locate the strudels and strudel scour marine surveys to gather bathymetric data. Additional information was provided in the Notice of Proposed IHA (74 FR 26217, June 1, 2009) and Shell's application (see **ADDRESSES**).

**Comments and Responses**

A notice of receipt of Shell's MMPA application and NMFS' proposal to issue an IHA to Shell published in the **Federal Register** on June 1, 2009 (74 FR 26217). That notice described, in detail, Shell's proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30–day public comment period, NMFS received six comment letters from the following: the Marine Mammal Commission (MMC); Ocean Conservancy and Oceana; the Alaska Eskimo Whaling Commission (AEWC); the Inupiat Community of the Arctic Slope (ICAS); the North Slope Borough (NSB) Office of the Mayor and NSB Department of Wildlife Management (collectively ''NSB''); and Alaska Wilderness League (AWL), Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Natural Resources Defense Council, Northern Alaska Environmental Center, Pacific Environment, Sierra Club, The Wilderness Society, and World Wildlife Fund (collectively ''AWL''), along with an attached letter from David E. Bain, Ph.D.

Both AEWC and NSB submitted several journal articles as attachments to their comment letters. NMFS acknowledges receipt of these documents but does not intend to address the specific articles themselves in the responses to comments. AEWC also submitted an unsigned, final version of the 2009 Conflict Avoidance Agreement (CAA). However, Shell signed the CAA on June 24, 2009. Some of NSB's comments were specific to the application and do not have a bearing on NMFS' determinations for issuing an IHA. For example, NSB pointed out that Figure 1 in Shell's application failed to identify the Alaska Maritime National Wildlife Refuge north of Point Lay and asked that the figure be revised. Those comments have been passed on to Shell for consideration in future IHA applications. Any application specific comments that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice. Additionally, some of NSB's comments concerned the Beaufort Sea operations or ice gouge surveys. As noted above and in the Notice of Proposed IHA (74 FR 26217, June 1, 2009), Shell notified NMFS that it did not intend to conduct these activities; therefore, no marine mammals will be taken. Comments on the Beaufort operations and Chukchi ice gouge survey are not addressed in this document.

*General Comments*

*Comment 1:* AWL believes that NMFS should not issue incidental take authorizations for oil and gas-related seismic surveying until NMFS and other agencies complete a comprehensive review of both the industrial activities and the marine resources of the Arctic. This review should ensure that critical information gaps relating to the Arctic are filled and that decisions made about Arctic activities are made in the context of a comprehensive plan for the region. In the interim, NMFS should not facilitate further potentially harmful seismic activity.

*Response:* In order to issue an authorization pursuant to Section 101(a)(5)(D) of the MMPA, NMFS must determine that the authorized activity will take only small numbers of marine mammals, will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on affected species or stocks for subsistence uses. If NMFS is able to make these findings, the Secretary is required to issue an IHA. In the case of Shell's activities for 2009/2010 (as described in the application, the Notice of Proposed IHA (74 FR 26217, June 1, 2009) and this document), NMFS determined that the authorized activity met the requirements of Section 101(a)(5)(D) of the MMPA. Additionally, as described later in this section and throughout this document, NMFS has determined that Shell's activities will not result in injury or mortality of marine mammals.

*Comment 2:* AWL, ICAS, and Ocean Conservancy and Oceana note that Shell's activities will occur on leases that were acquired in OCS LS 193, which was conducted pursuant to MMS' 2007–2012 Five-Year Leasing Program. This leasing program is part of on-going litigation. NMFS should not issue IHAs for activities on these leases until the litigation is resolved.

*Response:* NMFS is aware of the litigation in the U.S. Court of Appeals for the D.C. Circuit, but we disagree with the commenter's assertion that NMFS should not issue IHAs for activities on these leases until the litigation is resolved. Although the court issued an opinion vacating and remanding the 5–yr lease program to MMS, it also issued an order (on July 28, 2009) staying its mandate. MMS informed the court that it would complete remand proceedings as soon as possible and that, in the meantime, it would continue to review and act upon exploration plans for Chukchi Sea leases. MMS stated, however, that it would suspend activities under any approved plan pending the Secretary of the Interior's reconsideration decision on the remanded program, thereby halting all but data gathering ancillary activities on Chukchi Sea leases. Shell's 2009 operations are unaffected by the litigation because they are data gathering ancillary activities. Therefore, NMFS has concluded it was appropriate to issue an IHA to Shell for its 2009 seismic operations.

*Comment 3:* ICAS points out that Native communities in Alaska have long been ignored in the race to find and develop offshore oil and gas resources and that the U.S. Government has consistently failed to comply with legal requirements that require consultation with local Native communities as proposals are being developed that affect native environments. Instead, both Federal agencies and the entities they permit make only token gestures at consultations with Native groups offering them only the opportunity for involvement after proposals are developed and after local knowledge would serve a useful purpose.

*Response:* Regulations at 50 CFR 216.104(a)(12) require applicants for IHAs in Arctic waters to submit a Plan of Cooperation (POC), which, among other things, requires the applicant to meet with affected subsistence communities to discuss the proposed activities. Additionally, for many years, NMFS has conducted the Arctic Open-water Meeting, which brings together the Federal agencies, the oil and gas industry, and affected Alaska Native organizations to discuss the proposed activities and monitoring plans. Local knowledge is considered at these times, and it is not too late for that knowledge to serve a useful purpose.

*Comment 4:* Executive Order 13175 requires Federal agencies to conduct government-to-government consultation when undertaking to formulate and implement policies that have tribal implications. Despite this explicit requirement, ICAS believes that NMFS has failed to consult with governing bodies of Native people who will be and have been affected by the decisions NMFS is making under the MMPA. NMFS must meet with ICAS and local Native villages on a government-to-government basis to discuss the proposed IHA, as well as appropriate mitigation and monitoring requirements.

*Response:* NMFS recognizes the importance of the government-to-government relations and has taken steps to ensure that Alaska Natives play an active role in the management of Arctic species. For example, NOAA and the AEWC co-manage bowhead whales pursuant to a cooperative agreement. This agreement has allowed the AEWC to play a significant role in the management of a valuable resource by affording Alaska Natives the opportunity to protect bowhead whales and the Eskimo culture and to promote scientific investigation, among other purposes.

In addition, NMFS works closely with Alaska Natives when considering whether to permit the take of marine mammals incidental to oil and gas operations. NMFS has met repeatedly over the years with Alaska Native representatives to discuss concerns related to NMFS' MMPA program in the Arctic, and has also taken into account recommended mitigation measures to reduce the impact of oil and gas operations on bowhead whales and to ensure the availability of marine mammals for taking for subsistence uses. Finally, NMFS has participated in Alaska Native community meetings in the past and will continue to do so, when feasible. NMFS will continue to ensure that it meets its government-to-government responsibilities and will work closely with Alaska Natives to address their concerns.

*Comment 5:* Ocean Conservancy and Oceana believe that Shell's activities could substantially affect marine mammals in an area already impacted by climate change and particularly vulnerable to ocean acidification. Approving an IHA in these circumstances would be contrary to NMFS' responsibilities under the law.

*Response:* NMFS believes that it has made all of the necessary determinations in order to issue an IHA pursuant to Section 101(a)(5)(D) of the MMPA. NMFS has determined that Shell's activities will affect only small numbers of marine mammals, will have a negligible impact on the affected species and stocks, and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence purposes, provided the mitigation measures described later in this document are implemented. NMFS completed an EA to analyze the impacts of cumulative activities on the affected species in the action area, including climate change.

*Comment 6:* AEWC and NSB expressed three concerns with the timing of IHA applications. First, they ask that only one authorization be issued per calendar year or per operating season for work associated with a specific project. Secondly, NMFS should ensure that IHA applications are submitted at least 1 month prior to the April Open-water Meeting or comparable peer review meetings that may ultimately replace such meetings. This will allow Native communities to receive draft POCs and proposed mitigation measures sufficiently in advance of these meetings to allow for meaningful discussion of any identified major flaws, evaluation of suggested improvements that draw upon our particular local expertise, and consideration of appropriate peer reviewers. Lastly, they request that NMFS change the expiration date for authorizations so that a single calendar year is authorized rather than activities in the latter part of one calendar year and the early part of the following year.

*Response:* Regarding the first and third points, Section 101(a)(5)(D) of the MMPA allows NMFS to issue IHAs ''for periods of not more than 1 year.'' There is no requirement that the period of effectiveness of an IHA fall within 1 calendar year or operating season. In instances where the period of effectiveness of an IHA would cover more than one operating season (i.e., there is considerable downtime between the start and finish of the operations), NMFS analyzes impacts for the entire extent of the operations when issuing the IHA. Regarding the second point about distribution of applications, NMFS cannot guarantee that all applications will be submitted to NMFS at least 1 month prior to the meeting. NMFS has a unique relationship with AEWC pursuant to a cooperative agreement. Pursuant to this agreement, NOAA is required to consult with AEWC on any action undertaken or proposed to be undertaken that may affect the bowhead whale and/or subsistence whaling. To that end, NMFS will make every effort to provide the AEWC with as much information as possible prior to the Open-water Meeting or comparable peer review meeting. However, it is NMFS' practice not to release applications for MMPA authorizations until NMFS deems them complete and a proposed IHA notice or notice of receipt of an application for rulemaking has published in the **Federal Register**.

*Comment 7:* NSB notes that Shell's application indicates that several vessels will be involved in the 2009–2010 period, involving various transit routes that are to be used to reach the Arctic survey sites. There is an absence of discussion of impacts and ''takes'' that may occur upon these transit routes. Shell needs to consider and state the impacts sufficiently. Additionally, Shell should consider other stocks of belugas beyond the Beaufort and Chukchi sea stocks, as impacts may occur in Bristol Bay during ship transit.

*Response:* As has been stated in several **Federal Register** notices in the past, normal shipping and transit operations do not rise to a level requiring an authorization under the MMPA. To require IHAs and Letters of Authorization (LOAs) for standard shipping would reduce the ability of NMFS to review activities that have a potential to cause harm to marine mammal populations. For example, in the Arctic Ocean, NMFS would need to issue authorizations for barging operations that supply the North Slope villages in addition to various onshore and offshore oil and gas projects. However, on this matter, Shell will (in keeping with the CAA signed by Shell) follow transit routes contained in the CAA to avoid conflicts with subsistence hunters.

*Comment 8:* NSB states that NMFS should not issue Shell an IHA for the strudel scour surveys in 2010, as they are substantially different from the shallow hazards and site clearance surveys. Additionally, it is not clear what other activities might be occurring in 2010, so it is not possible to evaluate the potential cumulative impacts from multiple activities that might occur in 2010. If NMFS does issue Shell an IHA for that survey, estimated takes and monitoring are needed. Additional information is needed from Shell about the possible impacts to marine mammals, monitoring plans, and mitigation measures from helicopter surveys over the sea ice. NMFS needs to make this additional information available to the public and decision makers for review and comment before it issues an IHA to Shell for strudel scour surveys in 2010. NSB also notes that the number of days of operation for

the strudel scour surveys is not consistent throughout the application.

*Response:* The activities for the strudel scour survey are described in Shell's application and the proposed IHA in order to describe the full scale of Shell's operations. However, NMFS has determined that the activities for the strudel scour survey will not result in take of marine mammals. While the sonar equipment proposed to be used for this project generates high sound energy, the equipment operates at frequencies (>100 kHz) beyond the effective hearing range of most marine mammals likely to be encountered during strudel scour operations. Given the direct downward beam pattern of these sonar systems coupled with the high-frequency characteristics of the signals, the horizontal received levels of 180 and 190 dB re 1 μPa (rms) would be much smaller when compared to those from the low-frequency airguns with similar source levels. Therefore, NMFS has determined that marine mammals will not have a significant behavioral response (i.e., a ''take'') to the strudel scour surveys. However, Shell needs to coordinate these activities with the Native Alaskan communities to ensure that there is no unmitigable adverse impact to subsistence hunts. As described in the application, two separate activities will occur to complete the strudel scour surveys: helicopter overflights and marine vessel work. The overflights will take approximately 4 days to complete and will occur in mid-May or early June. The marine vessel portion of the survey will take approximately 10 days to complete and will occur sometime in July or early to mid-August.

*Comment 9:* NSB incorporated by reference a December 18, 2008, letter sent to the Acting Assistant Administrator for Fisheries, as well as NMFS' February 19, 2009, response, asking for suspension and review of Shell's 2008–2009 IHA, wherein Shell was allowed to proceed with seismic activities despite what was acknowledged by NMFS to be a potentially flawed survey design. At that time, NSB asked that no more IHAs be issued until compliance with the MMPA could be demonstrated. Based on NSB's review of NMFS' current proposed IHA, NSB does not see a demonstration of compliance and thus does not support issuance of an IHA at this time.

*Response:* As was stated in NMFS' February letter responding to NSB's concerns, NMFS determined that Shell was in substantial compliance with their IHA during the 2008 seismic survey season. No additional information has been provided to NMFS to indicate that Shell was not in compliance with the IHA. Additionally, NMFS believes that Shell will comply with the monitoring and mitigation measures required in the 2009 IHA.

*MMPA Concerns*

*Comment 10:* AWL, NSB, and AEWC state that NMFS cannot issue an IHA or a LOA (because NMFS has not promulgated regulations for mortality by seismic activities) to Shell for its activities since they carry the potential for serious injury or death to marine mammals. AEWC also believes that because Level A harassment is possible, an LOA is needed.

*Response:* Section 101(a)(5)(D) of the MMPA authorizes Level A (injury) harassment and Level B (behavioral) harassment takes. While NMFS' regulations indicate that a LOA must be issued if there is a potential for serious injury or mortality, NMFS does not believe that Shell's surveys will result in serious injury or mortality, thus obviating the need for a LOA. As explained throughout this **Federal Register** Notice, it is highly unlikely that marine mammals would be exposed to sound pressure levels (SPLs) that could result in serious injury or mortality. The best scientific information indicates that an auditory injury is unlikely to occur as apparently sounds need to be significantly greater than 180 dB for injury to occur (Southall *et al.*, 2007). Based on the analysis contained in the ''Potential Effects of Survey Activities on Marine Mammals'' section in the Notice of Proposed IHA (74 FR 26217, June 1, 2009), NMFS has determined that an IHA can lawfully be issued to Shell for their activities since the already unlikely potential for serious injury or mortality will be reduced even further through the incorporation of the mitigation and monitoring measures described later in this document and required by the IHA.

*Comment 11:* AEWC notes their disappointment in NMFS for releasing for public comment an incomplete application from Shell that fails to provide the mandatory information required by the MMPA and NMFS' implementing regulations. AEWC requests that NMFS return Shell's application as incomplete, or else the agency risks making arbitrary and indefensible determinations under the MMPA. The following is the information that AEWC believes to be missing from Shell's application: (1) a POC ''or information that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses'' (50 CFR 216.104(a)(12)); (2) a scheduled meeting ''with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts'' (50 CFR 216.104(a)(12)(ii)); (3) a ''description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing'' (50 CFR 216.104(a)(12)(iii)); (4) suggested means of learning of, encouraging, and coordinating any research related activities (50 CFR 216.104(a)(14)); (5) a description of the specified activities and specified geographic region (16 U.S.C. 1371(a)(5)(D)(i)); and (6) a description of the ''age, sex, and reproductive condition'' of the marine mammals that will be impacted (50 CFR 216.104(a)(6)). AWL and NSB also note their concern about the lack of specificity regarding the timing and location of the site clearance and shallow hazards and strudel scour surveys.

*Response:* NMFS does not agree that it released an incomplete application for review during the public comment period. After NMFS' initial review of the application, NMFS submitted questions and comments to Shell on its application. After receipt and review of Shell's responses, which were submitted as an addendum to the original application, NMFS made its determination of completeness and released the application, addenda, and the proposed IHA notice (74 FR 26217, June 1, 2009). Regarding the six specific pieces of information believed to be missing by AEWC, Shell's original application included a description of the pieces of information that are required pursuant to 50 CFR 216.104(a)(12). The application noted that Shell was planning to meet with subsistence communities in 2009 and described measures to ensure that the applicant's proposed activities will not interfere with subsistence whaling or sealing. The proposed IHA notice (74 FR 26217, June 1, 2009) also noted meetings that had already taken place in the villages of Barrow, Point Hope, Point Lay, Wainwright, and Kotzebue. Moreover, on May 15, 2009, Shell distributed its draft POC for the 2009 activities to NMFS, other government agencies, and affected stakeholder communities.

Information required pursuant to 50 CFR 216.104(a)(14) was also included in Shell's application. Shell provided a list of researchers who could potentially receive results of their research activities who may find the data useful in their own research. Additionally, Shell and ConocoPhillips will be

working together in 2009 to deploy an intensive array of acoustic recorders around both the Burger and Klondike prospects in the Chukchi Sea.

NMFS also determined that Shell's application provides descriptions of the specified activities and specified geographic region. NMFS defines ''specified geographical region'' as ''an area within which a specified activity is conducted and which has certain biogeographic characteristics'' (50 CFR 216.103). In regard to how specific one must be to define a ''specific geographic region'' within which the activity would take place, House Report 97–228 states:

> The specified geographic region should not be larger than is necessary to accomplish the specified activity, and should be drawn in such a way that the effects on marine mammals in the region are substantially the same. Thus, for example, it would be inappropriate to identify the entire Pacific coast of the North American continent as a specified geographic region, but it may be appropriate to identify particular segments of that coast having similar characteristics, both biological and otherwise, as specified geographical regions.

NMFS believes that the U.S. Chukchi Sea meets Congressional intent and NMFS' definition because the region has similar geographic, physiographic (e.g., topography, temperature, sea ice), biologic (e.g., marine fauna (fish and marine mammals)), and sociocultural characteristics. Shell's application noted that the applicant would conduct activities on some of its prospects gained during LS 193, which itself is considered a ''specified geographic region.'' Since that time, Shell has informed NMFS of the specific areas within the lease holdings on which Shell intends to conduct the site clearance and shallow hazards surveys. They are the Burger and Crackerjack prospects, as well as SW Shoebill if time and weather conditions allow. At this time, more specificity on the location of the in-water portion of the strudel scour surveys cannot be provided. Until areas with strudel scour are revealed during helicopter overflights, it is uncertain the exact location along the Chukchi Sea coast where marine vessel operations will occur. However, as previously mentioned, the Chukchi Sea itself is considered a ''specified geographic region.'' Shell also provided a description of the types of equipment that would be used and time frame for conducting its activities. Therefore, NMFS believes that Shell's description of the activity and the locations for conducting their surveys meet the requirements of the MMPA.

Lastly, 50 CFR 216.104(a)(6) requires that an applicant submit information on the ''age, sex, and reproductive condition (*if possible*)'' (emphasis added) of the number of marine mammals that may be taken. In the application, Shell described the species expected to be taken by harassment and provided estimates of how many of each species were expected to be taken during their activities. In most cases, it is very difficult to estimate how many animals, especially cetaceans, of each age, sex, and reproductive condition will be taken or impacted by seismic or site clearance and shallow hazards surveys. In conclusion, NMFS believes that Shell provided all of the necessary information to proceed with publishing a proposed IHA notice in the **Federal Register**.

*Comment 12:* AEWC and NSB state that Shell did not disclose the full spectrum of activities in which it will engage. For example, Shell mentions support vessels and other equipment in its application but such machinery is not disclosed among Shell's activities. Additionally, Shell changed the airgun array it planned to use after submitting its application but did not conduct any new analysis of the impacts from this change, thus negating its analysis of the impacts from the original airgun array. Shell needs to adequately specify the activities and impacts of all the actions that will be undertaken in the Chukchi. AEWC also states that NMFS relied on surveys conducted in 2008 by Shell to calculate the area of ''water exposed to received levels at or above 160 dB.'' The 2008 surveys, however, were based on signals from ''four 10 in$^3$ airguns,'' and not the 40 in$^3$ airguns that Shell now intends to use. Thus, for this reason as well, Shell's application must be returned.

*Response:* NMFS determined that Shell's application and application addenda fully described the activities in which Shell will engage. In previous years, when Shell conducted its larger, 3D seismic surveys, several support vessels were needed to carry out operations. However, for this smaller survey, all work will be conducted from the single source vessel. All acoustic equipment that will be used to conduct the surveys is listed in the application. Shell did change the number of airguns and submitted this information to NMFS in their second application addendum. In assessing the new airgun array, NMFS determined that the potential impacts to marine mammals would be the same if the total discharge volume was 20 in$^3$ or 40 in$^3$. Shell submitted revised take estimates based on the new discharge volume and ensonified zones. The analysis of impacts from airguns and the revised take estimates were contained in the proposed IHA notice (74 FR 26217, June 1, 2009). Therefore, NMFS determined that Shell adequately specified the activities and impacts of all the actions that will be undertaken in the Chukchi Sea.

The modeled radii that Shell submitted were from sound source verification tests conducted in the Chukchi Sea during the 2008 open-water season by JASCO. JASCO modeled three different airgun configurations: 4 x 10 in$^3$ airgun array; 2 x 10 in$^3$ airgun array; and 1 x 10 in$^3$ airgun. For 2009, Shell intends to use the 4 x 10 in$^3$ airgun array and not the 40 in$^3$ airguns, as noted by AEWC. Therefore, this modeling was accurately used by Shell in its submission to NMFS.

*Comment 13:* NSB and AWL expressed concern that the IHA will cover a full year, as the assessment of effects on bowhead whales apparently relies in part on the surveys ending before the peak of the bowhead fall migration through the Chukchi Sea. Shell indicates that it will require a maximum of 50 days of active data acquisition, but it is noteworthy that this estimate expressly excludes any unplanned downtime. Consequently, Shell could need to survey well into the month of October, and the IHA as proposed would allow it to do so. A 1–year IHA is clearly not compelled by the MMPA, and an authorization that includes a portion of the next open-water season only invites later confusion. Although NMFS' analysis of impacts to marine mammals appears to consider the entire 50 days of active surveying, the process leaves open the possibility of an unjustifiably segmented evaluation of survey activity, looking only at a portion of the surveying that will take place in a single season. NMFS should take steps to avoid such results.

*Response:* Section 101(a)(5)(D)(i) of the MMPA states that: ''Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region....''

As noted, the MMPA does not limit the issuance of an IHA to a single open-water season (approximately July 20 to approximately November 15 in the U.S. Beaufort and Chukchi Seas), a period of less than 4 months, and even less

available time if an applicant's activity is located in an area subject to area closure due to native subsistence hunting. Provided the IHA application includes an analysis of the specified activities during the time frame proposed by the applicant, NMFS will consider issuing an IHA that extends into a portion of the following year. NMFS evaluated the effects of Shell's activities for the full requested time frame, including evaluating effects into the following season. Additionally, NMFS believes that even if Shell must conduct activities into the middle or end of October, the mitigation and monitoring measures required by the IHA (described later in this document) will not increase the level of impact to marine mammals in the area.

*Comment 14:* AEWC and NSB state that NMFS failed to issue a draft authorization for public review and comment. The plain language of both the MMPA and NMFS' implementing regulations require that NMFS provide the opportunity for public comment on the ''proposed incidental harassment authorization'' (50 CFR 216.104(b)(1)(i); 16 U.S.C. 1371 (a)(5)(D)(iii)) and not just on the application itself as NMFS has done here. Without a complete draft authorization and accompanying findings, AEWC and NSB cannot provide meaningful comments on Shell's proposed activities, ways to mitigate the impacts of those activities on marine mammals, and measures that are necessary to protect subsistence uses and sensitive resources. For example, AEWC cannot ensure that the authorization will comport with the requirements of the applicable CAA.

*Response:* The June 1, 2009 proposed IHA notice (74 FR 26217) contained all of the relevant information needed by the public to provide comments on the proposed authorization itself. The notice contained the permissible methods of taking by harassment, means of effecting the least practicable impact on such species (i.e., mitigation), measures to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence use, requirements pertaining to the monitoring and reporting of such taking, including requirements for the independent peer review of the proposed monitoring plan. The notice provided detail on all of these points, allowing the public to provide meaningful comments. Additionally, the notice contained NMFS' preliminary findings of negligible impact and no unmitigable adverse impact.

The signing of a CAA is not a requirement to obtain an IHA. Additionally, the CAA is a document that is negotiated between and signed by the industry participant, AEWC, and the Village Whaling Captains' Associations. NMFS has no role in the development or execution (other than, where appropriate, to include marine mammal-related measures from the CAA in the IHA) of this agreement. While signing a CAA helps NMFS to make its no unmitigable adverse impact determination for bowhead and beluga whales, it is not a requirement.

*Comment 15:* NSB states that based on the limited information provided by NMFS, there is no way to determine whether Shell's monitoring and reporting plans were subjected to independent peer review, as required by the MMPA. Unless NMFS can demonstrate compliance with the MMPA and its own regulations, it cannot issue an IHA to Shell. AEWC also notes that NMFS cannot issue an IHA to any company whose monitoring plan has not been cleared through independent peer review.

*Response:* On May 6, 2009, NMFS contacted representatives from AEWC, NSB, MMC, and Shell about nominating people to participate in an independent peer review of Shell's monitoring plan. NMFS received nominations from all of the contacted parties and selected and contacted reviewers from these lists. Two of the contacted individuals provided detailed comments on Shell's monitoring and reporting plan. NMFS provided Shell with the comments and recommendations of the reviewers. The reviewers' comments and changes to the monitoring plan are addressed later in this document (see ''Monitoring Plan Independent Peer Review'' section later in this document). NMFS complied with the requirements under the MMPA and the implementing regulations for issuing IHAs, and therefore can legally issue an IHA to Shell to conduct their operations.

*Comment 16:* AEWC states that because of the critical information provided through the direct observations of AEWC hunters, the peer review process must include AEWC representatives.

*Response:* NMFS' proposed rule for implementing the 1994 amendments to the MMPA described the process for conducting an independent peer review of monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses (60 FR 28379, May 31, 1995). While panelists for the independent peer review are selected by NMFS in consultation with the MMC, AEWC and/or other Alaska native organizations as appropriate, and the applicant, selected ''panelists are experts who are not currently employed or contracted by either the affected Alaskan native organization or the applicant'' (60 FR 28381, May 31, 1995). Therefore, it was NMFS' intent not to include AEWC representatives in the independent peer review process. However, AEWC representatives are afforded the opportunity to provide information based on their direct observations and experiences at the annual Open-water Meeting and through the public comment process on the proposed IHA.

*Comment 17:* AEWC specifically requests that NMFS release its response to comments at the earliest possible time and that NMFS not allow seismic activities to begin until the whaling captains have had a chance to review NMFS' response. We note that in 2008, NMFS did not publish its response to comments on Shell's IHA for seismic operations in the Beaufort Sea until well after the fall subsistence hunt at Cross Island had concluded and seismic operations had already taken place. There can be no excuse for allowing seismic operations to take place directly within one of the most important subsistence hunting areas in the Arctic Ocean prior to NMFS explaining to the local communities and whaling captains why it was issuing an IHA over their well-reasoned objections, which were presented during the public comment period. The fact that NMFS would not release its response to comments until after the activities had taken place casts serious doubt on the validity of NMFS' public involvement process and the underlying analysis of impacts to subsistence activities and marine mammals.

*Response:* NMFS publishes its responses to public comments in the **Federal Register** notice of issuance or denial. There is no provision requiring an applicant to wait to begin operations until after review of NMFS' responses to comments by members of the public. No public comment period is required on the **Federal Register** notice announcing NMFS' final decision. For the issuance of Shell's 2008 and 2009 IHAs, NMFS reviewed and considered all of the comments submitted before making its final determinations. Additionally, NMFS summarized and presented all of the significant issues raised by the commenters to the decision maker before signing the IHA.

*Comment 18:* AEWC notes that by regulation, Shell must include with its application a POC that ensures potential conflicts with subsistence uses are resolved/mitigated prior to the issuance of an IHA. It is AEWC's view that

signing and following the CAA meets the POC requirement as it pertains to bowhead whales. AEWC states that Shell must agree to all the terms of the 2009 Open-water CAA in order to mitigate the effects of its proposed operations. In fact, the CAA was in use prior to NMFS' issuance of its regulations, and the POC requirement was included in the regulatory language to point operators to the CAA. In addition to the CAA setting forth mitigation measures agreed to by the operators and hunters, a schedule of meetings in preparation for each upcoming season, and post-season review meetings to evaluate the effectiveness of mitigation measures employed during a certain season, an operator's adherence to the terms of the CAA enables the Secretary to make the no unmitigable adverse impact finding required by Congress in the MMPA. NMFS is well-advised to heed the long-standing practice of relying on the CAA to enable the Secretary to make the required finding, as the agency has no other basis upon which to determine whether a specified set of mitigation measures will enable hunters to retain access to migrating marine mammals without increasing the risks associated with an already high-risk practice.

*Response:* NMFS believes that the CAA is an important mechanism to ensure that there is not an unmitigable adverse impact on the availability of bowhead whales for taking for subsistence uses. However, the CAA is a document entered into between two entities (industry applicants and native community stakeholders). NMFS is neither a signatory to the CAA, nor does it play any formal role in the development of the CAA other than by requiring industry applicants to develop a POC pursuant to 50 CFR 216.104(a)(12). Moreover, the CAA is only one way to make the no unmitigable adverse impact to subsistence uses finding. Although NMFS has a limited role in this process, NMFS supports the continuation of the CAA process to help ensure that native subsistence harvests are successful.

*Comment 19:* AEWC and NSB state that the conclusion that Shell's proposed activities will only take small numbers of marine mammals and will have no more than a negligible impact is not justified by the information provided. AEWC believes that without knowing more about the status and number of species present in the Chukchi Sea, this conclusion cannot be supported. NSB believes that NMFS has not adequately considered whether marine mammals may be harassed at received levels significantly lower than 160 dB and has not considered the possible serious injuries associated with authorizing the proposed activities.

*Response:* NMFS believes that it provided sufficient information in its proposed IHA notice (74 FR 26217, June 1, 2009) to make the small numbers and negligible impact determinations and that the best scientific information available was used to make those determinations. The available information was sufficient to make the necessary findings. While some published articles indicate that certain marine mammal species may avoid seismic vessels at levels below 160 dB, NMFS does not believe that these responses rise to the level of a significant behavioral response. While studies, such as Miller *et al.* (1999), have indicated that some bowhead whales may have started to be deflected from their migratory path 35 km (21.7 mi) from the seismic vessel, it should be pointed out that these minor course changes are during migration and, as described in MMS' 2006 Final Programmatic Environmental Assessment (PEA), have not been seen at other times of the year and during other activities. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that feeding, non-migratory bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a ''take.'' NMFS therefore continues to estimate ''takings'' under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 μPa).

NMFS has determined that Shell's activities will not cause serious injury to marine mammals. As explained throughout this **Federal Register** Notice, it is highly unlikely that marine mammals would be exposed to SPLs that could result in serious injury or mortality. The best scientific information indicates that an auditory injury is unlikely to occur, as apparently sounds need to be significantly greater than 180 dB for injury to occur (Southall *et al.*, 2007). The 180–dB radius for the airgun array to be used by Shell is 160 m (525 ft). Therefore, if injury were possible from Shell's activities, the animal would need to be closer than 160 m (525 ft). However, based on the configuration of the airgun array and streamers, it is highly unlikely that a marine mammal would be that close to the seismic vessel. Mitigation measures described later in this document will be implemented should a marine mammal enter this small zone around the airgun array.

*Comment 20:* AEWC notes that based on the density estimates, Shell is predicting that an average of 692 and a maximum of 1,078 ringed seals may be exposed to seismic sounds. These are by no means ''small numbers'' of marine mammals that will be subjected to impacts as a result of Shell's operations. NSB notes that Shell's application states that approximately 2 percent of the Bering-Chukchi-Beaufort stock of bowhead whales will be exposed to sounds greater than or equal to 160 dB (rms). This is a large percentage of the population.

*Response:* NMFS determined that the small numbers requirement has been satisfied. Shell has predicted that an average of 692 ringed seals will be exposed to SPLs of 160 dB or greater during operations. This does not mean that this is the number of ringed seals that will actually exhibit a disruption of behavioral patterns in response to the sound source; rather, it is simply the best estimate of the number of animals that potentially could have a behavioral modification due to the noise. For example, Moulton and Lawson (2002) indicate that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound, and, therefore, pinnipeds are not likely to react to seismic sounds unless they are greater than 170 dB re 1 μPa (rms).

The Level B harassment take estimate of 692 ringed seals is a small number, at least in relative terms, in that it represents only 0.3 percent of the regional stock size of that species (249,000), if each ''exposure'' at 160 dB represents an individual ringed seal. The percentage would be even lower if a higher SPL is required for a behavioral reaction (as is expected) or, if as expected, animals move out of the seismic area. As a result, NMFS determined that these ''exposure'' estimates are conservative, and seismic surveys will actually affect less than 0.3 percent of the Chukchi Sea ringed seal population.

Regarding bowhead whales, this percentage is a remnant from when Shell was going to conduct its full suite of surveys in both the Beaufort and Chukchi Seas. As mentioned earlier in this document, the Beaufort Sea surveys and the Chukchi Sea ice gouge survey were cancelled for the 2009/2010 season. Shell's Chukchi Sea site clearance and shallow hazards surveys are estimated to take only one bowhead whale, representing less than 0.01

percent of the Bering-Chukchi-Beaufort stock of bowhead whales.

*Comment 21:* AEWC states that Shell should be required to engage in monitoring activities that are separate and apart from its oil and gas activities (see 50 CFR 216.104(a)(14)). These activities must be separate from Shell's proposed oil and gas related operations, since any data from such operations is skewed in light of marine mammals' avoidance of the vessels and seismic noise.

*Response:* In 2009, Shell and ConocoPhillips are jointly funding an extensive acoustic monitoring program in the Chukchi Sea. A total of 44 recorders will be distributed both broadly across the Chukchi lease area and nearshore environment and intensively on the Burger and Klondike lease areas. The broad area arrays are designed to capture both general background soundscape data and marine mammal call data across the lease area. Shell hopes to gain insights into large-scale distribution of marine mammals, identification of marine mammal species present, movement and migration patterns, and general abundance data. Many of these recorders will be placed tens of miles away from the site clearance and shallow hazards surveys. Additionally, these recorders will remain deployed after completion of Shell's survey work in 2009.

Pursuant to 50 CFR 216.104(a)(14), an applicant must include ''suggested means of learning of, encouraging, and coordinating research opportunities, plans, and activities relating to reducing such incidental taking and evaluating its effects.'' There is no requirement that this information or monitoring be conducted separate and apart from the authorized activities, since the research is supposed to evaluate the effects of the taking.

*Marine Mammal Impact Concerns*

*Comment 22:* AWL, NSB, and AEWC noted that NMFS has acknowledged that permanent threshold shift (PTS) qualifies as a serious injury. Therefore, if an acoustic source at its maximum level has the potential to cause PTS and thus lead to serious injury, it would not be appropriate to issue an IHA for the activity (60 FR 28381, May 31, 1995). AEWC states that therefore an LOA is required here. While the airguns proposed by Shell are smaller than those associated with typical 2D/3D deep marine surveys, the noise they produce is still considerable, as evidenced by the estimated 120 dB radius that extends out to 24 km (15 mi). These groups state that in the proposed IHA, NMFS did not rule out the possibility of animals incurring PTS (74 FR 26222, June 1, 2009). Although NMFS characterizes the possibility as unlikely, it nevertheless relies on mitigation measures, such as ramp-ups and exclusion zones, to ''minimize'' the ''already-minimal'' probability of PTS.

*Response:* In the proposed rule implementing the process to apply for and obtain an IHA, NMFS stated that authorizations for harassment involving the ''potential to injure'' would be limited to only those that may involve non-serious injury (60 FR 28380, May 31, 1995). However, NMFS goes on to say that ''if the review of an application for incidental harassment indicates there is a potential for serious injury or death, NMFS proposes that it would either (1) determine that the potential for serious injury can be negated through mitigation requirements that could be required under the authorization or (2) deny'' (*Ibid*) the IHA and require the applicant to petition for regulations and LOA. As stated several times in this document and previous **Federal Register** notices for seismic activities, there is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (see Southall *et al.*, 2007). PTS is thought to occur several decibels above that inducing mild temporary threshold shift (TTS), the mildest form of hearing impairment (a non-injurious effect). NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 μPa (rms). The established 180- and 190–dB re 1 μPa (rms) criteria are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. As summarized later in this document, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 Pa rms (Southall *et al.*, 2007). Additionally, while the **Federal Register** notice cited by the commenters states that NMFS considered PTS to be a serious injury (60 FR 28380, May 31, 1995), our understanding of anthropogenic sound and the way it impacts marine mammals has evolved since then, and NMFS no longer considers PTS to be a serious injury. NMFS has defined ''serious injury'' in 50 CFR 216.3 as ''...any injury that will likely result in mortality.'' There are no data that suggest that PTS would be likely to result in mortality, especially the limited degree of PTS that could hypothetically be incurred through exposure of marine mammals to seismic airguns at the level and for the duration that are likely to occur in this action.

The extent of the 120–dB radius does not indicate that animals may be seriously injured. Additionally, NMFS has required monitoring and mitigation measures to negate the possibility of marine mammals being seriously injured as a result of Shell's activities. In the proposed IHA, NMFS determined that no cases of TTS are expected to result from Shell's activities. Based on this determination and the explanation provided here, PTS is also not expected. Therefore, an IHA is appropriate.

*Comment 23:* AEWC and NSB state that research is increasingly showing that marine mammals may remain within dangerous distances of seismic operations rather than leave a valued resource such as a feeding ground (see Richardson, 2004). The International Whaling Commission (IWC) scientific committee has indicated that the lack of deflection by feeding whales in Camden Bay (during Shell seismic activities) likely shows that whales will tolerate and expose themselves to potentially harmful levels of sound when needing to perform a biologically vital activity, such as feeding (mating, giving birth, etc.). Thus, the noise from Shell's proposed operations could injure marine mammals if they are close enough to the source.

*Response:* If marine mammals, such as bowhead whales, remain near a seismic operation to perform a biologically vital activity, such as feeding, depending on the distance from the vessel and the size of the 160–dB radius, the animals may experience some Level B harassment. Depending on the distance of the animals from the vessel and the number of individual whales present, certain mitigation measures are required to be implemented. If an aggregation of 12 or more mysticete whales are detected within the 160–dB radius, then the airguns must be shutdown until the aggregation is no longer within that radius. Additionally, if any whales are sighted within the 180–dB radius of the active airgun array, then either a power-down or shutdown must be implemented immediately. For the reasons stated throughout this document, NMFS has determined that Shell's operations will not injure marine mammals.

*Comment 24:* AWL and NSB state that the standard for determining whether an IHA is appropriate is exceptionally protective. If there is even the possibility of serious injury, NMFS must establish that the ''potential for serious injury can be negated through mitigation requirements'' (60 FR 28380, May 31, 1995; emphasis added). Reports from previous surveys, however, indicate that, despite monitored exclusion zones, marine mammals routinely stray too close to the airguns. AEWC states that the safety radii proposed by Shell do not negate injury.

Perhaps, more importantly, the documented exposures were recorded only because conditions were such that the marine mammals could be observed, but this only represents a fraction of the time that airguns are operating. Marine mammal observers (MMOs) cannot see animals at the surface when it is dark or during the day because of fog, glare, rough seas, the small size of animals such as seals, and the large portion of time that animals spend submerged. Shell has acknowledged that reported sightings are only ''minimum'' estimates of the number of animals potentially affected by surveying. AWL, NSB, and AEWC note that although NMFS recognizes that infra-red goggles and night-vision binoculars are of ''limited'' effectiveness when visibility is low, its only response for Shell's 2009 surveying is that MMOs are relieved of monitoring the exclusion zones at night, except during periods before and during ramp-ups.

NMFS appears to simply presume that marine mammals will naturally avoid airguns when they are operating at full strength, removing the need for monitoring when conditions prevent MMOs from effectively watching for intrusions into the exclusion zones. That premise is not supported by the survey data, indicating that shutdowns and power-downs have repeatedly proven necessary. The requirement for ramp-up rests on the same foundation that marine mammals will leave an affected area as a result of increasing noise. Yet, as the Joint Subcommittee on Ocean Science & Technology report noted, although ramp-up is a widely imposed practice, ''there has never been a demonstration that it works as intended.'' Because NMFS has not negated the possibility of serious injury from Shell's 2009 seismic surveying, it may not issue an IHA.

*Response:* As has already been stated several times in this document, recent literature has indicated that sounds need to be significantly higher than 180 dB to cause injury to marine mammals (see Southall *et al.*, 2007). Therefore, the 180- and 190–dB safety zones are conservative. The survey reports indicate that mitigation measures (i.e., power-downs or shutdowns) were implemented, thus preventing the animals from being exposed to more than one or two seismic pulses. Additionally, Shell's operations will occur in an area where periods of darkness do not begin until early September. Beginning in early September, there will be approximately 1–3 hours of darkness each day, with periods of darkness increasing by about 30 min each day. By the end of the survey period, there will be approximately 8 hours of darkness each day.

The source vessel will be traveling at speeds of about 1–5 knots (1.9–9.3 km/hr). With a 180–dB safety range of 160 m (525 ft), the vessel will have moved out of the safety zone within a few minutes. As a result, during underway survey operations, MMOs are instructed to concentrate on the area ahead of the vessel, not behind the vessel where marine mammals would need to be voluntarily swimming towards the vessel to enter the 180–dB zone. In fact, in some of NMFS' IHAs issued for scientific seismic operations, shutdown is not required for marine mammals that approach the vessel from the side or stern in order to ride the bow wave or rub on the seismic streamers deployed from the stern (and near the airgun array) as some scientists consider this a voluntary action on the part of an animal that is not being harassed or injured by seismic noise. While NMFS concurs that shutdowns are not likely warranted for these voluntary approaches, in the Arctic Ocean, all seismic surveys are shutdown or powered down for all marine mammal close approaches. Also, in all seismic IHAs, including Shell's IHA, NMFS requires that the safety zone be monitored for 30 min prior to beginning ramp-up to ensure that no marine mammals are present within the safety zones. Implementation of ramp-up is required because it is presumed it would allow marine mammals to become aware of the approaching vessel and move away from the noise, if they find the noise annoying. Data from 2007 and 2008, when Shell had support boats positioned 1 km (0.62 mi) on each side of the 3D seismic vessel, suggest that marine mammals do in fact move away from an active source vessel. In those instances, more seals were seen from the support vessels than were seen from the source vessels during active seismic operations. Additionally, research has indicated that some species tend to avoid areas of active seismic operations (e.g., bowhead whales, see Richardson *et al.*, 1999).

NMFS has determined that an IHA is the proper authorization required to cover Shell's survey. As described in other responses to comments in this document, NMFS does not believe that there is a risk of serious injury or mortality from these activities. The monitoring reports from 2006, 2007, and 2008 do not note any instances of serious injury or mortality (Patterson *et al.*, 2007; Funk *et al.*, 2008; Ireland *et al.*, 2009). Additionally, NMFS is confident it has met all of the requirements of section 101(a)(5)(D) of the MMPA (as described throughout this document) and therefore can issue an IHA to Shell for its survey operations in 2009/2010.

*Comment 25:* AWL, Dr. Bain, NSB, and AEWC believe that NMFS has not adequately considered whether marine mammals may be harassed at received levels significantly lower than 160 dB. Here, NMFS calculated harassment from Shell's proposed surveying based on the exposure to marine mammals to sounds at or above 160 dB. This uniform approach to harassment, however, does not take into account known reactions of marine mammals in the Arctic to levels of noise far below 160 dB. These letters state that bowhead, gray, killer, and beluga whales and harbor porpoise react to sounds lower than 160 dB. At least in the case of bowhead whales, a 120–dB level is more appropriate to assess levels of harassment.

Citing several papers on killer whales and harbor porpoise, Dr. Bain states that major behavioral changes of these animals appear to be associated with received levels of around 135 dB re 1 μPa, and that minor behavioral changes can occur at received levels from 90–110 dB re 1 μPa or lower. He also states that belugas have been observed to respond to icebreakers by swimming rapidly away at distances up to 80 km, where received levels were between 94 and 105 dB re 1 μPa. Belugas exhibited minor behavioral changes such as changes in vocalization, dive patterns, and group composition at distances up to 50 km (NRC, 2003), where received levels were likely around 120 dB.

AEWC also states that in conducting scoping on its national acoustic guidelines for marine mammals, NMFS noted that the existing system for determining take (i.e., the 160 dB mark) ''considers only the sound pressure level of an exposure but not its other attributes, such as duration, frequency, or repetition rate, all of which are critical for assessing impacts on marine mammals'' and ''also assumes a

consistent relationship between rms (root-mean-square) and peak pressure values for impulse sounds, which is known to be inaccurate under certain (many) conditions'' (70 FR 1871, 1873, January 11, 2005). Thus, NMFS itself has recognized that 160 dB (rms) is not an adequate measure.

*Response:* The best information available to date for reactions by bowhead whales to noise, such as seismic, is based on the results from the 1998 aerial survey (as supplemented by data from earlier years) as reported in Miller *et al.* (1999). In 1998, bowhead whales below the water surface at a distance of 20 km (12.4 mi) from an airgun array received pulses of about 117–135 dB re 1 μPa rms, depending upon propagation. Corresponding levels at 30 km (18.6 mi) were about 107–126 dB re 1 Pa rms. Miller *et al.* (1999) surmise that deflection may have begun about 35 km (21.7 mi) to the east of the seismic operations, but did not provide SPL measurements to that distance and noted that sound propagation has not been studied as extensively eastward in the alongshore direction, as it has northward, in the offshore direction. Therefore, while this single year of data analysis indicates that bowhead whales may make minor deflections in swimming direction at a distance of 30–35 km (18.6–21.7 mi), there is no indication that the SPL where deflection first begins is at 120 dB, it could be at another SPL lower or higher than 120 dB. Miller *et al.* (1999) also note that the received levels at 20–30 km (12.4–18.6 mi) were considerably lower in 1998 than have previously been shown to elicit avoidance in bowheads exposed to seismic pulses. However, the seismic airgun array used in 1998 was larger than the ones used in 1996 and 1997. Therefore, NMFS believes that it cannot scientifically support adopting any single SPL value below 160 dB and apply it across the board for all species and in all circumstances. Second, these minor course changes occurred during migration and, as indicated in MMS' 2006 PEA, have not been seen at other times of the year and during other activities.

Third, as stated in the past, NMFS does not believe that minor course corrections during a migration rise to a level of being a significant behavioral response. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that when, not migrating, but involved in feeding, bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to a level of a ''take.'' NMFS therefore continues to estimate ''takings'' under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 Pa). However, monitoring a 120–dB radius in the Chukchi Sea is not practicable and due to safety concerns, NMFS would not require this level of monitoring in the Chukchi Sea.

Although it is possible that marine mammals could react to any sound levels detectable above the ambient noise level within the animals' respective frequency response range, this does not mean that such animals would react in a biologically significant way. According to experts on marine mammal behavior, the degree of reaction which constitutes a ''take,'' i.e., a reaction deemed to be biologically significant that could potentially disrupt the migration, breathing, nursing, breeding, feeding, or sheltering, etc., of a marine mammal is complex and context specific, and it depends on several variables in addition to the received level of the sound by the animals. These additional variables include, but are not limited to, other source characteristics (such as frequency range, duty cycle, continuous vs. impulse vs. intermittent sounds, duration, moving vs. stationary sources, etc.); specific species, populations, and/or stocks; prior experience of the animals (naive vs. previously exposed); habituation or sensitization of the sound by the animals; and behavior context (whether the animal perceives the sound as predatory or simply annoyance), etc. (Southall *et al.*, 2007).

The references cited in the comment letters address different source characteristics (continuous sound rather than impulse sound that are planned for the proposed shallow hazard and site clearance surveys) or species (killer whales and harbor proposes) that rarely occur in the proposed Arctic action area. Much research regarding bowhead and gray whales response to seismic survey noises has been conducted in addition to marine mammal monitoring studies during prior seismic surveys. Detailed descriptions regarding behavior responses of these marine mammals to seismic sounds are available (e.g., Richardson *et al.*, 1995; review by Southall *et al.*, 2007), and are also discussed in this document. Additionally, as Shell does not intend to use ice-breakers during its operations, statements regarding beluga reactions to icebreaker noise are not relevant to this activity.

Regarding the last point raised in this comment by AEWC, NMFS recognizes the concern. Based on the information and data contained in Southall *et al.* (2007), NMFS is moving towards implementing a dual criteria for impacts of noise on marine mammals. However, until guidelines are available, NMFS will continue to use the 160–dB threshold for determining the level of take of marine mammals by Level B harassment for impulse noise (such as from airguns).

*Comment 26:* NSB and AWL note that this IHA, as currently proposed, is based on uncertainties that are not allowed under the MMPA. Citing comments made by NMFS on recent MMS LS Environmental Impact Statements, they note that NMFS stated that without more current and thorough data on the marine mammals in the Chukchi Sea and their use of these waters, it would be difficult to make the findings required by the MMPA. NMFS also specifically observed that activities ''occurring near productive forage areas such as the Hanna Shoal'' or ''along migratory corridors'' are most likely to encounter and impact marine mammals. Shell's proposed surveying for 2009 will likely take place proximate to the Hanna Shoal and within the pathway for migrating bowheads.

It is generally recognized that there is much unknown about the range of potential effects of sound on marine mammals, especially long-term sublethal effects and the impact of exposure to increasing levels of noise year after year. NMFS noted in both sets of LS comments that the ''continued lack of basic audiometric data for key marine mammal species'' that occur throughout the Chukchi Sea inhibits the ''ability to determine the nature and biological significance of exposure to various levels of both continuous and impulsive oil and gas activity sounds.'' Again, NMFS stressed that additional data should be obtained for the agency to consider authorizing incidental taking under the MMPA and the Endangered Species Act (ESA). AWL also states that the need for more information regarding the effects of sound and the appropriate mitigation measures was emphasized in a recent report issued by an interagency task force led by a representative from NOAA (JSOST, 2009). This lack of information runs up against the precautionary nature of the MMPA. Nor can NMFS claim the lack of available information justifies its decision. NMFS has an affirmative obligation to find that impacts are no more than ''negligible''

and limited to the harassment of only ''small numbers of marine mammals.''

NSB also notes that Shell's application contains several references to the lack of evidence for damage to auditory mechanisms of several marine mammals. A lack of data does not amount to a lack of evidence. Shell needs to provide actual citations that show a lack of damage. These citations must be from studies of baleen whales, belugas, and pinnipeds that were focused on the assessment of this type of damage. But this information does not exist for the noise produced typical of Arctic open-water seismic operations. In fact, the basic anatomy of bowhead whale auditory apparatus has not been investigated.

*Response:* NMFS agrees that there is some uncertainty on the current status of some marine mammal species in the Chukchi Sea and on impacts to marine mammals from seismic surveys. NMFS is currently proposing to conduct new population assessments for Arctic pinniped species, and current information is available on-line through the Stock Assessment Reports (SARs). In regard to impacts, there is no indication that seismic survey activities are having a long-term impact on marine mammals. For example, apparently, bowhead whales continued to increase in abundance during periods of intense seismic in the Chukchi Sea in the 1980s (Raftery *et al.*, 1995; Angliss and Outlaw, 2007), even without implementation of current mitigation requirements. As a result, NMFS believes that seismic survey noise in the Arctic will affect only small numbers of and have no more than a negligible impact on marine mammals in the Chukchi Sea. However, as NMFS recognizes that there is a lack of information on certain aspects of the marine mammals in the Chukchi Sea and the potential impacts on marine mammal species and stocks from offshore oil exploration, Shell (in collaboration with other offshore companies) has developed and implemented a monitoring program to address data gaps. NMFS used the best scientific information available to make the required findings under the MMPA. As explained in this document, based on that information, NMFS has determined that Shell's activities will affect only small numbers of marine mammals, will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on subsistence uses of the affected species or stocks.

*Comment 27:* The MMC recommends that the IHA require that operations be suspended immediately if a dead or seriously injured marine mammal is found in the vicinity of the operations and if that death or injury could be attributable to the applicant's activities. Any suspension should remain in place until NMFS has: (1) reviewed the situation and determined that further deaths or serious injuries are unlikely to occur; or (2) issued regulations authorizing such takes under section 101(a)(5)(A) of the MMPA.

*Response:* NMFS concurs with the MMC's recommendation and will require the immediate suspension of seismic activities if a dead or injured marine mammal has been sighted within an area where the Holder of the IHA deployed and utilized seismic airguns within the past 24 hours. Additionally, Shell is required to notify the Marine Mammal Stranding Network of stranded marine mammals.

*Comment 28:* NSB and AEWC note that stranded marine mammals or their carcasses are also a sign of injury. NMFS states in its notice that it ''does not expect any marine mammal will...strand as a result of the proposed survey'' (74 FR 26222, June 1, 2009). In reaching this conclusion, NMFS claims that strandings have not been recorded for the Beaufort and Chukchi Seas. NSB and AEWC included a paper, which documents 25 years of stranding data, including five whales reported in 2008 alone in comparison with the five dead whales that were reported in the same area over the course of 25 years (Rosa, 2009). NSB also included some stranding reports and newspaper articles for bowhead whales discovered in the last 25 years.

In light of the increase in seismic operations in the Arctic since 2006, NSB's study raises serious concerns about the impacts of these operations and their potential to injure marine mammals. While we think this study taken together with the June 2008 stranding of ''melon headed whales off Madagascar that appears to be associated with seismic surveys'' (74 FR 26222, June 1, 2009) demonstrate that seismic operations have the potential to injure marine mammals beyond beaked whales (and that Shell needs to apply for an LOA for its operations), certainly NSB's study shows that direct injury of whales is on-going. These direct impacts must be analyzed and explanations sought out before additional activities with the potential to injure marine mammals are authorized.

Thus, NMFS must explain how, in light of this new information, Shell's application does not have the potential to injure marine mammals. NMFS must also require Shell to report the numbers and species of dead animals it encounters and require necropsies to be performed on dead marine mammals found during Shell's operations.

*Response:* NMFS has reviewed the information provided by NSB and AEWC regarding marine mammal strandings in the Arctic. The stranding reports and accompanying newspaper articles for the three bowhead whales discovered in the 1980s and 1990s do not link the deaths to seismic activities. Rather, the two more detailed reports point to entanglement in fishing gear as the possible cause of death in both instances. Additionally, Rosa (2009) does not provide any evidence linking the cause of death for the bowhead carcasses reported in 2008 to seismic operations. Additionally, the increased reporting of carcasses in the Arctic since 2006 may also be a result of increased reporting effort and does not necessarily indicate that there were fewer strandings prior to 2008. MMOs aboard industry vessels in the Beaufort and Chukchi Seas have been required to report sightings of injured and dead marine mammals to NMFS as part of the IHA requirements only since 2006.

Regarding the June 2008 stranding of melon headed whales off Madagascar, information available to NMFS at this time indicates that the seismic airguns were not active around the time of the stranding. While the NSB study (Rosa, 2009) does present information regarding the injury of whales in the Arctic, it does not link the cause of the injury to seismic survey operations. As NMFS has stated previously, the evidence linking marine mammal strandings and seismic surveys remains tenuous at best. Two papers, Taylor *et al.* (2004) and Engel *et al.* (2004) reference seismic signals as a possible cause for a marine mammal stranding.

Taylor *et al.* (2004) noted two beaked whale stranding incidents related to seismic surveys. The statement in Taylor *et al.* (2004) was that the seismic vessel was firing its airguns at 1300 hrs on September 24, 2004, and that between 1400 and 1600 hrs, local fishermen found live stranded beaked whales 22 km (12 nm) from the ship's location. A review of the vessel's trackline indicated that the closest approach of the seismic vessel and the beaked whales stranding location was 18 nm (33 km) at 1430 hrs. At 1300 hrs, the seismic vessel was located 25 nm (46 km) from the stranding location. What is unknown is the location of the beaked whales prior to the stranding in relation to the seismic vessel, but the close timing of events indicates that the distance was not less than 18 nm (33 km). No physical evidence for a link between the seismic survey and the

stranding was obtained. In addition, Taylor *et al.* (2004) indicates that the same seismic vessel was operating 500 km (270 nm) from the site of the Galapagos Island stranding in 2000. Whether the 2004 seismic survey caused the beaked whales to strand is a matter of considerable debate (see Cox *et al.*, 2004). However, these incidents do point to the need to look for such effects during future seismic surveys. To date, follow up observations on several scientific seismic survey cruises have not indicated any beaked whale stranding incidents.

Engel *et al.* (2004), in a paper presented to the IWC in 2004 (SC/56/E28), mentioned a possible link between oil and gas seismic activities and the stranding of 8 humpback whales (7 off the Bahia or Espirito Santo States and 1 off Rio de Janeiro, Brazil). Concerns about the relationship between this stranding event and seismic activity were raised by the International Association of Geophysical Contractors (IAGC). The IAGC (2004) argues that not enough evidence is presented in Engel *et al.* (2004) to assess whether or not the relatively high proportion of adult strandings in 2002 is anomalous. The IAGC contends that the data do not establish a clear record of what might be a ''natural'' adult stranding rate, nor is any attempt made to characterize other natural factors that may influence strandings. As stated previously, NMFS remains concerned that the Engel *et al.* (2004) article appears to compare stranding rates made by opportunistic sightings in the past with organized aerial surveys beginning in 2001. If so, then the data are suspect.

Moreover, marine mammal strandings do not appear to be related to seismic survey work in the Arctic Ocean. Additionally, NMFS notes that in the Beaufort Sea, aerial surveys have been conducted by MMS and industry during periods of industrial activity (and by MMS during times with no activity). No marine mammal strandings have been observed during these surveys, that appear to be related to seismic survey activity, and none have been reported by NSB inhabitants (although dead marine mammals are occasionally sighted). Finally, if bowhead and gray whales react to sounds at very low levels by making minor course corrections to avoid seismic noise and mitigation measures require Shell to ramp-up the seismic array to avoid a startle effect, strandings, similar to what was observed in the Bahamas in 2000, are unlikely to occur in the Arctic Ocean. Therefore, NMFS does not expect any marine mammals will incur serious injury or mortality as a result of Shell's 2009/2010 survey operations, so an LOA is not needed.

Lastly, Shell is required to report all sightings of dead and injured marine mammals to NMFS and to notify the Marine Mammal Health and Stranding Response Network. However, Shell is not permitted to conduct necropsies on dead marine mammals. Necropsies can only be performed by people authorized to do so under the Marine Mammal Health and Stranding Response Program MMPA permit. NMFS is currently considering different methods for marking carcasses to reduce the problem of double counting. However, a protocol has not yet been developed, so marking is not required in the IHA.

*Comment 29:* AWL states that additional mitigation measures are needed to address vulnerable cow/calf pairs. When assessing the potential impacts of noise, NMFS and MMS have recognized that bowhead cow/calf pairs merit special conditions. NMFS acknowledged in 2008 that more information is needed about the potential effects of even a single seismic survey on the health of females and very young calves. Collectively, these factors led NMFS to require a safety zone tailored to protect multiple migrating cow/calf pairs for the surveying that took place in both seas in 2006 and for the subsequent surveying in the Beaufort Sea in 2007 and 2008. These same factors compel a 120–dB safety zone for migrating cow/calf pairs during Shell's proposed surveying in the Chukchi Sea in 2009.

*Response:* The 120–dB safety zone for migrating bowhead cow/calf pairs was implemented to reduce impacts to the animals as they migrated through the narrow corridor in the Beaufort Sea. However, in the Chukchi Sea, the migratory corridor for bowhead whales is wider and more open, thus the 120–dB ensonified zone would not impede bowhead whale migration. The animals would be able to swim around the ensonified area. Additionally, NMFS has not imposed a requirement to conduct aerial monitoring of the 120–dB safety zone for the occurrence of four or more cow-calf pairs in the Chukchi Sea because it is not practicable. First, NMFS determined that monitoring the 120–dB safety zone was not necessary in the Chukchi Sea because there would not be the level of effort by 3D seismic survey operations found in 2006. This provides cow/calf pairs with sufficient ability to move around the seismic source without significant effort. Second, aerial surveys are not required in the Chukchi Sea because they have currently been determined to be impracticable due to lack of adequate landing facilities, the prevalence of fog and other inclement weather in that area, potentially resulting in an inability to return to the airport of origin, thereby resulting in safety concerns.

*Comment 30:* AEWC states the analysis that is provided regarding bowhead whales assumes, without supporting evidence, their migrations through the Chukchi follow a narrow path. AEWC and NSB note that insufficient data exist about bowhead whale and other species' use of the Chukchi, and Shell should not be authorized to operate in this sensitive area until further information has been collected. For this same reason, AEWC asks NMFS to cap the seismic and related activities that it authorizes each year in the Arctic to ensure that we are not damaging sensitive marine resources that are relied on for subsistence in ways that we are unaware of.

*Response:* NMFS disagrees with the first statement. In fact, in NMFS' Notice of Proposed IHA (74 FR 26217, June 1, 2009), NMFS stated that the bowhead migration pathway is narrower and more well defined in the Beaufort Sea than in the Chukchi Sea. Regarding the comment about insufficient data, please see the response to comment 26 in this document. While NMFS acknowledges that there is some uncertainty about the status of marine mammals in and their use of the Chukchi Sea, population assessments are being conducted. NMFS used the best scientific information available to make the necessary findings required under the MMPA. Using the best available information, NMFS determined that Shell's survey will affect only small numbers of marine mammals, will have a negligible impact on affected species or stocks, and will not have an unmitigable adverse impact on the affected species or stocks for subsistence uses.

NMFS does not authorize the actual seismic and related activities. That authority falls to MMS. Rather, NMFS authorizes the take of marine mammals incidental to a specified activity (in this case, seismic activity) pursuant to sections 101(a)(5)(A) and (D) of the MMPA. While NMFS agrees that limiting the number of geophysical operations in either the Arctic would reduce impacts on marine mammals, this condition is unnecessary for a determination on whether there will be an unmitigable adverse impact on subsistence uses of marine mammals because applicants are required to complete a POC to ensure that their activities will not affect subsistence hunts. As described elsewhere in this document, Shell has incorporated design features into their program,

signed the 2009 CAA, and implemented a POC, and NMFS has included measures in the IHA to ensure no unmitigable adverse impacts to subsistence hunts.

NMFS understands that, under the terms of an OCS lease, the lessee is required to make progress on exploration and development on its leases in order to hold that lease beyond the initial lease term. Ancillary activities (such as seismic and shallow hazard surveys) are those activities conducted on a lease site to obtain data and information to meet MMS' regulations to explore and develop a lease. If a limit is placed by NMFS on the number of ancillary activities authorized for a planning area in a given year, NMFS may preclude the lessee from complying with MMS regulations to proceed in a timely manner on exploring or developing its OCS leases. Therefore, based on both practicability and that it is not necessary, NMFS has not adopted this suggested mitigation measure. However, NMFS encourages industry participants to work together to reduce seismic sounds in the Arctic Ocean through cooperative programs in data collection to reduce impacts on marine mammals.

*Comment 31:* NSB states that Shell needs to consider impacts on those species that may not occur in the project area in ''meaningful numbers.''

*Response:* Although bowhead, beluga, and gray whales and harbor porpoise are more likely to occur in the project area than other cetacean species (i.e., humpback, fin, killer, and minke whale), all of these species were described and analyzed in Shell's application and NMFS' proposed IHA (74 FR 26217, June 1, 2009).

*Comment 32:* NSB notes that Shell states, ''These types of surveys, collectively and individually, have not resulted in impacts of biological significance to marine mammals of the Arctic...'' Shell does not have data to support this statement, as Shell and other oil and gas companies have yet to examine whether there have been impacts of biological significance from exploration activities in the Beaufort and Chukchi Seas. Determination of the biological significance of impacts from oil and gas activities (beyond just behavioral deflection) is needed. Further, ''biological significance'' must be defined. NSB also notes that Shell states, ''Any effects would be temporary and of short duration at any one place.'' It is difficult, if not impossible to judge this statement from the information included in this IHA.

*Response:* To date, there have not been any reported large scale impacts attributable to offshore oil and gas development in the Arctic. NMFS would expect that villagers who hunt and fish in the offshore waters would notice changes in marine life. However, NMFS agrees that there is some uncertainty on the current status of some marine mammal species in the Beaufort and Chukchi Seas and on impacts on marine mammals from seismic surveys. NMFS is currently proposing to conduct new population assessments for Arctic pinniped species and current information is available on-line through its SARs program. As stated previously, NMFS determines whether takings by harassment are occurring based on whether there is a significant behavioral change in biologically important activity, such as feeding, breeding, migration or sheltering. All of these activities are potentially important for reproductive success of a marine mammal population (67 FR 46722, July 16, 2002). In regard to impacts, there is no indication that seismic survey activities are having a long-term impact on marine mammals. For example, apparently, bowhead whales continued to increase in abundance during periods of intense seismic in the Chukchi Sea in the 1980s (Raftery *et al.*, 1995; Angliss and Outlaw, 2007), even without implementation of current mitigation requirements. As a result, NMFS has determined that seismic survey noise in the Arctic will have no more than a short-term effect on marine mammals in the Chukchi Sea.

Large-scale impact assessments on marine mammal species from offshore seismic activities have been ongoing since 2006 through the industry's comprehensive monitoring plan. NMFS along with AEWC, NSB, oil exploration companies, and others have developed an off-seismic vessel monitoring program to help address the potential impact of seismic activities on marine mammals and subsistence uses of marine mammals. This program is described later in this document (see ''Comprehensive Monitoring Reports''). If NSB wishes to set alternative priorities for this impact assessment program, it should make that concern known to NMFS and Shell as soon as possible.

*Comment 33:* NSB notes that Shell states, ''Excessive amounts of repeated exposure can lead to overestimation of the number of animals potentially exposed through double counting.'' NSB indicates that this can also cause greater harm in animals exposed multiple times/chronically.

*Response:* Repeated exposure may cause a marine mammal to exhibit diminished responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat. Additionally, the relatively short cross-track distance of the 160–dB radius associated with Shell's site clearance and shallow hazards surveys result in little overlap of exposed waters during the survey.

Moreover, as explained in detail elsewhere in this document, marine mammals will need to be significantly closer to the seismic source and be exposed to SPLs greater than 180 dB to be injured or killed by the airgun array. For large airgun arrays (much larger than the array to be used by Shell in 2009/2010), this distance may be within 200 m (656 ft) of the vessel. In order for a marine mammal to receive multiple exposures (and thereby incur PTS), the animal would: (1) need to be close to the vessel and not detected during the period of multiple exposure; (2) be swimming in approximately the same direction and speed as the vessel; and (3) not be deflected away from the vessel as a result of the noise from the seismic array. Preliminary model simulations for seismic surveys in the Gulf of Mexico indicate that marine mammals are unlikely to incur single or multiple exposure levels that could result in PTS, as the seismic vessel would be moving at about 4–5 knots, while the marine mammals would not likely be moving within the zone of potential auditory injury in the same direction and speed as the vessel, especially for those marine mammals that take measures to avoid areas of seismic noise.

*Comment 35:* Citing research on long term adverse effects to whales and dolphins from whale watching activities (Trites and Bain, 2000; Bain, 2002; Lusseau *et al.*, 2006), Dr. Bain states that Level B behavioral harassment could be the primary threat to cetacean populations.

*Response:* Although NMFS agrees that long-term, persistent, and chronic exposure to Level B harassment could have a profound and significant impact on marine mammal populations, such as described in the references cited by Dr. Bain, those examples do not reflect the impacts of seismic surveys to marine mammals for Shell's project. First, whale watching vessels are intentionally targeting and making close approaches to cetacean species so the tourists onboard can have a better view of the animals. Some of these whale/dolphin

watching examples cited by Dr. Bain occurred in the coastal waters of the Northwest Pacific between April and October and for extended periods of time (''[r]ecreational and scientific whale watchers were active by around 6 a.m., and some commercial whale watching continued until around sunset''). Thus multiple vessels have been documented to be in relatively close proximity to whales for about 12 hours a day, six months a year, not counting some ''out of season'' whale watching activities and after dark commercial filming efforts. In addition, noise exposures to whales and dolphins from whale watching vessels are probably significant due to the vessels' proximity to the animals. To the contrary, Shell's proposed open-water shallow hazard and site clearance surveys, along with existing industrial operations in the Arctic Ocean, do not intentionally approach marine mammals in the project areas. Shell's survey locations are situated in a much larger Arctic Ocean Basin, which is far away from most human impacts. Therefore, the effects from each activity are remote and spread farther apart, as analyzed in NMFS' 2009 EA, as well as the MMS 2006 PEA.

Shell's site clearance and shallow hazards activities would only be conducted between August and October for 50 days, weather permitting. In addition, although studies and monitoring reports from previous seismic surveys have detected Level B harassment of marine mammals, such as avoidance of certain areas by bowhead and beluga whales during the airgun firing, no evidence suggests that such behavioral modification is biologically significant or non-negligible (Malme *et al.*, 1986, 1988; Richardson *et al.*, 1987, 1999; Miller *et al.*, 1999, 2005), as compared to those exposed by chronic whale watching vessels cited by Dr. Bain. Therefore, NMFS believes that potential impacts to marine mammals in the Chukchi Sea by site clearance and shallow hazards surveys would be limited to Level B harassment only, and due to the limited scale and remoteness of the project in relation to a large area, such adverse effects would not accumulate to the point where biologically significant effects would be realized.

*Comment 36:* Dr. Bain states that changes in behavior resulting from noise exposure could lead to indirect injury in marine mammals in the wild. He presented several examples to suggest that marine mammals repeatedly exposed to Level B harassment could result in Level A takes: (1) Harbor porpoise were observed traveling at high speeds during exposure to mid-frequency sonar in Haro Strait in 2003 and that exhaustion from rapid flight could lead to mortality; (2) citing MMS' (2004) *Environmental Assessment on Proposed Oil and Gas Lease Sale 195 in the Beaufort Sea Planning Area* (OCS EIS/EA MMS 2004–028) that feeding requires a prey density of 800 mg/m3 and his own observation, Dr. Bain is concerned displacement from high productive feeding areas would negatively affect individual whales and that small cetaceans such as harbor porpoise would face a risk of death if they are unable to feed for periods as short as 48 - 72 hours, or they may move into habitat where they face an increased risk of predation; (3) individual killer whales have been observed splitting from their pod when frightened by sonar and that other killer whales' separation from their social units has resulted in death; (4) TTS may lead to harm, as a minke whale was nearly struck by a research vessel in the area where one had been observed fleeing mid-frequency sonar, and blunt force trauma was identified as a cause of death in the investigation of harbor porpoise mortalities following exposure to mid-frequency sonar; and (5) impaired auditory ability may increase predation, as white-sided dolphins were attacked by killer whales because the noise of the research vessel caused the approach of the killer whales to go undetected by the dolphins.

*Response:* NMFS agrees that it is possible that changes in behavior or auditory masking resulting from noise exposure could lead to injury in marine mammals under certain circumstances in the world, such as those examples/hypotheses raised by Dr. Bain. However, it is not likely that received SPLs from the site clearance and shallow hazards surveys would drastically cause changes in behavior or auditory masking in marine mammals in the vicinity of the action area. First, marine mammals in the aforementioned examples and hypotheses were exposed to high levels of non-pulse intermittent sounds, such as military sonar, which has been shown to cause flight activities (e.g., Haro Strait killer whales); and continuous sounds such as the vessel, which could cause auditory masking when animals are closer to the source. The sources produced by the acoustic equipment and airguns for Shell's site clearance and shallow hazards surveys are impulse sounds used in seismic profiling, bathymetry, and seafloor imaging. Unlike military sonar, seismic pulses have an extremely short duration (tens to hundreds of milliseconds) and relatively long intervals (several seconds) between pulses. Therefore, the sound energy levels from these acoustic sources and small airguns are far lower in a given time period. Second, the intervals between each short pulse would allow the animals to detect any biologically significant signals, and thus avoid or prevent auditory masking. In addition, NMFS requires mitigation measures to ramp-up acoustic sources at a rate of no more than 6 dB per 5 min. This ramp-up would prevent marine mammals from being exposed to high level noises without warning, thereby eliminating the possibility that animals would dramatically alter their behavior (i.e. from a ''startle'' reaction). NMFS also believes that long-term displacement of marine mammals from a feeding area is not likely because the seismic vessel is constantly moving, and the maximum 160–dB ensonified radius is about 1.4 km, which would create an area of ensonification of approximately 6 $km^2$ at any given moment, which constitutes a very small portion of the Chukchi Sea (0.001 percent). In reality, NMFS expects the 160–dB ensonified zone to be smaller due to absorption and attenuation of acoustic energy in the water column.

*Comment 36:* AEWC states that NMFS does little to assess whether Level A harassment is occurring as a result of the deflection of marine mammals as a result of Shell's proposed operations. Deflected marine mammals may suffer impacts due to masking of natural sounds including calling to others of their species, physiological damage from stress and other non-auditory effects, harm from pollution of their environment, tolerance, and hearing impacts (see Nieukirk *et al.*, 2004). Not only do these operations disrupt the animals' behavioral patterns, but they also create the potential for injury by causing marine mammals to miss feeding opportunities, expend more energy, and stray from migratory routes when they are deflected. Dr. Bain also states that there are three main ways that minor behavioral changes, when experienced by numerous individuals for extended periods of time, can affect population growth: increased energy expenditure, reduced food acquisition, and stress (Trites and Bain, 2000).

*Response:* See the response to comment 35 regarding the potential for injury. The paper cited by AEWC (Nieukirk *et al.*, 2004) tried to draw linkages between recordings of fin, humpback, and minke whales and airgun signals in the western North Atlantic; however, the authors note the difficulty in assessing impacts based on the data collected. The authors also state

that the effects of airgun activity on baleen whales is unknown and then cite to Richardson *et al.* (1995) for some possible effects, which AEWC lists in their comment. There is no statement in the cited study, however, about the linkage between deflection and these impacts. While deflection may cause animals to expend extra energy, there is no evidence that this deflection is causing a significant behavioral change to a biologically significant activity. In fact, bowhead whales continued to increase in abundance during periods of intense seismic in the Chukchi Sea in the 1980s (Raftery *et al.*, 1995; Angliss and Outlaw, 2007). Therefore, NMFS does not believe that injury will occur as a result of Shell's activities. Additionally, Shell's total data acquisition activities will occur in an extremely small portion of the Chukchi Sea (0.2 percent). Therefore, based on the smaller radii associated with Shell's site clearance and shallow hazards surveys than the larger 2D or 3D seismic programs and the extremely small area of the Chukchi Sea where Shell will utilize airguns, it is unlikely that marine mammals will need to expend extra energy to locate prey or to have reduced foraging opportunities.

*Comment 37:* Citing Erbe (2002), AEWC notes that any sound at some level can cause physiological damage to the ear and other organs and tissues. Placed in a context of an unknown baseline of sound levels in the Chukchi Sea, it is critically important that NMFS take a precautionary approach to permitting additional noise sources in this poorly studied and understood habitat. Thus, the best available science dictates that NMFS use a more cautious approach in addressing impacts to marine mammals from seismic operations.

*Response:* The statement from Erbe (2002) does not take into account mitigation measures required in the IHA to reduce impacts to marine mammals. As stated throughout this document, based on the fact that Shell will be using a small airgun array (total discharge volume of 40 $in^3$) and will implement mitigation measures (i.e., ramp-up, power-down, shutdown, etc.), NMFS does not believe that there will be any injury or mortality of marine mammals as a result of Shell's operations.

*Comment 38:* AEWC states that in making its negligible impact determination, NMFS failed to consider several impacts: (1) Non-auditory, physiological effects, namely stress; (2) the possibility of vessel strikes needs to be considered in light of scientific evidence of harm from ship traffic to marine mammals; (3) impacts to marine mammal habitat, including pollution of the marine environment and the risk of oil spills, toxic, and nontoxic waste being discharged; (4) impacts to fish and other food sources upon which marine mammals rely; (5) specific marine mammals that will be taken, including their age, sex, and reproductive condition; and (6) the use of multiple airguns at one time. For this last point, referencing Nieukirk *et al.* (2004) and NRC (2003), AEWC states that the impacts from airguns cannot simply be discounted by assuming that most of the energy is focused vertically, and, thus, the impacts horizontally are not great. Dr. Bain also notes that directional sources and arrays produce significant energy in directions other than their primary direction.

*Response:* NMFS does not agree that these impacts were not considered. First, non-auditory, physiological effects, including stress, were analyzed in the Notice of Proposed IHA (74 FR 26217, June 1, 2009). No single marine mammal is expected to be exposed to high levels of sound for extended periods based on the size of the airgun array to be used by Shell and the fact that an animal would need to swim close to, parallel to, and at the same speed as the vessel to incur several high intensity pulses. This also does not take into account the mitigation measures described later in this document.

Second, impacts resulting from vessel strikes and habitat pollution and impacts to fish were fully analyzed in MMS' 2006 Final PEA and incorporated by reference into NMFS' 2009 EA for Shell's activities. Additionally, the proposed IHA analyzed potential impacts to marine mammal habitat, including prey resources. That analysis noted that while mortality has been observed for certain fish species found in extremely close proximity to the airguns, Saetre and Ona (1996) concluded that mortality rates caused by exposure to sounds are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant. Based on the small portion of the Chukchi Sea that will be ensonified during Shell's activities, less than 0.1 percent of available food resources are anticipated to be impacted, which would have little, if any, effect on a marine mammal's ability to forage successfully.

For the fifth point, please see the response to comment 11. The age, sex, and reproductive condition must provided when possible. However, this is often extremely difficult to predict. Additional mitigation measures for bowhead cow/calf pairs, such as monitoring the 120–dB radius and requiring shutdown when 4 or more cow/calf pairs enter that zone, were considered but determined to be impracticable for this survey. As stated elsewhere in this document, due to safety concerns, aerial surveys are not required in the offshore Chukchi Sea environment. Regarding the last point raised by AEWC, NMFS analyzed impacts from the use of an airgun array with a total discharge volume of 40 $in^3$. In its analysis, NMFS did not discount the impacts from airguns by simply assuming that most of the energy is focused downward (i.e., vertically). While the fact that the downward direction of the airguns minimizes sound that is emitted in the horizontal direction, NMFS fully analyzed the impacts of airgun sounds on marine mammals and has required monitoring and mitigation measures to reduce the impacts further. Based on the information contained in this response and the analyses in the proposed IHA and NMFS' EA, NMFS determined that impacts to marine mammals as a result of Shell's action will be negligible.

*Comment 39:* NSB notes that Shell's application states, ''In the absence of important feeding areas, the potential diversion of a small number of bowheads is not expected to have any significant or long-term consequences for individual bowheads or their population. Bowheads, gray, or beluga whales are not predicted to be excluded from any habitat.'' If these whales are avoiding the 160 dB and potentially the 120 dB isopleths, and the logic that is used for use of the mitigation gun is that the sound ''clears'' the area, then, yes, they will most certainly be excluded from part of their habitat.

*Response:* NMFS agrees with NSB's statement that whales will likely be excluded from part of their habitat. However, the exclusion is expected to be temporary and would not affect feeding opportunities because only an extremely small fraction of the Chukchi Sea will be ensonified as a result of Shell's operations (less than 0.2 percent). Implicit in this conclusion, therefore, is that there will be many other areas available to whales for feeding and other biologically important activities.

*Acoustic Impacts*

*Comment 40:* Citing studies on noise impacts to chinchillas (Henderson *et al.*, 1991) and human noise exposure standards by the U.S. Occupational Safety Health Administration (OSHA), Dr. Bain states, ''[I]n humans, chronic exposure to levels of noise too low to generate a TTS can result in PTS.'' As OSHA standards require limiting human

exposure to noise at 115 dBA above threshold to 15 minutes per day, Dr. Bain concludes that this level is equivalent to 145 dB re 1 μPa for killer whales. Dr. Bain states that although the reference levels for sound in air and water are different, this difference is taken into account when determining thresholds.

Dr. Bain notes that while OSHA's standards are for continuous noise and assume multi-year exposure, surveys employ multiple intermittent sources, which in a reverberant environment, have the potential to become nearly continuous. While individual projects will cause limited exposure to individual marine mammals, these individuals will accumulate exposure from natural sources (e.g., wind) and human activities (e.g., other seismic surveys, vessel traffic) conducted over the course of their lifetime.

*Response:* Although NMFS agrees that chronic exposure to noise levels that would not cause TTS could result in hearing impairment in the long-term, it is important to understand that such exposure has to be of a chronic and long-term nature. The OSHA standards for permissible exposure are based on daily impacts throughout an employee's career, while the noise exposure to seismic surveys by marine mammals is short-term and intermittent (surveys occur for 2–3 months in a given year), as described in the Notice of Proposed IHA and NMFS' EA. In addition, the reference Dr. Bain cites (Henderson *et al.*, 1991) does not address chronic noise impact to humans. The research by Henderson *et al.* (1991) focused on the applicability of the equal energy hypothesis (EEH) to impact (impulse) noise exposures on chinchillas, and the results indicated that hearing loss resulting from exposure to impact noise did not conform to the predictions of the EEH, which is the basis for OSHA standards for continuous noise exposure.

Most importantly, Dr. Bain's extrapolation of 145 dB re 1 Pa for killer whale hearing safety from OSHA's 115 dBA is fundamentally flawed for three reasons:

(1) The reference points when using decibel units that address sound in air and in water are different. For airborne sounds, such as those by OSHA, the reference point is 20 μPa, while for underwater sounds, the reference point is 1 μPa. There is a 26 dB difference between the values when different reference points are used for the same sound pressure; therefore, 115 dB re 20 μPa is 141 dB re 1 μPa for the same sound pressure. So 115 dB re 20 μPa in air above human threshold (defined as 0 dB re 20 μPa in air) would be 141 dB re 1 μPa underwater for the same sound pressure. Using the lowest threshold of 30 dB re 1 μPa as the killer whale hearing threshold and assuming that noise impacts to killer whales are the same as for humans, one could extrapolate that continuous noise exposure of 171 dB re 1 μPa (141 dB over the 30 dB threshold) for 15 minutes for killer whales would be equivalent to humans exposed to 115 dB re 20 Pa for 15 minutes. Nevertheless, such extrapolation still leaves much uncertainty since marine mammals have a different mechanism for sound reception (Au, 1993; Richardson *et al.*, 1995). Some of the most recent science has shown that for some odontocetes, the onset of TTS when exposed to impulse noise is much higher (Finneran *et al.*, 2002) than NMFS' current thresholds.

(2) The decibel values used by OSHA are expressed as broadband A-weighted sound levels expressed in dBA. This frequency-dependent weighting function is used to apply to the sound in accordance with the sensitivity of the human ear to different frequencies. Thus, it is inappropriate to compare these values to an animal's hearing capability, including how an animal perceives sound in air (Richardson *et al.*, 1995). For marine mammals, M-weighting functions have been suggested based on five different hearing functional groups to address different hearing sensitivities of different frequencies by each of the marine mammal groups (Southall *et al.*, 2007).

(3) Finally, the sound characteristic used in OSHA standards is continuous sound, while the seismic sound from the proposed shallow hazard and site clearance surveys is impulse sound, which by its very nature is not a continuous sound. There are several seconds between each shot, and each shot only lasts for a few milliseconds. Therefore, the amount of time without seismic sound between each shot is greater than 99 percent. As there is a significant period of time between shot events, this does not qualify as a continuous sound source. NMFS' EA assessed the cumulative impacts from all activities in the Chukchi Sea. Based on that assessment, NMFS determined that Shell's activities would not produce any significant cumulative impacts to the human environment (i.e., marine mammals).

*Comment 41:* Dr. Bain states that sound sources are typically divided into continuous and pulsed categories, and that behavioral effects from pulsed sound are likely to be independent of the repetition rate and duty cycle and depend primarily on the duration of the survey. Dr. Bain further states that intermittent pulses can result in continuously received noise when sound arrives via multiple paths, which Dr. Bain explains as ''sound that bounces between the bottom and the surface will take longer to reach an animal than sound traveling via a direct path,'' and that ''noise can mask signals for a brief period before and after it is received, meaning an almost continuous received noise can mask signals continuously.''

*Response:* NMFS does not agree with Dr. Bain's statement on ocean acoustics and his subsequent analysis and assessment regarding underwater sound propagation and its effects to marine mammals. Within the scientific community on ocean acoustics and bioacoustics, two types of sound are traditionally recognized: transient sounds (sounds of relatively short duration) and continuous sounds (sounds that go on and on). Transient sounds can be further classified into impulsive (such as seismic airguns, explosives, pile driving) and non-impulsive (such as military tactic sonars) sounds (Richardson *et al.*, 1995). Other researchers studying noise impacts on marine mammals classified sound types into a single pulse (a single explosive), multiple pulses (seismic airguns, pile driving), and non-pulses (ships, sonar) (Southall *et al.*, 2007). A simple way to distinguish pulses sound from non-pulses (continuous sound included) is that the former have rapid rise-time in relation to its extremely short duration. As mentioned in the response to comment 25, behavioral responses from marine mammals when exposed to underwater noise is complex and context specific, and often depend on the sound characteristics (such as received levels, duration, duty cycles, frequency, etc.) and other variables.

NMFS agrees that the distinction between transient and continuous sounds is not absolute, as continuous sound from a fast moving vessel is often treated as transient sound in relation to a stationary or slow moving marine mammal. Further, the distinction between pulses and non-pulses is also not always clear, as certain pulsed sound sources (e.g., seismic airguns and explosives) may become non-pulses at greater distances due to signal decay through reverberation and other propagation paths. However, Dr. Bain's statement that intermittent pulses can result in continuously received noise when sound arrives via multiple paths is unfounded. For a marine mammal exposed to noise, multipath propagation

would expose the animal to the noise multiple times, usually each subsequent exposure with lower sound level due to loss of acoustic energy from surface and bottom reflections; however, the noise arriving via multipath propagation would not become continuous sound because the intervals between signals would always exist. In addition, noise cannot mask a signal before or after it is received by the animal. Masking of signals can only occur when the unwanted sound (noise) interferes with the signal when received by the animal, generally at similar frequencies (Richardson *et al.*, 1995). Therefore, Dr. Bain's assessment regarding the potential impact of the acoustic sources to be used during Shell's operations is not supported.

*Comment 42:* Dr. Bain states that one characteristic of pulsed sources is known as ''time-bandwidth'' product, and he explains that it is ''any sound with a finite duration (that is, any real-world sound) contains additional frequencies to the nominal frequency. That is, pulsed sources that nominally have a frequency that is too high to hear, may, in fact, be audible, as the source will contain lower frequencies that are detectable.''

*Response:* NMFS does not agree with Dr. Bain's statement that high frequency pulsed sources nominally contain additional frequencies that are audible. The high frequency pulsed sources are expected to operate within their frequency range, although some mechanical noise at lower frequencies may be produced as a byproduct during the operation. The mechanical noise associated with acoustic equipment is expected to be low intensity and is not expected to result in harassment of marine mammals. Furthermore, the term ''time-bandwidth product'' is generally used in signal process, which is irrelevant to the Chukchi Sea site clearance and shallow hazards survey.

*Marine Mammal Biology Concerns*

*Comment 43:* NSB states that Table 4–1 in Shell's application should be organized based on the NMFS accepted stocks of marine mammals, which is the appropriate management unit. For example, beluga whales should be evaluated for the Beaufort Sea stock and the eastern Chukchi Sea stock. Population estimates (including nmin, point estimate for stock size, and confidence interval around that point estimate) should be given for each stock. Grouping by species is misleading and inappropriate.

Furthermore, Shell separates out numbers of marine mammals by offshore vs. nearshore/ice edge. This approach is confusing, inappropriate for the Chukchi Sea, and needs to be refined. Marine mammals occur and migrate across the entire area. Designating a separate abundance for offshore and nearshore is not appropriate and is not helpful for evaluating the potential for small takes of marine mammals.

The pinniped section of Table 4–1 is also misleading. All four species occur in areas other than sea ice. Shell's estimate of the number of spotted seals is incorrect. The provided estimate is from a MMS document and is only for the Beaufort Sea. Thousands of spotted seals use Chukchi Sea haulouts. That information should be provided in the application.

*Response:* Table 4–1 is meant to provide an overview of the marine mammals that are described in detail in Section 4 of Shell's application. The different stocks that may be encountered during Shell's activities are described in the text portions of the application that follow the table. For example, the discussion for beluga whales describes both the Beaufort Sea stock and the eastern Chukchi Sea stock. Where available, the requested information (e.g., nmin, point estimate for stock size, etc.) was provided; however, that information is not available in the NMFS SARs for all Arctic species. Shell will consider revising this table in future IHA applications. The textual descriptions also provide additional information on the use of the Chukchi Sea by the different species listed in Table 4–1 and a Chukchi Sea specific abundance estimate for spotted seals.

*Comment 44:* NSB states that the last paragraph in the beluga section of the application (page 16) is incomplete. Decision makers and the public need to be aware that the entire Beaufort and Chukchi populations of belugas migrate through the Chukchi Sea during the autumn. This information is necessary because Shell's proposed work is in the Chukchi Sea and may impact beluga whales. Therefore, appropriate monitoring and mitigation plans are needed for the central Chukchi Sea.

*Response:* Discussion of the migration patterns of the Beaufort Sea stock of beluga whales is contained earlier in the beluga whale description (page 15 of the application). NMFS considered impacts to beluga whales during Shell's Chukchi operations. The IHA issued to Shell contains appropriate monitoring and mitigation measures (described in detail later in this document) for all marine mammal species under NMFS' jurisdiction.

*Comment 45:* NSB notes that statements regarding bowheads summering in the Chukchi Sea and feeding in the Beaufort Sea are incomplete. They provide statements of sightings during the summer months, indicating that not all bowheads migrate to the eastern Beaufort Sea in the summer. This information is needed by decision makers and the public to better assess the potential impacts from oil and gas activities on bowheads.

*Response:* MMS' 2006 Final PEA contains a discussion about bowhead migration and references scientific literature and accounts from hunters, indicating that some bowheads may summer in the western Beaufort Sea or Chukchi Sea. This information was incorporated by reference into NMFS' 2009 EA for the issuance of an IHA to Shell and was considered in making the necessary MMPA findings.

*Comment 46:* NSB states that the discussion of results from Shell's aerial surveys regarding gray whales is misleading. Shell states that gray whales were most abundant near shore between Barrow and Wainwright; however, Shell did not conduct aerial surveys in offshore areas, including in the proposed operation area. Shell's visual observations in offshore areas came solely from observers on boats. It is not reasonable to compare aerial and vessel surveys to conclude that gray whales are mostly using nearshore areas. Scientific information on how gray whales are using offshore areas should be considered limited at this time.

*Response:* Comment noted. In assessing impacts to gray whales, NMFS considered that individuals may occur within the action area. Estimated take numbers for gray whales reflect the fact that the animals may use offshore areas near Shell's operations (see the ''Estimated Take of Marine Mammals'' section later in this document).

*Comment 47:* AWL states that there is insufficient information in the proposed IHA **Federal Register** notice related to gray whales to justify NMFS' MMPA conclusions. Gray whales have been shown to abandon habitat in response to anthropogenic noise. It is not clear that NMFS considered the proximity of Shell's proposed survey areas to the Hanna Shoal or other potential eastern gray whale feeding areas.

AWL and Dr. Bain note that gray whale numbers have declined since de-listing of the species in 1994. Dr. Bain states that this raises the question of whether gray whales should be re-listed as threatened under the ESA since their population has a negative trend and is at a level that was considered threatened even when it was increasing. One implication of re-listing would be a change in the recovery factor for

calculating Potential Biological Removal (PBR). Using the value for an ESA-listed species would reduce PBR to 42. Subsistence harvest in Russia alone exceeds this number. Thus, additional threats such as habitat loss due to disturbance from seismic surveys would result in further jeopardy to the survival of the species. It is clear that a careful evaluation of this species is needed before activities that disturb gray whales are allowed.

*Response:* NMFS considered the potential impacts of the site clearance and shallow hazards surveys on gray whales. MMS' 2006 Final PEA contains discussion and analysis of the potential effects of airgun noise on gray whales, including avoidance of habitat when seismic surveys are occurring. This information was considered by NMFS and incorporated by reference into the EA prepared for this action. Through this analysis, NMFS considered the fact that the Chukchi Sea is considered a primary summer feeding ground for the eastern North Pacific stock of gray whales. However, NMFS determined that Shell's surveys will impact only small numbers of gray whales and will have a negligible impact on the affected stock. This determination was made based on several factors: (1) the small size of the airgun array (40 $in^3$); (2) the short duration of the survey (approximately 50 days); and (3) the incorporation of the required mitigation and monitoring measures described later in this document.

Since 1994, NMFS has continued to monitor the status of the population consistent with its responsibilities under the ESA and the MMPA. In 1999, a NMFS review of the status of the eastern North Pacific stock of gray whales recommended the continuation of this stock's classification as non-threatened (Rugh *et al.*, 1999). Workshop participants determined the stock was not in danger of extinction, nor was it likely to become so in the foreseeable future. In 2001 several organizations and individuals petitioned NMFS to re-list the eastern North Pacific gray whale population. NMFS concluded that there were several factors that may be affecting the gray whale population but there was no information indicating that the population may be in danger of extinction or likely to become so in the foreseeable future. Wade and Perryman (2002) and Punt *et al.* (2004) (cited in the 2008 SAR, Angliss and Allen, 2009) found that the stock is within its optimum sustainable population level and that the population is likely close to or above its unexploited equilibrium level. NMFS continues to monitor the abundance of the stock through the MMPA stock assessment process, especially as it approaches its carrying capacity. If new information suggests a reevaluation of the eastern North Pacific gray whales' listing status is warranted, NMFS will complete the appropriate reviews. Lastly, Shell's surveys are not expected to destroy or result in any permanent impact on habitats used by gray whales or to their prey resources or to jeopardize the continued existence of the species.

*Comment 48:* AWL, Dr. Bain, and AEWC state that the division of the harbor porpoise population in Alaska is incorrect. Dr. Bain and AEWC cite to the 2008 harbor porpoise Bering Sea stock SAR (Angliss and Allen, 2009):

> In cases outside of Alaska, studies have shown that stock structure is more fine-scale than is reflected in the Alaska Stock Assessment Reports. At this time, no data are available to reflect stock structure for harbor porpoise in Alaska. However, based on comparisons with other regions, smaller stocks are likely. Should new information on harbor porpoise become available, the harbor porpoise Stock Assessment Reports will be updated.

That is, the stock to be affected by the survey is likely to be far smaller than currently recognized. The implication is that the population is far less able to tolerate takes than expected based on the current stock definition. AWL states that while NMFS is not required to develop a definitive stock assessment, it cannot rely on concededly inaccurate information in order to comply with its MMPA obligations. AEWC states that without knowing whether a specific stock of harbor porpoise exists in the area that will be impacted by Shell's operations and the population numbers and health of that stock, NMFS cannot determine the level of take and whether such take will be negligible to the stock. Thus, operations in the Chukchi should not proceed until additional studies have been conducted.

*Response:* Currently, there are insufficient samples to draw conclusions about stock structure of harbor porpoise within Alaska. While NMFS acknowledges that perhaps smaller stocks should be recognized in Alaska, the best science currently available indicates that Shell's activities will potentially impact only small numbers of harbor porpoise and will not have a negligible impact on the affected species or stock. Using the current estimated stock size for the Bering Sea stock, only 0.01 percent is estimated to be taken by harassment. If the number should be something closer to the low 1,000s (as suggested by AWL), this would still represent less than 1 percent of the stock size. NMFS does not agree that just because a stock contains fewer individuals than originally estimated that it is far less able to tolerate takes than expected. Dr. Bain does not provide any scientific evidence for this statement.

*Comment 49:* Dr. Bain states that another point of concern regarding the harbor porpoise is that NMFS is reviewing new data on other sources of takes but will not complete the analysis until next year (Allen and Angliss, in prep.). These data are needed to assess the cumulative effects of the proposed survey and other factors that impact the population.

*Response:* While the draft 2009 SAR (Allen and Angliss, in prep.) states that more current data on fishery-related serious injury and mortality are being analyzed and will be available for inclusion in the 2010 SAR, it also states that in 2001 only one fishery-related harbor porpoise mortality was recorded in 2001, and none were recorded for the period 2002–2006. Although no records are currently available for 2007–2009, the estimated level of human-caused mortality and serious injury is not known to exceed PBR (Allen and Angliss, in prep.). NMFS assessed cumulative impacts to all marine mammals that may occur in the area of Shell's operations in its 2009 EA. Based on that assessment, NMFS concluded that issuance of an IHA to Shell to conduct its open-water marine survey program in the Chukchi Sea during the 2009/2010 Arctic open-water season would not produce any significant cumulative impacts to the human environment.

*Comment 50:* NSB notes that more information is needed regarding use of the Chukchi Sea and how environmental changes may affect that use for bearded and ringed seals.

*Response:* As required by the MMPA implementing regulations at 50 CFR 216.102(a), NMFS has used the best scientific information available in making its determinations required under the MMPA. While recent stock assessments are lacking for several species of ice seals, for reasons stated elsewhere in this **Federal Register** Notice, no ice seals are expected to be killed or seriously injured as a result of Shell's site clearance and shallow hazards surveys and the number of takings by Level B harassment will be small relative to the best estimate of population size. Therefore, NMFS has determined that Shell's activity would not result in a decrease in population sizes of any of the ice seal species. As a result of our analysis, NMFS believes that Shell's proposed site clearance and

shallow hazard surveys are not expected to have adverse impacts on ice seals.

*Density and Take Estimate Concerns*

Several of the comment letters addressed concerns over the species densities used by Shell to calculate take estimates. In general, the commenters believed that Shell used flawed density estimates, which then led to incorrect take estimates. This subsection addresses those concerns and provides further explanation beyond the information and explanations provided in Shell's application and the Notice of Proposed IHA (74 FR 26217, June 1, 2009). Dr. Sue Moore was one of the independent peer reviewers for Shell's 4MP. Those comments are addressed in the ''Monitoring Plan Independent Peer Review'' subsection later in this document. However, Dr. Moore also provided comments on the density estimates used by Shell, which are more appropriately addressed in this subsection.

*Comment 51:* NSB states, ''Shell contends that ''Animal [marine mammal] densities are generally expected to be lower in deep water, and at locations far-offshore''' (page 13 in Shell's application). Shell does not provide references to support this statement. It is possible that the statement is based on visual surveys in offshore areas conducted from boats during the past 3 years. (Shell's nearshore surveys were conducted by plane.) Because of the impact from boat sounds, including 3D seismic, to marine mammals and the limited efficacy of MMOs, it is inappropriate to compare density estimates from the nearshore and offshore areas using these two different methods. Moreover, Shell's 2008 report on the ''Joint Monitoring Program'' showed that in some cases the number of marine mammal calls detected was greater in offshore areas compared to nearshore areas.

*Response:* The statement is a generalization across multiple species and seasons and does not indicate that it applies for all species (use of the word ''generally''). Additionally, this statement was written when the application was also considering estimates of marine mammals in the Beaufort Sea. For example, results presented in Moore *et al.* (2000b) for bowhead and beluga whales during the summer months in the Beaufort Sea and to some extent for gray whales in the Chukchi Sea support this statement, as well as statements contained in Bengtson *et al.* (2005) for ringed and bearded seals. However, it is possible that certain species may be encountered in higher densities in offshore areas. The paragraph from which this statement was taken was merely an introduction. Species specific descriptions are contained in the following pages of the application.

*Comment 52:* AEWC states that in assessing the level of take and whether it is negligible, NMFS relied on flawed density estimates that call into question all of NMFS' preliminary conclusions. Density data are lacking or outdated for almost all marine mammals that may be affected by Shell's operations in the Chukchi Sea, especially for the fall. A few species specific examples are provided that illustrate NMFS' failure to utilize the best available scientific studies in assessing Shell's application.

NMFS' guess at the number of beluga and bowhead whales in the Chukchi in the summer relies on a study from Moore *et al.* that was published in 2000 based upon information from ''industry vessels.'' The estimate is contrary to the best available scientific information on beluga whale presence in the Chukchi in the SAR from 2005. While more updated information is necessary on beluga presence in the Chukchi during the summer, even the SAR demonstrates the arbitrary nature of NMFS' density calculations and the information upon which these calculations rely. The SAR for bowhead whales cites to a 2003 study that documented bowheads ''in the Chukchi and Bering Seas in the summer'' that are ''thought to be a part of the expanding Western Arctic stock'' (Angliss and Allen, 2009). While a study published in 2003 still is not a sufficient basis for a 2009 density analysis, this study does show that additional information is available that indicates that the number of bowhead whales in the Chukchi may be higher than estimated by NMFS.

*Response:* As required by the MMPA implementing regulations at 50 CFR 216.102(a), NMFS has used the best scientific information available in assessing the level of take and whether it is negligible. The data presented in Moore *et al.* (2000b) was not derived from sightings on industry vessels. The paper relies on data collected over 10 years (1982–1991) from aerial surveys offshore of northern Alaska. AEWC does not provide a citation for the 2005 publication cited in the beluga SAR; however, NMFS assumes it is Suydam *et al.* (2005). This is a more recent paper that provides information on the movements of 23 tagged beluga whales in the Arctic Ocean basin. However, Suydam *et al.* (2005) do not provide any density calculations or information. Shell did reference this publication in section 4 of the IHA application when describing the distribution of beluga whales. Therefore, although this information was not used when deriving density or take estimates for beluga whales, this information was considered by NMFS in making its MMPA findings. Additionally, the 2003 study noted by AEWC in the bowhead whale SAR discusses distribution, not density (Rugh *et al.*, 2003). This paper is cited in the distribution discussion of bowhead whales in the Chukchi in section 4 of Shell's application. However, it is not useful for deriving density estimates. Therefore, density estimates for bowhead and beluga whales using Moore *et al.* (2000b) are based on the best available science.

*Comment 53:* Dr. Moore notes that the last paragraph on page 25 of Shell's application states in part that ''For the Chukchi Sea, cetacean densities during the summer (July-August) were estimated from effort and sightings data in Moore *et al.* (2000b).'' Moore *et al.* (2000b) does provide summer Chukchi transect survey effort and sighting data (stratified by bathymetry) but only for gray whales. However, expected densities are listed for eight cetacean species. Since data for seven of these species cannot be referenced to Moore *et al.* (2000b), they must be calculated (somehow) from ''data collected aboard industry vessels in 2006 and 2007.'' However, to my knowledge, industry vessels never conducted surveys in a manner from which abundance can be estimated. NSB, AEWC, and Dr. Bain echo Dr. Moore's comment about using data from industry vessels for harbor porpoise. AEWC also states that the insufficiency of the harbor porpoise density estimate is compounded by NMFS' decision not to rely on data from ''early autumn months'' in calculating the ''fall period'' density of porpoises and to use ''minimal values'' instead, which is equally arbitrary.

*Response:* The paragraph noted by the reviewer is meant to indicate to the reader the primary sources from which density information was derived. In the following paragraphs in the application (and in the Notice of Proposed IHA), additional information on the derivation of summer and fall densities for each species is provided. As Dr. Moore suggests, data on the effort and sightings of gray whales during summer surveys are reported in Moore *et al.* (2000b), and these data were used to estimate their expected density. Although not reported in the text or tables in Moore *et al.* (2000b), Figure 6 in the article indicates two on-transect sightings of beluga whales in the Chukchi Sea in the summer. These two sightings along with the survey effort for gray whales were used to calculate a summer beluga

whale density estimate for the Chukchi Sea. As explained in Shell's application, this same method was used to calculate a summer density of bowhead whales by assuming one sighting had occurred (although none were actually reported) during the reported survey effort for gray whales.

No published densities or data on survey efforts or sightings were available for harbor porpoise, but estimates had been calculated from industry survey data in 2006 and 2007, so those densities were used. The commenter is correct that the industry vessels did not conduct standard randomized line-transect surveys while operating (except for short periods in 2006). However, this information was considered the best scientific information available to determine a density estimate for harbor porpoise in the Chukchi Sea. As noted in the subsequent paragraphs in Shell's application, density or survey data for other cetacean species are either not available or have been reported in such low numbers that minimal densities were selected to account for chance encounters of these species that are less frequently observed in the area of Shell's operations in the Chukchi Sea. Additionally, for harbor porpoise, different density estimates were used for the summer and fall periods (see Tables 6–1 and 6–2 in Shell's application).

*Comment 54:* Dr. Moore also notes that page 25 of Shell's application also states, ''Because few data are available on the densities of marine mammals other than large cetaceans in the Chukchi Sea in the fall (Sep-Oct), *density estimates from the summer period have been adjusted* to reflect the expected ratio of summer-to-fall densities based on the natural history characteristics of each species'' (emphasis added by commenter). Moore *et al.* (2000b) provides fall Chukchi data for bowhead, beluga, and gray whales, why is this not used? Even if these data were used, however, there remains the question of using sightings from industry vessels to ''calculate densities'' for five of the eight cetacean species listed in Table 6–2 of Shell's application. The MMC also recommends that NMFS require Shell to describe in detail how it adjusted the data in Moore *et al.* (2000b) to estimate cetacean densities in the Chukchi Sea in the fall.

*Response:* Shell used the data from Moore *et al.* (2000b) to calculate densities for beluga and gray whales during the fall period in the Chukchi Sea, which is noted in subsequent paragraphs in the application. However, in order to be consistent with methods used to calculate bowhead densities in previous years, Moore *et al.* (2000b) was not used, although that data could have been used. See the response to comment 53 regarding deriving densities from industry vessels. In the absence of peer-reviewed literature, this was the best information available. Additional information on the use of correction factors and calculating density estimates is provided in the responses to several of the comments contained in this subsection of the document.

*Comment 55:* AEWC states that NMFS fails to explain how and why it reaches various conclusions in calculating marine mammal densities and what the densities are actually estimated to be once calculated. One example is NMFS' reliance on Moore *et al.* (2000b) in making its density determinations. This study documented sightings of marine mammals but did not estimate the total number of animals present. NMFS fails to explain the basis for its ''conversion'' of data on sightings to its density conclusions.

*Response:* All densities used in calculating estimated take of marine mammals based on the described operations are shown in Tables 6–1 and 6–2 of Shell's application. Moore *et al.* (2000b) provides line transect effort and sightings from aerial surveys for cetaceans in the Chukchi Sea. The kilometers of ''on-transect'' observer effort and number of sightings were used in the accepted line-transect density estimate equation described in Buckland *et al.* (2001). Species specific correction factors for animals that were not at the surface or that were at the surface but were not sighted [g(0)] and animals not sighted due to distance from the survey trackline [*f*(0)] used in the equation were taken from reports or publications on the same species or similar species if no values were available for a given species, that used the same survey platform. Additional explanations regarding the calculations of marine mammal densities are provided in the responses to other comments in this subsection of this document.

*Comment 56:* NSB indicates that Shell's approach to estimating densities of beluga and bowhead whales is problematic. Shell uses densities from aerial surveys, which would be appropriate if bowheads and belugas were more or less stationary. In reality, the entire bowhead population and both stocks of belugas migrate through the area Shell proposes for its 2009 exploration activities. Thus, many more bowheads and belugas may potentially be taken during Shell's operations than what they have estimated. NMFS should carefully evaluate, and modify as appropriate, the approach Shell has used for estimating takes.

AWL also questions the use of a ''density'' measure in determining take in the Chukchi Sea during the bowhead migration. NMFS has recognized in the past that using density is inappropriate for determining bowhead take from seismic activities in the Beaufort Sea during the fall. It is not clear on what basis NMFS abandons an approach that would estimate migrating whales in the Chukchi Sea. Using a density calculation artificially reduces the number of bowheads that will likely be impacted from Shell's surveying and does not represent the best available science.

*Response:* Shell's density estimates for bowhead and beluga whales are based on the best scientific information available, which is the standard required by the MMPA implementing regulations at 50 CFR 216.102(a). The alternative method referred to by AWL for estimating take of migrating bowhead whales was only used for seismic operations in the Beaufort Sea (and is described in Shell's IHA application in the Beaufort Sea Estimating Take Section; however, Shell cancelled the Beaufort Sea activities). This method has not been applied to activities in the Chukchi Sea. Because the migration corridor is narrower and better defined in the Beaufort Sea than the Chukchi Sea this method was deemed appropriate by NMFS for seismic operations in the Beaufort. However, the migratory path taken by bowhead whales once they enter the Chukchi Sea is not as well understood. Moreover, the migratory route is not as narrowly defined in the Chukchi. Additionally, if these species avoid areas of active seismic operations at levels lower than 160 dB re 1 μPa (rms), as noted by several of the commenters, then fewer animals will occur in the area of Shell's operations. After careful evaluation of the methods used by Shell to estimate take, NMFS has determined that Shell used the best scientific information available in calculating the take estimates.

*Comment 57:* Dr. Bain notes that when estimating number of takes, it is important to consider if the individuals are feeding or migrating. In the case where there is little natural movement, the number of individuals in the ensonified area is an index of the number of takes. Exposed individuals can accumulate noise exposure or move out of the area. Assuming optimal foraging, displaced individuals will move to poorer feeding areas or compete with individuals for food in comparable habitat. When competition outside the

ensonified area occurs, the fitness of all individuals involved will be reduced, although only those exposed to noise are typically counted as taken.

Dr. Bain continues that when individuals are migrating through an area, new individuals are exposed to noise as they approach the noise source. Rather than estimating takes based on density in the ensonified area, it is more appropriate to draw a line across the ensonified area and estimate the number of individuals that would be expected to cross that line during the survey. Using an estimate of bowhead density from Funk *et al.* (2006) of 3/100 $km^2$ (3/38.6 mi2) in offshore waters in mid-season and a 120–dB diameter of 46 km (28.6 mi), Dr. Bain presents take numbers during the bowhead migration. Taking into account typical migration speed for bowhead whales (4.5 km reported in Koski *et al.* [2002]), in 24 hours, approximately 144 whales would either enter the ensonified area or be deflected to avoid it. As can be seen, the number of migrating whales exposed is far higher than would be the case if the sound source and whales were relatively stationary. Although not meant to be exact, the numbers used here are well within the range of possibilities and serve to illustrate that far more whales might be exposed during migration than during a feeding season.

*Response:* Dr. Bain does not provide any scientific support for his theory. The temporary displacement of marine mammals from foraging habitat is not expected to affect individual fitness. For example, apparently, bowhead whales continued to increase in abundance during periods of intense seismic in the Chukchi Sea in the 1980s (Raftery *et al.*, 1995; Angliss and Allen, 2009), even without implementation of current mitigation requirements. NMFS is not certain what Dr. Bain means by ''an index of the number of takes.''

NMFS does not agree with Dr. Bain's method for calculating takes of migrating bowhead whales. First, Dr. Bain uses the 120–dB level to estimate the level of take. For impulse sounds, such as from seismic airguns, NMFS uses the 160 dB re 1 μPa (rms) threshold to estimate Level B harassment. NMFS has responded several times over the past few years and elsewhere in this document to the assertion by commenters that Level B harassment takes should be estimated at the 120 dB level and not at the 160 dB level (see response to comment 25). Because Dr. Bain used this lower threshold, the take number presented is much higher than that generated by NMFS and Shell. Second, Dr. Bain uses a density estimate from Funk *et al.* (2006), which is based on industry monitoring. The public has expressed concern over the use of density estimates derived from industry monitoring (see other comments in this subsection). As explained in the response to comment 53, NMFS uses density estimates from peer reviewed journal articles when they are available. However, in instances when monitoring from industry vessels provide the only information, estimates are derived from those reports. However, in the case of bowhead whales, information is available from non-industry monitoring studies (e.g., Moore *et al.* (2000b)); therefore, the estimate provided in Funk *et al.* (2006) was not used. Additionally, Dr. Bain's calculation assumes that the whales will continue their entire migration along the same track as the seismic vessel. While some bowhead whales may occur in the action area, the migration corridor in the Chukchi Sea is not well defined. One cannot assume that the entire migration will occur near Shell's operations. Lastly, Dr. Bain's calculation also asserts that deflection itself constitutes a take. As explained elsewhere in this document, a minor course correction does not constitute a significant behavioral response rising to the level of a take. Therefore, NMFS does not agree that Dr. Bain's formula accurately portrays the number of bowhead whale takes during the fall migration period through the Chukchi Sea.

*Comment 58:* Dr. Bain states that NMFS modeled takes in the Chukchi in September based on sightings in the Beaufort. However, the model is demonstrably inaccurate based on existing data from the Chukchi. Further, NMFS misinterpreted the data that form the basis of their extrapolation. Dr. Bain argues that the three reasons provided by NMFS for believing densities would be 20 times lower in the survey area than in the Beaufort in September are wrong. First, while it may be true to some degree that the migration corridor is narrower in the Beaufort, this is irrelevant. The reported density for the Beaufort depends on how well the survey design identifies the corridor boundary. Regardless of whether the average density is correctly identified, the density will vary across the corridor. That is, when the corridor widens, the average density will decline, but concentrations may still occur, as appears to be the case for the survey area (see plot in Moore *et al.* (2000b)).

Second, NMFS maintains that bowheads are more likely to migrate non-stop through the Chukchi in contrast to the Beaufort where they sometimes linger. As discussed in detail in Dr. Bain's letter (and comment 59), this will increase rather than decrease the number of whales taken. Third, NMFS states that most of the whales will migrate north of the survey area. To the contrary, the survey area is in the center of the migration route. Dr. Bain cites Quakenbush (2007), which shows a tagged bowhead whale migrating through Shell's survey area, and Moore *et al.* (2000b), which plotted bowhead sightings the same distance offshore as the survey area, not north of it. Finally, Funk *et al.* (2006) found many bowheads nearshore, not north of the survey area as anticipated by NMFS.

AWL states even accepting a density approach for the fall, we do not believe that the 95% discount applied by NMFS is appropriate. NMFS' .05 ''correction factor'' rests on the three points raised by Dr. Bain in this comment. AWL states that as discussed by Dr. Bain, these assertions do not justify such a severe reduction.

*Response:* Although it would be preferable to estimate takes of marine mammals migrating through the Chukchi Sea using detailed data on migration location, timing, and rates, as exist for bowhead whales in the Beaufort Sea, no such data exist for any species in the Chukchi Sea. Applying data from the Beaufort Sea without adjustment to the Chukchi Sea, as suggested by the commenter, is also demonstrably inaccurate based on the evidence provided. Because specific migration data are lacking, the more common approach of using expected marine mammal densities to estimate takes in the Chukchi Sea was used. However, even basic density information on many species present in the Chukchi Sea during the open-water season are not available in the published literature.

In the case of bowhead whales, the most well documented density estimates, including $f(0)$ and $g(0)$ correction factors, are given in Richardson and Thomson (2002) for the Beaufort Sea, so this density was chosen as the starting point for estimating an expected density in the Chukchi Sea. The bowhead migration through the Chukchi Sea has been thought to bifurcate after passing Point Barrow. Recent data from the Alaska Department of Fish and Game (ADF&G 2009), which provides updated information of the tagging studies presented in Quakenbush (2007), suggest that a majority of bowheads travel through the northern Chukchi Sea to the Russian coast during the fall migration (approximately 90 percent) while a small number may travel southeast along the U.S. Chukchi Sea coast

(approximately 10 percent). Many of the animals traveling through the northern Chukchi Sea to the Russian coast appeared to travel north of Shell's Burger and Crackerjack prospects (the location for the 2009 site clearance and shallow hazards surveys). Although the sample size in the Beaufort Sea is somewhat smaller, the geographic distribution of migration paths through the Beaufort Sea does appear more restricted than through the northern Chukchi Sea (Quakenbush 2007; ADF&G 2009). Bowhead whale feeding areas have not been identified in or near lease holdings in the Chukchi Sea, so whales are not likely to concentrate at densities as high as those encountered by Richardson and Thomson (2002) in the Beaufort Sea, supporting a further reduction in the density used in the Chukchi Sea. These factors lead to the selection of a density that was 5 percent of the density reported by Richardson and Thomson (2002).

*Comment 59:* AWL states that equally important is the lack of reasoning to support the final result. Although NMFS has provided some information as to why it applied a discount factor, it has not explained how it arrived at the precise figure. While some adjustment may be appropriate, NMFS does not include adequate information to demonstrate the basis for determining that such a sharp reduction is required. At a minimum, NMFS must reveal how it developed its calculations.

Dr. Bain also notes that it is unclear how corrections were made, as the application indicated species specific values for g(0) and *f*(0) were used. However, these values are dependent on the species and the observation platform used *and* sighting conditions involved, not just the species. While no on-effort sightings during surveys were reported for some species, the probability of detecting any individuals given the effort level and assumed density was not reported.

*Response:* See response to comment 58, which explains how NMFS arrived at a specific discount factor for bowhead whales in the Chukchi Sea. As noted in Shell's application, when densities were provided in publications the g(0) and *f*(0) correction factors used in density calculations were developed or applied by the original authors in the appropriate manner given the survey platform and conditions. Otherwise, g(0) and *f*(0) correction factors developed for the same type of survey platform and during on-effort (i.e., good sighting conditions) were used on survey data for which densities had not been explicitly calculated.

*Comment 60:* Dr. Bain states that while the mean density may be used in some cases to calculate a best estimate of take, maximum estimates should be considered as well to ensure worst case scenarios do not pose an unacceptable threat to a population.

*Response:* When evaluating the take estimates presented in Shell's IHA application, NMFS took into consideration both the average and maximum estimates. However, as explained in the Notice of Proposed IHA (74 FR 26217, June 1, 2009), since Shell did not provide a rationale regarding the maximum estimate, NMFS decided that the average density data of marine mammal populations would be used to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the proposed project area. NMFS only used the ''maximum'' estimates for marine mammal species that are considered rare in the project area and for which little to no density information exists (i.e., killer, fin, humpback, and minke whales and ringed seals) in order to account for some possibility of these species possibly being taken by Shell's activities. Additionally, using maximum density estimates is problematic as it tends to inflate harassment take estimates to an unreasonably high number and is not based on empirical science.

*Comment 61:* Dr. Bain states that since the assumptions upon which NMFS based its model are faulty, one would expect available data to contradict the model, and this is, in fact, the case. He notes that Funk *et al.* (2006), using more recent data from the Chukchi than the data in Richardson and Thomson (2002) from the Beaufort Sea used by NMFS, found mid-season offshore densities to be 0.03156/km$^2$, meaning that NMFS' model underestimates density by a factor of almost 30 for the latter part of the survey season. Additionally, Dr. Bain notes that the model used to calculate August densities works a little bit better than the September model, as the early season densities observed by Funk *et al.* (2006) were about 7.5 times higher than predicted by NMFS, using data from Moore *et al.* (2000b). Even if NMFS concluded estimating abundance from missed sightings rather than existing sighting data were the best approach, the assumption of one missed sighting is the wrong methodology. Rather, NMFS should identify the lowest density which would result in a small probability that all whales would be missed (scientists typically use 0.05, 0.01, or 0.001 as the definition of a ''small probability''). In summary, the models used for estimating bowhead density are based on faulty assumptions and underestimate bowhead density by an order of magnitude.

*Response:* Dr. Bain relies on Funk *et al.* (2006) for validating the applicability of bowhead density estimates derived from Moore *et al.* (2000b) and Richardson and Thomson (2002). However, the density estimates in Funk *et al.* (2006) were calculated from data collected aboard industry vessels during routine operations, not while conducting line-transect surveys and therefore serve as a very poor comparison to data reported by Richardson and Thomson (2002) and Moore *et al.* (2000b) collected from aircraft flying line-transect surveys. Routine industry vessel operations are often conducted in one or more highly localized areas, creating spatial and temporal auto-correlation that likely artificially inflate density estimates calculated from the data. As yet, there are no known or accepted methods to account for these types of auto-correlation in non-randomized survey data.

Dr. Bain also appears to have misunderstood how a ''missed'' sighting was used to calculate the Chukchi Sea bowhead density estimate. Dr. Bain fails to understand that there were zero reported sightings (i.e., there were no ''existing sighting data'' to use, as suggested by the commenter), and, therefore, the assumption that there had been one sighting is, in effect, calculating the lowest density which would result in zero sightings. Because the calculation of bowhead density assuming this hypothetical sighting included the g(0) correction factor, animals ''missed'' by observers, for the various reasons described by Dr. Bain, were taken into account.

*Comment 62:* NSB quotes a statement from page 29 of Shell's application: ''Small numbers of minke and humpback whales were observed during industry activities in 2006 and 2007'' (Ireland *et al.*, 2008). NSB notes that if these animals were expected to flee from the industry operations/disturbance, then the numbers of animals actually seen would likely be a gross underestimate.

*Response:* The sightings of minke and humpback whales that were reported in Ireland *et al.* (2008) occurred during non-seismic periods (i.e., no airguns firing). Therefore, fleeing would not be expected at those times.

*Comment 63:* Dr. Moore and NSB note that Shell used Bengtson *et al.* (2005) to estimate pinniped densities; however, this paper only provides information for

springtime estimates of bearded and ringed seals. NSB notes that it is very likely that estimates of seals during open-water periods are much different than spring surveys, and Shell should be required to conduct surveys to appropriately estimate densities of these two seal species that are being considered for listing. Additionally, Shell states that it uses shipboard estimates of some marine mammals to estimate densities for estimating takes in the Chukchi Sea, which is inappropriate because it will underestimate densities. A cursory comparison of Shell's density estimate from shipboard and aerial surveys reveals that shipboard estimates are biased low; therefore, take estimates will be biased low for any time that density estimates from ships are used. NSB also believes that the method used to calculate density estimates for ribbon seals is entirely inappropriate and unacceptable. Dr. Moore asks, ''how is it that expected densities are listed for ribbon and spotted seals in Tables 6–1 and 6–2?''

*Response:* NMFS agrees that densities may be different for ringed and bearded seals during the open-water period than during the spring ice-covered season reported in Bengtson *et al.* (2005). However, estimates for the open-water period are expected to be lower than those reported in the springtime because animals will no longer be concentrated during pupping/breeding season near ice cracks or leads. As mentioned later in the application, densities of seals calculated from industry vessel data were indeed lower than those reported by Bengtson *et al.* (2005). The data were provided merely for comparison purposes within the text. However, the higher densities reported by Bengtson *et al.* (2005) were used to calculate the take estimates. Additionally, as described later in the application, very little information exists on spotted seal densities in the offshore areas of the Chukchi Sea. Therefore, spotted seal densities were estimated by multiplying the bearded seal density provided in Bengtson *et al.* (2005) by 0.2, based on the ratio of abundance estimates of spotted seal to bearded seal. Ribbon seals have been reported in very small numbers within the Chukchi Sea by observers on industry vessels (Ireland *et al.*, 2007a; Patterson *et al.*, 2007) so minimal values have been used for expected densities to account for chance encounters of this species during Shell's operations. The use of minimal values for ribbon seal density estimates is appropriate and actually provides an overestimate of the likelihood of encountering a ribbon seal during Shell's surveys. Using actual densities of ribbon seals in the project area would result in an estimate of less than one seal being encountered. NMFS has determined that the best scientific information available on the four pinniped species that may occur in the project area was used to calculate density and take estimates.

*Comment 64:* Page 35 of Shell's application states: ''Under this assumption, densities of marine mammals expected to be observed in or near ice margin areas have been applied to 10% of the proposed survey trackline.'' NSB requests more information on how these estimates were developed.

*Response:* Survey operations require towing equipment in the water, making it susceptible to damage or loss in the presence of ice. Therefore, survey activities will not occur within pack-ice, and only a small amount of surveying may occur within the vicinity of ice. Densities of some marine mammal species that may occur in the project area are expected to be higher in or near sea ice. In order to avoid underestimating the potential number of takes by harassment if surveying occurs near ice for a short period of time, a small portion (10 percent) of the survey trackline was applied to these densities.

*Comment 65:* NSB states that Shell must use the 120–dB isopleth for estimating the number of bowheads that might be taken by harassment, not the 160–dB isopleth because of the sensitivity of migrating bowheads to anthropogenic sound. Additionally, allowance for migration of the other marine mammal species is needed. Dr. Bain also states that increased takes due to migration of beluga whales should have been taken into account.

*Response:* See responses to comments 27 and 31 in this document. Based on the information provided in those responses, NMFS continues to support the use of the 160–dB threshold to estimate take by Level B harassment from impulse sounds, such as seismic airguns.

*Comment 66:* The AEWC states that ringed seals provide another prime example of NMFS' reliance on industry operations for information on the species (see 74 FR 26224, June 1, 2009). Again, the industry operations obtained far lower numbers than the scientific studies of ringed seals.

*Response:* The commenter has misunderstood the inclusion of the density estimates obtained from industry operations in the Notice of Proposed IHA and Shell's application for ringed seals. The values were given in the text merely for purposes of comparison. As stated elsewhere in the application and Notice of Proposed IHA, the values used to calculate ringed seal densities were derived from Bengtson *et al.* (2005), which are higher than the values obtained from industry operations.

*Comment 67:* NSB notes that Shell provides a take estimate of 283 bowhead whales in the IHA application. NSB states that this would assume that Shell's MMOs would need to visualize 283 bowhead whales in the 160–dB isopleth. Such numbers of whales have not been seen in the past.

*Response:* First, this number was the combined estimate for surveys that were originally proposed to be conducted in the Beaufort Sea and for operations proposed in the Chukchi Sea. The Beaufort Sea operations were cancelled by Shell and were not analyzed or authorized by NMFS. The average and maximum take estimates for bowheads in the Chukchi Sea are much lower (one and five, respectively). Additionally, NSB has misunderstood the original calculation of 283 whales and the method by which post-season take estimates are calculated. The calculation of 283 whales includes corrections for animals that would not be observed by MMOs on the vessels either because the animals were underwater or because detection is more difficult the farther the animals are from the vessel. These same corrections are applied when estimating post-season take numbers. However, based on the small size of the 160–dB radius for Shell's Chukchi Sea operations (1,400 m [0.87 mi]), it is anticipated that MMOs will be able to better monitor the zone than when monitoring aboard vessels using large airgun arrays.

*Comment 68:* NSB notes that Shell states in its application that ''the number of migrating bowhead whales exposed to sounds ≥120 dB by the proposed surveys would be 8.5x the number estimated at ≥160 dB.'' Actual numbers should be included. By our calculation, this is 2,405 whales, almost a fifth of the Bering-Chukchi-Beaufort Sea stock of bowhead whales, exposed at 120 dB. Harassment of this many whales in this stock should not be permissible.

*Response:* This statement was meant to indicate how many bowhead whales could potentially be exposed to sounds at the 120 dB level. However, as discussed elsewhere in this document, NMFS does not consider exposure to impulse sound at 120 dB to constitute a take. Additionally, as explained in the response to comment 67, the take estimate of 283 whales was when all operations were still planned to occur.

*Comment 69:* AEWC is opposed to NMFS using ''survey data'' gathered by industry while engaging in oil and gas related activities and efforts to document their take of marine mammals. NMFS' methodologies are not adequate for assessing the density or presence of marine mammals that typically avoid such operations. Thus, it is completely arbitrary to rely on data collected from the very vessels that marine mammals avoid in making density arguments, and it is not surprising that such industry information consistently reports lower numbers for this reason. For these reasons, NMFS cannot rely on such industry information in calculating the density of marine mammals or determining whether certain species are present in the area without running afoul of the law.

*Response:* See the response to comment 53. In making its determinations, NMFS uses the best scientific information available, as required by the MMPA implementing regulations. For some species, density estimates from sightings surveys, as well as from ''industry surveys'', were provided in the text of Shell's application and the Notice of Proposed IHA for purposes of comparison. However, where information was available from sightings surveys (e.g., Moore *et al.*, 2000b, Bengtson *et al.*, 2005), those estimates were used to calculate take. Data collected on industry vessels were only used when no other information was available. Additionally, while some Arctic marine mammal species have shown fleeing responses to seismic airguns, data is also collected on these vessels during periods when no active seismic data collection is occurring.

*Comment 70:* AEWC states that as a general matter, when it comes to NMFS assessing the various stocks of marine mammals under the MMPA, it cannot use out-dated data i.e., ''abundance estimates older than 8 years'' because of the ''decline in confidence in the reliability of an aged abundance estimate'' (Angliss and Allen, 2009) and the agency is thus unable to reach certain conclusions. Similarly, here, where data are out-dated or non-existent, NMFS should decide it cannot reach the necessary determinations. These flaws in NMFS' analysis render the agency's preliminary determinations about the level of harassment and negligible impacts completely arbitrary.

*Response:* The statements quoted by AEWC from Angliss and Allen (2009) are contained in species SARs where abundance estimates are older than 8 years. However, the full statement reads as follows: ''However, the 2005 revisions to the SAR guidelines (NMFS, 2005) state that abundance estimates older than 8 years should not be used to calculate PBR due to a decline in confidence in the reliability of an aged abundance estimate.'' Shell's activities are not anticipated to remove any individuals from the stock or population. Therefore, a recent estimate of PBR is not needed for NMFS to make the necessary findings under Section 101(a)(5)(D) of the MMPA. Additionally, Shell's application provides information (including data limitations) and references for its estimates of marine mammal abundance. Because AEWC has not provided information contrary to the data provided by Shell, and NMFS does not have information that these estimates are not reliable, NMFS considers these data to be the best available.

*Comment 71:* The MMC notes that Shell will base estimates of the minimum number of marine mammals taken by harassment on the numbers of animals directly seen within the relevant safety radii by observers on the vessel during survey activities. The MMC is concerned that this method of estimation may be misleading because (1) the minimum estimate will depend on the portion of time observers are on duty (e.g., operations or observations at night may not be included), (2) it does not account for observer sighting proficiency (e.g., the ability to sight cetaceans versus pinnipeds), and (3) it does not account for behavioral responses of animals outside the so-called safety zones. Shell's maximum take estimate is likewise problematic because it fails to take into account the movement patterns of these species, which could greatly bias the maximum estimates of take by harassment. Absent reasonable corrections for these factors, the minimum and maximum estimates may be potentially useless or misleading, with potentially adverse consequences. The MMC therefore recommends that NMFS require Shell and other applicants to develop and implement a biologically realistic study design for estimating take levels. Dr. Tim Ragen, one of the independent peer reviewers of Shell's 4MP, expressed similar concerns. [Dr. Ragen's comments specific to the contents of the 4MP are addressed later in this document in the ''Monitoring Plan Independent Peer Review'' subsection.]

*Response:* In order to account for the concerns expressed by the MMC, Shell provides take estimates in the 90–day report based on several methods of calculation: a minimum; a potential maximum; and a mid-level estimate. NMFS agrees that all observations are a function of observer effort. The minimum effort is exactly that, a minimum. It is how many animals were actually seen within the specified sound radius (e.g., 160–dB isopleth). NMFS does not assume that the minimum estimate is anything more than what was seen or that this number is the actual number taken. It is not possible to provide a ''correction factor'' for the minimum take estimate, as it represents the number of animals sighted by the MMOs within a given radius.

A mid-level estimate is made comparing the densities of animals collected during seismic and non-seismic periods. NMFS and Shell recognize that various factors, including those mentioned above create potential variation in these numbers. The third estimate is based on densities reported in the literature during periods when no seismic operations are occurring. Shell uses the numbers that are considered to be the best estimate of density for the area of operations. Depending upon when the densities are measured and when the seismic shoot occurred, such densities may overestimate the number of ''takes,'' but these are reported as potential maximum levels of ''take'' assuming that there was no avoidance of the operational area. (However, based on information provided elsewhere in this document, several species, such as bowhead and beluga whales have shown avoidance behavior to airguns.) The actual number of takes most likely lies somewhere between the mid-level estimate and the potential maximum estimate. Calculation methods are described in detail in the 90–day reports submitted by Shell for operations conducted in 2006, 2007, and 2008 (Patterson *et al.*, 2007; Funk *et al.*, 2008; Ireland *et al.*, 2009).

*Comment 72:* Dr. Bain indicates that NMFS failed to consider the increases in takes of bowhead and beluga whales if there are delays in the work, resulting in its completion at the end of the period covered by the application (end of October) rather than at the time given for the best case scenario (late September).

*Response:* If Shell encounters several delays in August or September, then animals would not be taken because no active data acquisition would be occurring. Those takes would then potentially occur in October. However, based on the migration patterns for these two species, the density estimates would be nearly the same in early to mid-October as late September (i.e., the beginning of the migratory period). Therefore, these higher densities have

already been taken into account when estimating the level of take.

*Comment 73:* AEWC states that NMFS failed to account for the impacts from the strudel scour surveys in the spring of 2010, proposing only summer and fall density estimates. These practices have resulted in entirely arbitrary calculations of the level of take of marine mammals and whether such takes constitute ''small numbers'' or a ''negligible impact'' as a result of Shell's proposal.

*Response:* See response to comment 8. NMFS has determined that marine mammals will not have a significant behavioral response (i.e., a ''take'') to the strudel scour surveys. Therefore, neither Shell's application nor the Notice of Proposed IHA provide any take estimates for the strudel scour survey. However, Shell needs to coordinate these activities with the Native Alaskan communities to ensure that there is no unmitigable adverse impact to subsistence hunts.

*Habitat Concerns*

*Comment 74:* NSB notes that Shell's application states, ''...concluded that mortality rates caused by exposure to sounds are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant.'' NSB asks, ''What about these effects in addition to natural mortality?''

*Response:* The potential for Shell's activities to affect ecosystem features and biodiversity components, including fish and invertebrates, is analyzed in NMFS' EA for this action. Shell's activities would impact less than 0.1 percent of available food resources, which would have little, if any, effect on a marine mammal's ability to forage successfully. Fish would need to be in very close proximity to the airguns in order to incur mortality. Based on the small scale of effects anticipated on fish, fish eggs, and larvae from the airgun activity, these mortalities are not expected to cumulatively cause significant impacts when added to the natural mortality rates.

*Subsistence Use Concerns*

*Comment 75:* The MMC recommends that issuance of the IHA be contingent upon NMFS establishing specific mitigation measures for bowhead and beluga whales that will ensure that the proposed activities do not affect the subject species in ways that will make them less available to subsistence hunters. Such measures should reflect the provisions of any CAA, as well as meet the requirements of the MMPA.

*Response:* NMFS has required Shell, through the IHA, to implement mitigation measures for conducting seismic surveys that are designed to avoid, to the greatest extent practicable, impacts on coastal marine mammals and thereby, meet the needs of those subsistence communities that depend upon these mammals for sustenance and cultural cohesiveness. For the 2009 season, several of these mitigation measures were taken from the 2009 CAA signed by Shell on June 24, 2009, and include coastal stand-off distances for seismic and vessel transiting activities; a coastal community communication station; and emergency assistance to whalers, among other measures.

*Comment 76:* NSB and AEWC state that the MMPA requires NMFS to find that the specified activities covered by an IHA ''will not have an unmitigable adverse impact on the availability of [marine mammal populations] for taking for subsistence uses '' (16 U.S.C. 1371(a)(5)(D)(i)(II)). For the reasons presented herein, such a conclusion cannot be adequately supported. First, in order for impacts to be mitigated, the measures must be ''successfully implemented'' (50 CFR 216.104(c)) (emphasis added). Thus, Shell cannot on the one hand rely on mitigation to claim its activities will not adversely impact subsistence use but on the other hand fail to commit to mitigating the impacts of its action or ensuring the public has the opportunity to comment on the mitigation measures. For example, Shell acknowledges that there ''could be an adverse impact on the Inupiat bowhead subsistence hunt'' but claims the impact ''is mitigated'' despite the fact the mitigation measures upon which Shell relies, such as the POC, have yet to even be established, and Shell makes no definitive commitment to measures to avoid conflicts.

Second, the dates and durations of Shell's activities are stated in amorphous terms, making it impossible for NMFS to assess whether Shell's activities will interfere with subsistence hunting, migration, or feeding of marine mammals. Without this detailed information, NMFS is making arbitrary determinations about the actual impacts of Shell's activities on subsistence uses in the Chukchi Sea.

*Response:* The MMPA does not prohibit an activity from having an adverse impact on the availability of marine mammals for subsistence uses; rather, the MMPA requires NMFS to ensure the activity does not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Shell signed the 2009 CAA on June 24, 2009. As mentioned in the response to comment 75, NMFS included measures from the 2009 CAA related to marine mammals and avoiding conflicts with subsistence hunts in the IHA. Additionally, NMFS, other government agencies, and affected stakeholder agencies and communities were provided a copy of the draft POC in May 2009, which outlined measures Shell would implement to ensure no unmitigable adverse impact to subsistence uses. The POC specifies times and areas to avoid in order to minimize possible conflicts with traditional subsistence hunts by North Slope villages for transit and open-water activities. Shell waited to begin activities until the close of the spring beluga hunt in the village of Point Lay. NMFS also considered the fact that Shell's activities will occur more than 113 km (70 mi) offshore. Hunters typically do not travel this far to collect animals. Based on the measures contained in the IHA (and described later in this document), NMFS has determined that mitigation measures are in place to ensure that Shell's operations do not have an unmitigable adverse impact on the availability of marine mammal species or stocks for subsistence uses.

*Comment 77:* NSB and AWL state that Shell's discussion of the impacts to subsistence use is far too limited in scope. Shell looks only at the direct impacts from its activities on active scouting and whaling but does nothing to quantify the overall impacts to subsistence users from on-going oil and gas activities throughout the whales' migration routes in the Beaufort and Chukchi Seas and beyond. AWL also states that NMFS must also evaluate the following: the susceptibility of bowhead and beluga whales to disturbance from levels of noise below 160 dB; the potential impacts of future activities in both oceans; the acknowledged uncertainty regarding the effects of seismic activity; and the lack of baseline

biological data for the Chukchi Sea. For these reasons, NMFS has not adequately supported its MMPA finding as to subsistence resources (see 50 CFR 216.104(c)) (best available science standard for subsistence finding).

*Response:* NMFS analyzed the impacts from these additional activities in the cumulative impacts analysis section in the EA for this action. MMS' 2006 Final PEA also contains a full cumulative impacts analysis, which was incorporated into NMFS' 2009 EA by reference. NMFS has responded to the other issues raised by AWL elsewhere in this document. Based on the responses and reasoning provided throughout this document, NMFS has determined that its MMPA finding as to subsistence resources is adequately supported.

*Comment 78:* NSB states that the MMPA authorizes NMFS to issue a take authorization only if it first finds that there will be adequate monitoring of such taking and that all methods and means of ensuring the least practicable impact have been adopted (16 U.S.C. 1371(a)(5)(D)(ii)(I)). Shell's proposed monitoring and mitigation measures are insufficient to protect against adverse impacts on the availability of the species or stock for subsistence uses. Thus, NMFS should not issue an IHA for the proposed activities until adequate monitoring and mitigation techniques for avoiding adverse impacts to the marine mammals and subsistence hunting are developed.

*Response:* First, the section of the statute the discussion the requirement for monitoring measures is 16 U.S.C. 1371(a)(5)(D)(ii)(III), not 16 U.S.C. 1371(a)(5)(D)(ii)(I) as cited by the commenter. Second, NMFS has included measures from the 2009 CAA in Shell's IHA. Measures include: (1) avoiding groups or concentrations of whales; (2) reducing vessel speed when within 300 yards of whales and taking care not to separate members of a group from other members; (3) participating in Communication Centers; (4) planning vessel routes to minimize any potential conflict with subsistence whaling and sealing activities; (5) transiting at least five miles offshore; (6) conducting seismic operations at least 60 miles from shore; (7) providing emergency assistance to whalers; and (8) conducting a post-season review with the communities. Additionally, the following factors (1) Shell's activities will occur more than 113 km (70 mi) offshore where little to no subsistence hunting occurs, (2) activities will not commence before the end of the spring beluga hunt in Point Lay, and, (3) the location of the operational area is 225 km (140 mi) west of Barrow, so whales will reach Barrow for the fall hunt before being exposed to sounds from the airguns will also ensure no unmitigable adverse impact to subsistence uses in the Chukchi Sea. Therefore, NMFS has determined that the monitoring and mitigation measures required to be implemented by Shell are adequate to ensure no unmitigable adverse impact to subsistence uses.

*Comment 79:* NSB notes that Shell states in its application that it will work with the communities to ''eliminate disturbance to subsistence whaling activities in the Beaufort and Chukchi Seas.'' Shell needs to provide the details of how it intends to ''eliminate disturbance.'' Shell has expressed increasing unwillingness to sign a CAA with AEWC to protect subsistence hunting of bowheads. If Shell is planning on only using POCs, developed in village meetings that are often poorly attended and without dialogue about details of mitigation measures, then Shell must provide details of the plans to ''eliminate disturbance.'' Additionally, details are needed about how Shell will avoid impacts to hunting of other marine mammals, especially belugas and walrus. NSB also states, ''If NMFS is going to rely on a POC so there are no unmitigable adverse impacts to subsistence hunting of marine mammals, there must be some process by which the communities can formally agree and accept the POC.'' They note that the CAA has worked well over the past 15 years in part because all parties agree to mitigation measures.

*Response:* It should be understood that the POC is required by NMFS' implementing regulations to be submitted as part of the industry's IHA application; so it is logical that NMFS' MMPA determinations would be made after submission of the POC. The POC is required by NMFS regulations in order to bring industry and the village residents together to discuss planned offshore activities and to identify potential problems. To be effective, NMFS and Shell believe the POC must be a dynamic document, which will expand to incorporate the communications and consultation that will continue to occur throughout 2009. Outcomes of POC meetings are included in updates attached to the POC and distributed to Federal, state, and local agencies, as well as local stakeholder groups.

In its Interim Rule for Arctic Activities (61 FR 1588, April 10, 1996), NMFS clarified that if either a POC or information required by 50 CFR 216.104(a)(12) is not submitted, and, if during the comment period, evidence is provided indicating that an adverse impact to subsistence needs will result from the activity, an authorization may be delayed in order to resolve this disagreement. The requirements for meeting this requirement are clearly stated in 50 CFR 216.104(12).

In any event, Shell signed a CAA in June 2009, which contains measures agreed to by the parties. Many of these subsistence-related measures (as they pertain to marine mammals and the related subsistence harvests) have been included in the IHA and are enforceable.

Information on how Shell will avoid impacts to subsistence hunts of beluga whales in the Chukchi Sea have been discussed elsewhere in this document. The walrus is managed by the U.S. Fish and Wildlife Service (USFWS), and as such, NMFS does not have jurisdiction over this species.

*Comment 80:* NSB states that transit of Shell's vessels should not occur before July 15 instead of the stated date of July 1. The villages of Point Lay and Wainwright hunt beluga whales during late June or July (or sometimes early August). Transiting vessels through the Chukchi Sea might cause belugas to avoid their traditional congregation areas nearshore and thus impact subsistence hunting.

*Response:* Shell's policy has been to communicate with the villages of Point Lay and Wainwright during the spring hunting period in order to ensure that vessel transits will not interfere with the spring beluga hunt. Shell will wait until the completion of the spring hunt before transiting through the Chukchi Sea.

*Mitigation and Monitoring Concerns*

*Comment 81:* The MMC notes that NMFS is proposing to include in the IHA the additional mitigation and monitoring measures that were included in IHAs issued to Shell in 2006, 2007, and 2008. The MMC supports these proposed mitigation and monitoring measures and recommends that they be incorporated in the IHA, if issued.

*Response:* NMFS has included the mitigation and monitoring measures described in the Notice of Proposed IHA (74 FR 26217, June 1, 2009) in the issued IHA. However, for reasons described elsewhere in this document, NMFS has not required a 120–dB shutdown zone for activities in the Chukchi Sea.

*Comment 82:* NSB notes that it appears Shell wants to survey in areas other than Burger. If this is the case, NMFS needs to require additional and appropriate monitoring.

*Response:* The monitoring measures contained in the IHA are required at all

site clearance and shallow hazards surveying sites, not just Burger. Therefore, if Shell conducts surveying activities at Crackerjack or SW Shoebill, the same monitoring measures required at Burger will be undertaken at Crackerjack and SW Shoebill.

*Comment 83:* AWL states that NMFS has proposed an exclusion zone for 12 or more gray or bowhead whales within the 160–dB zone, extending 1,400 m (0.87 mi) from the seismic vessel. AWL and Dr. Bain note that there are serious concerns with the efficacy of mitigation measures such as exclusion zones, particularly when visibility is poor to non-existent. AWL also states that NMFS has not indicated that it will require a fixed number of MMOs to be on duty, and Shell states that the number of MMOs during any period depends on multiple factors, including berthing availability and lifeboat space. If Shell ultimately relies on single observers located on the source vessel only, monitoring the full 1,400 m (0.87 mi) radius for aggregations of whales will present a considerable challenge.

NSB also notes the inadequacies of MMOs to monitor the 160- and 120–dB isopleths. Therefore, MMOs will not provide a reasonable measure of how many marine mammals are exposed to sounds produced by site clearance and shallow hazards surveys. Additional monitoring approaches, such as intensive acoustic arrays, chase vessels, or aerial surveys are needed. NSB also states that Shell is intending to conduct intensive acoustic monitoring near the Burger and Klondike prospects. This will be useful for measuring takes of marine mammals and examining behavioral responses to site clearance and shallow hazards surveys. Other areas that Shell intends to explore with airguns should also be monitored with intensive acoustic arrays or with another suitable monitoring technique, such as aerial surveys. Detailed monitoring of marine mammal behavior and density is needed.

*Response:* The seismic vessels will be traveling at speeds of about 1–5 knots (1.9–9.3 km/hr). With a 180–dB safety range of 160 m (525 ft) and a 160–dB safety range of 1,400 m (0.87 mi), a vessel will have moved out of the applicable safety zone within a few minutes. As a result, during underway seismic operations, MMOs are instructed to concentrate on the area ahead of the vessel, not behind the vessel where marine mammals would need to be voluntarily swimming towards the vessel to enter the 180– or 160–dB zones. In fact, in some of NMFS' IHAs issued for scientific seismic operations, shutdown is not required for marine mammals that approach the vessel from the side or stern in order to ride the bow wave or rub on the seismic streamers deployed from the stern (and near the airgun array) as some scientists consider this a voluntary action on the part of an animal that is not being harassed or injured by seismic noise. While NMFS concurs that shutdowns are not likely warranted for these voluntary approaches, in the Arctic Ocean, all seismic surveys are shutdown or powered down for all marine mammal close approaches. Also, in all seismic IHAs, including Shell's IHA, NMFS requires that the safety zone be monitored for 30 min prior to beginning ramp-up to ensure that no marine mammals are present within the safety zones. Implementation of ramp-up is required because it is presumed it would allow marine mammals to become aware of the approaching vessel and move away from the noise, if they find the noise annoying.

Periods of total darkness will not set in during Shell's survey until early September. For the month of September, nighttime conditions will occur for approximately 1–6 hrs. However, during times of reduced light, MMOs will be equipped with night vision devices. During poor visibility conditions, if the entire safety zone is not visible for the entire 30 min pre-ramp-up period, operations cannot begin.

Shell will not be relying on single MMOs aboard the source vessel to monitor the different radii. The IHA requires Shell to have five MMOs on the source vessel at any time, and two MMOs must be on duty during all pre-ramp up and ramp-up periods, as well as for a large a fraction of the other operating hours as possible. MMOs are not permitted to work more than 4 consecutive hours and no more than three shifts per day (i.e., no more than 12 hours in a 24 hour period). By requiring five MMOs on the vessel at all times, this will allow for two MMOs to be on-watch for a greater period of time without causing fatigue.

In 2009, Shell and ConocoPhillips are jointly funding an extensive acoustic monitoring program in the Chukchi Sea. A total of 44 recorders will be distributed both broadly across the Chukchi lease area and nearshore environment and intensively on the Burger and Klondike lease areas. The broad area arrays are designed to capture both general background soundscape data and marine mammal call data across the lease area. Shell hopes to gain insights into large-scale distribution of marine mammals, identification of marine mammal species present, movement and migration patterns, and general abundance data. While intensive arrays will not be deployed at the Crackerjack prospect, the broad array will still collect some of the information suggested by NSB. However, an intensive array is not necessary at every site, as the acoustic monitoring is not used to implement mitigation measures.

Aerial monitoring is not required in IHAs for surveys that occur in the offshore environment of the Chukchi Sea because they have currently been determined to be impracticable due to lack of adequate landing facilities, the prevalence of fog and other inclement weather in that area, potentially resulting in an inability to return to the airport of origin, thereby resulting in safety concerns.

*Comment 84:* AEWC states that as part of its application, Shell is required to suggest its proposed ''means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species'' and document ''the level of taking or impacts on populations of marine mammals...'' (50 CFR 216.104(a)(13)). One of the reasons for this monitoring is for NMFS to ''ensure that authorizations over time have only a negligible impact on species or stocks of marine mammals and no unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses (60 FR 28381, May 31, 1995). Thus, monitoring is critical to the proper functioning of the MMPA. For this reason, NMFS has previously explained that a site-specific monitoring plan must be submitted and would have to include information regarding survey techniques and/or other methods to be used to determine whether the behavior of marine mammals near the activity is being affected and how the number of takes would be determined, including the expected precision of that estimated number. However, Shell has failed to adequately describe its monitoring plans. For example, Shell fails to disclose its ethograms for studying marine mammal behavior or describe how data will be collected to ''estimate the 'take' of marine mammals by harassment.'' Without this detailed information, AEWC cannot comment on the adequacy of Shell's monitoring plan or make suggestions for study design so that the data collected can easily be used by AEWC and others.

*Response:* While a list of the types of animal behaviors that are recorded by the MMOs was not included in the 4MP, MMOs record common behaviors exhibited by cetaceans and pinnipeds. Shell's 2009 monitoring and reporting plan is similar to that used by Shell in

2006, 2007, and 2008. The 90–day reports from those seasons contain descriptions of the types of behaviors that were recorded (Patterson *et al.*, 2007; Funk *et al.*, 2008; Ireland *et al.*, 2009). The 4MP contains a brief description of the methods to calculate take. These are the same methods that have been used by Shell in previous years. The full explanations can be found in the 90–day reports (Patterson *et al.*, 2007; Funk *et al.*, 2008; Ireland *et al.*, 2009). Shell's methods have been described several times, and AEWC and others have had several opportunities over the past few years to comment on the methods for monitoring and reporting behavior and take levels during seismic surveys.

*Comment 85:* AEWC indicates that Shell's monitoring plan focuses solely on ''reporting'' the level of take and not ''monitoring'' marine mammals. The monitoring plan is designed to attempt to document the take of marine mammals and fails to include proactive monitoring beyond that necessary for attempting to assess the level of take that occurs. Especially given the lack of data that exists on marine mammals use of the Chukchi, Shell should be required to conduct basic presence and absence surveys and collect density data utilizing vessels and other tools that will minimally disturb marine life and scientifically recognized data collection techniques.

*Response:* MMOs record the presence of marine mammals sighted outside of the monitoring zones and note the behaviors exhibited by the animals. Additionally, in 2009, Shell will be deploying an array of 44 acoustic recorders to gain insights into large-scale distribution of marine mammals, identification of marine mammal species present, movement and migration patterns, and general abundance data of marine mammals in the Chukchi Sea. Similar data have been collected in 2006–2008. The data collected during the 2009 season will assist in evaluating changes in the Chukchi Sea ecosystem.

*Comment 86:* NSB asks how the mitigation measures are being evaluated for efficacy. NSB and AEWC note that Shell asserts that mitigation measures are designed to protect animals from injurious takes, but it is not clear that these mitigation measures are effective in protecting marine mammals or subsistence hunters. Data previously presented by Shell and ConocoPhillips from their seismic activities made clear that MMOs failed to detect many marine mammals that encroached within the designated safety zones. NSB states, ''In essence the MMOs were not able to observe marine mammals in the entire safety zone.'' Thus, the safety zones do not provide adequate mitigation from physical harm to marine mammals.

*Response:* NMFS believes that the required monitoring and mitigation measures are effective at ensuring the least practicable impact to marine mammals. Moreover, the safety zones for Shell's 2009 surveys are much smaller than those for the larger 3D seismic surveys in past years. The 180– and 190–dB safety zones are 160 m (525 ft) and 50 m (164 ft), respectively. The monitoring reports from 2006, 2007, and 2008 do not note any instances of serious injury or mortality (Patterson *et al.*, 2007; Funk *et al.*, 2008; Ireland *et al.*, 2009). Additionally, the fact that a power-down or shutdown is required does not indicate that marine mammals are not being detected or that they are incurring serious injury. As discussed elsewhere in this document and in the Notice of Proposed IHA (74 FR 26217, June 1, 2009), the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2 \cdot s$ (i.e., 186 dB sound exposure level [SEL]) in order to produce brief, mild TTS (a non-injurious, Level B harassment) in odontocetes. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. For Shell's proposed survey activities, the distance at which the received energy level (per pulse) would be expected to be ≥175–180 dB SEL is the distance to the 190 dB re 1 μPa (rms) isopleth (given that the rms level is approximately 10–15 dB higher than the SEL value for the same pulse). Seismic pulses with received energy levels ≥175–180 dB SEL (190 dB re 1 μPa (rms)) are expected to be restricted to a radius of approximately 50 m (164 ft) around the airgun array.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.*, 1999, 2005; Ketten *et al.*, 2001; cf. Au *et al.*, 2000). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal, which is closely related to the ringed seal) may occur at a similar SEL as in odontocetes (Kastak *et al.*, 2004).

NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 μPa (rms). The established 180– and 190–dB re 1 μPa (rms) criteria are not considered to be the levels above which TTS might occur. Rather, they are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. As summarized above, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 μPa rms (Southall *et al.*, 2007).

No cases of TTS are expected as a result of Shell's proposed activities given the small size of the source, the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS, and the mitigation measures proposed to be implemented during the survey described later in this document.

There is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (see Southall *et al.*, 2007). PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal is exposed to the strong sound pulses with very rapid rise time.

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause permanent hearing impairment during a project employing the airgun sources planned here (i.e., an airgun array with a total discharge volume of 40 $in^3$). In the proposed project, marine mammals are unlikely to be exposed to

received levels of seismic pulses strong enough to cause more than slight TTS. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, even the levels immediately adjacent to the airgun may not be sufficient to induce PTS, especially because a mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the airgun for a period longer than the inter-pulse interval. Baleen whales, and belugas as well, generally avoid the immediate area around operating seismic vessels. The planned monitoring and mitigation measures, including visual monitoring, power-downs, and shutdowns of the airguns when mammals are seen within the safety radii, will minimize the already-minimal probability of exposure of marine mammals to sounds strong enough to induce PTS.

*Comment 87:* NSB states that Shell needs to include a plan of reporting/communicating the presence of floating dead marine mammals within the zone of industrial exploration. NSB would like to work with industry to determine cause of death and perform other biological sampling from carcasses noted in areas of industrial activity. There are no provisions within the 4MP that facilitate these objectives. Additionally, NSB has asked industry to work with NMFS to develop a plan to mark carcasses so that they are not re-counted and a more definitive count of dead, floating marine mammals within the industry zone of operations can be made. This is not included here.

*Response:* The IHA requires Shell to notify both NMFS and the Marine Mammal Stranding Network within 24 hours of sighting a stranded marine mammal. The MMOs are also required to complete a Level A Stranding Report Form and to take photographs when possible. However, Shell is not permitted to collect samples or conduct necropsies on dead marine mammals. Necropsies can only be performed by people authorized to do so under the Marine Mammal Health and Stranding Response Program MMPA permit. NMFS is currently considering different methods for marking carcasses to reduce the problem of double counting. However, a protocol has not yet been developed, so marking is neither required nor authorized in the IHA.

*Comment 88:* The MMC believes that absent an evaluation by the oil and gas industry of its monitoring and mitigation measures, the effects of the industry's activities will remain uncertain. The MMC recommends that NMFS require Shell and other companies conducting seismic work in the Arctic to undertake the studies needed to verify observer proficiency (including the number of observers needed to monitor entire safety zones and the presence of marine mammals near or within those zones, particularly when operations are being conducted 24 hours a day) and provide additional rationale allowing seismic surveys to continue under nighttime conditions when observer proficiency is severely compromised. AWL also notes that NMFS should prohibit surveying at night and at times of low visibility to achieve the means of effecting the least practicable impact on a species or stock. At a minimum, NMFS must require multiple observers working simultaneously in order to effectively monitor the 160–dB zone. NSB states that with regard to nighttime and poor visibility conditions, Shell proposes essentially no limitations on operations, even though they acknowledge that the likelihood of observers seeing marine mammals in such conditions is low. The obvious solution not analyzed by Shell or NMFS is to simply prohibit seismic surveying when conditions prevent MMOs from detecting all marine mammals in the safety zone.

The MMC, AWL, and Dr. Bain recommend that Shell be required to supplement its mitigation measures by using passive acoustic monitoring (PAM). Such monitoring will enhance marine mammal detection capabilities under all conditions, but particularly at night and when visibility is otherwise poor.

*Response:* The MMOs hired by Shell are required to complete training courses and exams to verify their proficiency. All MMOs used for the 2009 surveys have at least 2 years of experience working as MMOs for surveys in Arctic waters. Several of the MMOs also have experience working on vessels in other parts of the world as well. Two MMOs are required to be on-duty during all pre-ramp-up and ramp-up periods and for as large a fraction of the active surveying period as possible. MMOs are not required to be on-duty during nighttime periods. However, if the entire safety zone is not visible during the 30 min pre-ramp-up and ramp-up periods, then operations are not permitted to begin.

On the matter of practicability, NMFS has been informed by Shell that requiring a shutdown of the airgun arrays due to inclement weather or darkness in the Arctic would reduce overall effectiveness by about 40 percent. Such a loss in efficiency could increase the potential for Shell and other companies to increase effort by bringing additional seismic vessels into the Beaufort and/or Chukchi Seas. As a result, implementation of this suggestion as a mitigation measure is considered by NMFS to be impracticable because of economic and practical reasons.

However, an alternative mitigation measure has been identified by NMFS and is being reviewed that could increase detection of marine mammals during darkness. The alternative mitigation measure could involve the use of a high-frequency marine mammal monitoring (HF/M3) sonar, similar to a model used by the U.S. Navy. The HF/M3 sonar is capable of detecting marine mammals out to about 2 km (1.1 mi), with up to 98 percent detection ability (depending upon animal size, distance from sonar and animal depth) (Ellison and Stein, 1999) and has the capability to be ramped up to avoid injury to marine mammals (as it can detect the mammal prior to the HF/M3 sonar reaching levels of auditory injury). It should be noted that this sonar does not require a marine mammal to be vocalizing in order to be detected and has the capability of being ramped-up, ensuring that, once a marine mammal is detected within a 2–km (1.1 mi) radius, powering up the HF/M3 ceases until the marine mammal is no longer detected within the 2–km zone. Once ramp-up of the HF/M3 is complete, seismic surveys can commence. During surveys, the HF/M3 would continue to monitor the area closest to the array where there is a higher potential for injury, if marine mammals were not either deflected by the seismic noise or detected by MMOs, passive acoustics, or active acoustics. NMFS believes that utilizing the HF/M3 with ramp-up would result in the harassment of fewer marine mammals and further ensure that auditory injury does not occur. However, based on the small discharge volume of the airgun array to be used by Shell for its 2009/2010 survey operations and the required mitigation and monitoring measures (described later in this document), NMFS does not believe that marine mammal injury will occur, with or without the use of the HF/M3.

Moreover, as stated in the **Federal Register** Notice of Proposed IHA (74 FR 26217, June 1, 2009), once the safety zones are visually established and pre-survey monitoring has concluded that there are no marine mammals within the safety zones, seismic surveys can commence and continue into low visibility conditions. However, if for any reasons the seismic sources are stopped during low visibility conditions, they are not to be restarted until the conditions are suitable for the marine

mammal visual monitoring so that the safety zones can be re-established.

NMFS' 2009 EA for this action contains an analysis of why PAM is not required to be used by Shell to implement mitigation measures. Shell will deploy acoustic recorders to collect data on vocalizing animals. However, this information will not be used in a real-time or near-real-time capacity. Along with the fact that marine mammals may not always vocalize while near the PAM device, another shortcoming is that it requires a quiet vessel so that vessel noise does not hinder the ability to hear marine mammals. MMS is sponsoring a workshop in November 2009, which will review available acoustic monitoring technology (passive and active), its feasibility and applicability for use in MMS-authorized activities, and what additional developments need to take place to improve its effectiveness. NMFS may consider requirements for PAM in the future depending on information received as the technology develops further.

*Comment 89:* It is also AEWC's position that independent verification of offshore operators' compliance with IHA provisions must be required as part of the mitigation for the IHAs.

*Response:* NMFS' implementing regulations at 50 CFR 216.104 require an applicant to submit information about the mitigation, monitoring, and reporting measures that will be implemented to ensure the least practicable impact on the affected species or stock. NMFS reviews these proposed measures, and, after discussion with the applicant, requires mitigation, monitoring, and reporting protocols that NMFS determines will ensure only small numbers of marine mammals will be taken, that those takings will have a negligible impact on the affected species or stock, will not have an unmitigable adverse impact on the affected species or stock for taking for subsistence uses, and will effect the least practicable impact on the affected species or stock. While NMFS recognizes that independent verification of an operator's compliance with the terms of an IHA is generally the best course of action if possible or practicable, in some cases it is not practicable. In this case, and at this time, NMFS does rely on the industry to comply with the measures set forth in the IHA. NMFS continues to review reports submitted by IHA holders to ensure that they comply with the terms contained in the authorization. These reports require, among other things, the holder to supply information regarding sightings of marine mammals and the implementation of appropriate mitigation measures. NMFS is continually interested, and trying, to develop a monitoring program more independent of the action, but, until such a monitoring plan is implemented, NMFS will rely on the industry to provide assurance that the activity remains in compliance with measures contained in an IHA.

*Comment 90:* The MMC cannot determine from the information provided in the application whether Shell plans to collect data during ramp-up procedures to test the assumption that animals are able to, and will, move away from an increasingly loud noise to avoid harmful effects. The MMC recommends that NMFS require Shell and other applicant's using ramp-up procedures to collect and analyze data pertaining to the efficacy of ramp-up as a mitigation measure. NSB also states that data need to be collected to better understand the effectiveness of the mitigation measures (i.e., ramp-up, power-down, and shutdown). Dr. Bain stresses the importance of collecting data on animals that are exposed to noise versus those that are not exposed in order to allow for comparisons of population dynamics.

*Response:* While scientific research built around the question on whether ramp-up is effective has not been conducted, several studies on the effects of anthropogenic noise on marine mammals indicate that many marine mammals will move away from a sound source that they find annoying (e.g. Malme, 1984; Clark *et al.*, 1999; Miller *et al.*, 1999; others reviewed in Richardson *et al.*, 1995). In particular, three species of baleen whales have been the subject of tests involving exposure to sounds from a single airgun, which is equivalent to the first stage of ramp-up. All three species were shown to move away at the onset of a single airgun operation (Malme *et al.*, 1983–1986; BBN Reports 5366, 5586, 6265; Richardson *et al.*, 1986; McCauley *et al.*, 1998, 2000).

From this research, it can be presumed that if a marine mammal finds a noise source annoying or disturbing, it will move away from the source prior to sustaining an injury, unless some other over-riding biological activity keeps the animal from vacating the area. This is the premise supporting NMFS' and others' belief that ramp-up is effective in preventing injury to marine mammals. In addition, observers and power-down/shut-down criteria provide for the protection of non-responding mammals: e.g., those that either do not hear the sounds because of a hearing impairment or because the sounds are outside the hearing range of the species, or those individuals that do not react to the sounds because of behavioral or other physiological factors. Implementation of these measures would prevent injury to those animals that do not vacate the area. A ramp-up study was first proposed to be conducted by MMS in 1999 (HESS, 1999). While this study has not been funded to date, NMFS believes that a basic difficulty exists for testing ramp-up effectiveness without first establishing some mode of dose-response. As a result, prior to testing ramp-up effectiveness, this type of information is currently being obtained by the Sperm Whales Seismic Study. NMFS believes that this information is a critical component for understanding marine mammal impacts from world-wide operating seismic activities.

Additionally, the IHA requires that MMOs make observations for the 30 min prior to ramp-up, during all ramp-ups, and during all daytime seismic operations and record the following information: (1) the species, group size, age/size/sex categories (if determinable), the general behavioral activity, heading (if consistent), bearing and distance from seismic vessel, sighting cue, behavioral pace, and apparent reaction of all marine mammals seen near the seismic vessel and/or its airgun array (e.g., none, avoidance, approach, paralleling, etc); and (2) the time, location, heading, speed, and activity of the vessel (shooting or not), along with sea state, visibility, cloud cover and sun glare. These requirements should provide information regarding the effectiveness of ramp-up as a mitigation measure, provided animals are detected during ramp-up. This information is also recorded when a power-down or shutdown occurs. Lastly, Shell also documents sightings and behaviors of marine mammals when no active survey operations are occurring (e.g., down due to weather, transiting), allowing for some level of comparison between exposed and non-exposed individuals.

*Comment 91:* AEWC states that Shell relies on an out-dated Notice to Lessees (NTL 2004–G01) in its proposed mitigation plan to supply some of its mitigation measures. Not only has this notice been superceded (see NTL 2007–G02), but it is based on requirements stemming from a NMFS Biological Opinion for a lease sale in the Gulf of Mexico. The conditions in the Notice are not designed for Alaskan operations or the specific and unique needs of the Arctic. Thus, Shell's reliance on this Notice in crafting its mitigation measures is arbitrary.

*Response:* The full statement in the 4MP to which AEWC refers reads as follows: ''The Program will be operated and administered consistent with MMS NTL 2004–G01 or such alternative requirements as may be specified in the NMFS IHA...'' While the 2004 NTL is mentioned in the 4MP, the mitigation measures that are described in the 4MP and Notice of Proposed IHA (74 FR 26217, June 1, 2009) and subsequently required in the IHA are similar to those that have been developed and required by NMFS over the past few years for oil and gas seismic surveys in Arctic waters. Several of the mitigation measures required by NMFS in the IHA are specific to the unique needs of the Arctic. One example is the 160–dB shutdown requirement when an aggregation of 12 or more bowhead are gray whales occur within that isopleth.

*Comment 92:* AEWC and NSB both state that if NMFS relies on mitigation included in an IHA to find an activity will have only a negligible level of impact, that finding is ''subject to such mitigating measures being successfully implemented'' (50 CFR 216.104; emphasis added). The simple existence of a measure is not enough. Shell must be able to demonstrate that measures will and can be implemented, thus, ensuring that impacts to bowheads remain negligible. As Shell's proposed mitigation currently stands, this is a difficult if not impossible determination for NMFS to make.

*Response:* Shell's 2006, 2007, and 2008 90–day monitoring reports indicate that the company was able to implement the required mitigation measures (Patterson *et al.*, 2007; Funk *et al.*, 2008; Ireland *et al.*, 2009). Since the measures contained in the 2009 IHA do not differ substantially from those required previously, NMFS does not have any reason to doubt successful implementation during the current site clearance and shallow hazards surveys. NMFS has determined that with the incorporation and implementation of the mitigation measures, impacts to bowheads and other marine mammals will be negligible. Additionally, AEWC and NSB have not provided information indicating that Shell did not successfully implement the required mitigation measures.

*Comment 93:* NSB states that while there are descriptions of zones of impact within the 4MP, there is no clear statement of mitigation measures associated with these zones of impact. Monitoring does not equate to mitigation. There must be a clear action that results from monitoring, and these actions should go further than just power-downs. Clear indications of when mitigation measures are triggered and what results will occur are needed in this document.

*Response:* The Notice of Proposed IHA (74 FR 26217, June 1, 2009) contained a discussion of mitigation measures associated with the different zones of impact. It explained when a power-down or shutdown in required to occur and how long airguns must remain off or used at a reduced level. NMFS has informed Shell that commenters have requested additional detail in the application documents. However, this does not have a bearing on NMFS' required MMPA findings for issuing an IHA.

*Comment 94:* Dr. Bain questions the effectiveness of marine mammal monitoring with only two MMOs on duty full time. Citing Forney and Barlow (1998) and Dahlheim and Towell (1994), Dr. Bain states that a common work schedule where consistent effort is required would be 40 minutes on, 40 minutes off, 40 minutes on, two hours off, three times a day. Dr. Bain suggests that an observation team of 12 MMOs would be required to cover a 24–hour period. Further, MMOs working shifts longer than 40 minutes cannot be expected to have the same sighting efficiency as those working in dedicated surveys, making it questionable to use sighting efficiencies from dedicated surveys to predict effectiveness of MMOs and to use dedicated survey parameters to extrapolate density estimates from MMO data. Dr. Bain further states that the probability of detecting marine mammals would drop with increased distance from the vessel.

*Response:* NMFS does not agree with Dr. Bain's assessment and suggestions regarding MMOs and marine mammal monitoring. NMFS reviewed the references (Dahlheim and Towell, 1994; Forney and Barlow, 1998) provided by Dr. Bain, and did not find any type of work schedules described. Unlike observers during marine mammal population surveys who are required to search the entire field for any marine mammals, the primary responsibilities for MMOs are to monitor the safety zones, which in this case are 160 m (525 ft) for the 180–dB isopleth and 50 m (164 ft) for the 190–dB isopleth and to ensure that proper mitigation measures (power-down or shutdown) are implemented if a marine mammal is about to enter or is sighted within these safety zones. NMFS agrees that the detection probability of a marine mammal drops with increased distance from the ship. However, the occurrence of marine mammals outside the safety zones is not a big concern for marine mammal monitoring during the proposed seismic activity because it is presumed these animals would not be within a zone that could result in injury. Furthermore, MMOs would be on duty for 4 consecutive hours or less to reduce fatigue. Shell will have five MMOs on the vessel at all times so that two MMOs are on duty during all pre-ramp-up and ramp-up periods and for as a large a fraction of other periods as possible. In addition, all MMOs hired for the proposed seismic surveys must be NMFS-approved observers who are qualified to perform the required monitoring tasks. Therefore, NMFS believes that two MMOs are effective for marine mammal monitoring for Shell's shallow hazard and site clearance surveys.

*Comment 95:* Dr. Bain is concerned that many species that are capable of diving for more than 30 minutes could be missed during the monitoring.

*Response:* NMFS agrees with Dr. Bain that monitoring for deep diving marine mammals poses a challenge. However, within the proposed survey area, there are no marine mammals that normally dive for more than 30 minutes. However, in the event that a marine would be missed during the initial pre-survey monitoring, ramp-up procedures will be followed when an acoustic source begins to operate, so the undetected animal(s) would have an opportunity to detect the sound as it increases gradually and move away from the source. Please refer to the Mitigation and Monitoring Measures sections later in this document for a detailed description of these measures.

*Comment 96:* Dr. Bain notes that a fundamental assumption in noise mitigation is that animals will move away from the noise source (horizontal avoidance). Dr. Bain is concerned that many species are sedentary, territorial, or have strong tendencies toward site fidelity, and that these species are unlikely to move away from a noise source. In addition, Dr. Bain is concerned that many predators are used to experiencing pain during feeding, and hence tolerate pain [from being exposed to loud noise] rather than abandoning their prey (e.g., many mammals involved in fishery-interactions).

*Response:* First, the monitoring and mitigation measures described in this document and contained in Shell's IHA would prevent any marine mammals from being exposed to received levels that could cause onset of injury (180 dB re 1 μPa (rms) for cetaceans and 190 dB re 1 μPa (rms) for pinnipeds). Second, there are no sedentary marine mammals. The proposed survey is fundamentally

different from commercial fisheries activities in which the appearance of a seismic vessel does not reinforce the marine mammal with food or prey, therefore, it is unlikely that predatory marine mammals would approach the seismic vessel or acoustic source while searching for prey. Even if a marine mammal happens to be in close vicinity of the vessel or source, monitoring and mitigation measures require the crew to power-down or shutdown the acoustic sources so that the animal will not be affected by Level A harassment.

*Cumulative Impact Concerns*

*Comment 97:* The MMC continues to be concerned about the potential cumulative impacts of climate-related ecosystem changes occurring in the Arctic and the anticipated increase in the level of seismic and other oil and gas-related activities in the region. The MMC recommends that NMFS conduct a more extensive analysis of the potential or likely effects of currently authorized and proposed oil and gas activities, climate change, and additional anthropogenic risk factors (e.g., industrial operations) and the possible cumulative effects of all of these activities over time. The MMC also recommends that NMFS, together with the applicant and other appropriate agencies and organizations, develop a comprehensive population monitoring and impact assessment program to assess whether these activities, in combination with other risk factors, are individually or cumulatively having any significant adverse population-level effects on marine mammals or having an unmitigable adverse effect on the availability of marine mammals for subsistence uses by Alaska Natives. Such a monitoring program should focus initially on the need to collect adequate baseline information to allow for future analyses of effects. Finally, the MMC recommends that NMFS sponsor a workshop or workshops to facilitate the development of a comprehensive population monitoring and impact assessment program.

*Response:* A description of the monitoring program submitted by Shell was provided in Shell's application, outlined in the Notice of Proposed IHA (74 FR 26217, June 1, 2009), and posted on the NMFS PR IHA webpage. As a result of a dialogue on monitoring by scientists and stakeholders attending NMFS' public meetings in Anchorage in April, 2006, October, 2006, and April, 2007, the industry has expanded its monitoring program in order to fulfill its responsibilities under the MMPA. Additionally, Shell's 2009 monitoring plan was subjected to an independent peer review. (See the ''Monitoring Plan Independent Peer Review'' subsection later in this document for more information.) For the fourth year, Shell has included a marine mammal research component designed to provide baseline data on marine mammals for future operations planning. A description of this research is provided later in this document (see ''*Comprehensive Monitoring Reports*'' section). Scientists are continuing discussions to ensure that the research effort obtains the best scientific information possible. Finally, it should be noted that this far-field monitoring program follows the guidance of the MMC's recommended approach for monitoring seismic activities in the Arctic (Hofman and Swartz, 1991), that additional research might be warranted when impacts to marine mammals would not be detectable as a result of vessel observation programs.

*Comment 98:* NSB, AEWC, AWL, and Oceana and the Ocean Conservancy state that NMFS must also consider the effects of disturbances in the context of other activities occurring in the Arctic. NSB notes, as stated previously, the cumulative impacts of all industrial activities must be factored into any negligible impact determination. NMFS has not done so for Shell's activities, and, therefore, the proposed IHA should not be issued until a cumulative impact assessment is conducted.

*Response:* Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the applicant's specified activity will take only small numbers of marine mammals, will have a negligible impact on the affected marine mammal species or population stocks, and will not have an unmitigable impact on the availability of affected species or stocks for subsistence uses. Cumulative impact assessments are NMFS' responsibility under the National Environmental Policy Act (NEPA), not the MMPA. In that regard, MMS' 2006 Final PEA, NMFS' 2007 and 2008 Supplemental EAs, and NMFS' 2009 EA address cumulative impacts. The Final PEA's cumulative activities scenario and cumulative impact analysis focused on oil and gas-related and non-oil and gas-related noise-generating events/activities in both Federal and State of Alaska waters that were likely and foreseeable. Other appropriate factors, such as Arctic warming, military activities, and noise contributions from community and commercial activities were also considered. Appendix D of the Final PEA addresses similar comments on cumulative impacts, including global warming. That information was incorporated into and updated in the NMFS 2008 SEA and into this document by citation. Because these documents are part of NMFS' Administrative Record on this matter, the information contained within them do not need to be repeated. Please refer to these documents for that assessment.

*Comment 99:* AEWC is concerned that absent an analysis of the effects of all of the planned operations on marine mammals, it is impossible to assess the level of take of these animals that is on-going. For this reason, AEWC advocates that NMFS implement a cap on the overall seismic-related activities that can occur in Arctic waters each year.

*Response:* See the response to comment 98 discussing analysis of cumulative impacts. Regarding the suggestion to cap the number of activities each year, NMFS understands that under the terms of an OCS lease, the lessee is required to make progress on exploration and development on its leases in order to hold that lease beyond the initial lease term. Ancillary activities (such as seismic and shallow hazard surveys) are those activities conducted on a lease site to obtain data and information to meet MMS' regulations to explore and develop a lease. If a limit is placed by NMFS on the number of ancillary activities authorized for a planning area in a given year, NMFS may preclude the lessee from complying with MMS regulations to proceed in a timely manner on exploring or developing its OCS leases. However, NMFS will not issue an IHA for any activity where NMFS is unable to make the necessary findings under section 101(a)(5)(D) of the MMPA. Therefore, based on both practicability and that it is not necessary in this particular instance (because there is only one ancillary activity occurring this season), NMFS has not adopted this suggested mitigation measure. However, NMFS encourages industry participants to work together to reduce seismic sounds in the Arctic Ocean through cooperative programs in data collection to reduce impacts on marine mammals.

*ESA Concerns*

*Comment 100:* AEWC and NSB both note that the Notice of Proposed IHA (74 FR 26217, June 1, 2009) states NMFS' determination that ''Shell's proposed activities...are adequately analyzed in the 2008 Biological Opinion'' and that ''NMFS does not plan to conduct a new section 7 consultation.'' They both state that this is in direct contravention of the ESA. Both Shell and NMFS readily acknowledge that several endangered species will likely be impacted by

Shell's proposed authorizations. Therefore, under the plain language of the statute, the IHA must be consulted on pursuant to section 7 of the ESA. Moreover, in light of our changing climate and the increased activity in the Arctic, it is essential that NMFS continue to *consult on authorized activities* so that *the baseline* used in making jeopardy/no-jeopardy determinations remains current.

*Response:* Under section 7 of the ESA, NMFS has completed consultation with the MMS on ''*Oil and Gas Leasing and Exploration Activities in the U.S. Beaufort and Chukchi Seas, Alaska; and Authorization of Small Takes Under the Marine Mammal Protection Act.*'' In a Biological Opinion issued on July 17, 2008, NMFS concluded that the issuance of seismic survey permits by MMS and the incidental take authorizations under the MMPA for seismic surveys are not likely to jeopardize the continued existence of the endangered fin, humpback, or bowhead whale. As no critical habitat has been designated for these species, none will be affected. The 2008 Biological Opinion takes into consideration all oil and gas related activities that are reasonably likely to occur, including exploratory oil drilling activities. This Biological Opinion does not include impacts from production activities, which are subject to a separate consultation.

NMFS has reviewed Shell's proposed action and has determined that the findings in the 2008 Biological Opinion apply to its 2009 Chukchi Sea site clearance and shallow hazards surveys. In addition, NMFS has issued an Incidental Take Statement (ITS) under this Biological Opinion for Shell's survey activities, which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of bowhead, humpback, and fin whales.

*Comment 101:* AWL notes that NMFS' 2008 programmatic Biological Opinion does not contain an ITS. AWL assumes that NMFS will issue a new ITS in a timely manner.

*Response:* As indicated in the response to comment 100, after issuance of the IHA, NMFS also issued a new ITS.

*NEPA Concerns*

*Comment 102:* AEWC and NSB believe that NMFS, in direct contravention of the law, excluded the public from the NEPA process since NMFS did not release a draft EA for the public to review and provide comments prior to NMFS taking its final action.

*Response:* Neither NEPA nor the Council on Environmental Quality's (CEQ) regulations explicitly require circulation of a draft EA for public comment prior to finalizing the EA. The Federal courts have upheld this conclusion, and in one recent case, the Ninth Circuit squarely addressed the question of public involvement in the development of an EA. In *Bering Strait Citizens for Responsible Resource Development* v. *U.S. Army Corps of Engineers* (9th Cir. 2008), the court held that the circulation of a draft EA is not required in every case; rather, Federal agencies should strive to involve the public in the decision-making process by providing as much environmental information as is practicable prior to completion of the EA so that the public has a sufficient opportunity to weigh in on issues pertinent to the agency's decision-making process. In the case of Shell's 2009 MMPA IHA request, NMFS involved the public in the decision-making process by distributing Shell's IHA application and addenda for a 30–day notice and comment period. However, at that time, a draft EA was not available to provide to the public for comment. The IHA application and NMFS' Notice of Proposed IHA (74 FR 26217, June 1, 2009) contained information relating to the project. For example, the application included a project description, its location, environmental matters such as species and habitat to be affected, and measures designed to minimize adverse impacts to the environment and the availability of affected species or stocks for subsistence uses.

*Comment 103:* AEWC notes that Shell's IHA application warrants review in an environmental impact statement (EIS) given the potential for significant impacts.

*Response:* NMFS' 2009 EA was prepared to evaluate whether significant environmental impacts may result from the issuance of an IHA to Shell, which is an appropriate application of NEPA. After completing the EA, NMFS determined that there would not be significant impacts to the human environment and accordingly issued a FONSI. Therefore, an EIS is not needed for this action.

*Comment 104:* AEWC, AWL, and NSB note the release of the MMS/NMFS Draft Programmatic EIS (PEIS; MMS, 2007) in the summer of 2007. To date, a Final PEIS has not been completed. The commenters believe that all public comments submitted on the Draft PEIS must be answered and the Final PEIS released before NMFS can issue new IHAs for seismic activities in the Chukchi and Beaufort Seas. AWL states that CEQ regulations limit new activities that are otherwise covered by a PEIS during the period in which the environmental review is in progress. Allowing surveying to continue avoids the broader look at potential impacts and could prejudice the agency's decision making.

*Response:* While the Final PEIS will analyze the affected environment and environmental consequences from seismic surveys in the Arctic, the analysis contained in the Final PEIS will apply more broadly to Arctic seismic operations. NMFS' issuance of an IHA to Shell for the taking of several species of marine mammals incidental to conducting its open-water marine survey program in the Chukchi Sea in 2009, as analyzed in the EA, is not expected to significantly affect the quality of the human environment. Shell's surveys are not expected to significantly affect the quality of the human environment because of the limited duration and scope of Shell's operations. Additionally, the EA contained a full analysis of cumulative impacts.

**Marine Mammals Affected by the Activity**

Marine mammals that occur in the proposed survey areas belong to three taxonomic groups: (1) odontocetes (toothed cetaceans), (2) mysticetes (baleen whales), and (3) carnivora (pinnipeds and polar bears). Cetaceans and pinnipeds (except walrus) are the subject of this IHA. In the U.S., the walrus and polar bear are managed by the USFWS. USFWS issued a LOA to Shell on July 16, 2009, for incidental ''takes'' specific to walruses and polar bears.

Marine mammal species under the jurisdiction of NMFS which are known to or may occur in the open-water marine survey area of the Chukchi Sea include eight cetacean and four pinniped species (see Table 4–1 in Shell's application). Three of these species, the bowhead, humpback and fin whales, are listed as ''endangered'' under the ESA. Bowhead whales are more common in the survey area than other ESA species. Based on a small number of sightings, fin whales are unlikely to occur along the planned trackline in the Chukchi Sea. Humpback whales normally are not found in the Chukchi Sea; however, several humpback sightings were recorded during vessel-based surveys in the Chukchi Sea in 2007 (Reiser *et al.*, 2008).

The marine mammal species under NMFS jurisdiction that are most likely to occur in the survey area include:

beluga, bowhead, and gray whales, harbor porpoise, and ringed, bearded, and spotted seals. The marine mammal species likely to be encountered most widely (in space and time) throughout the survey period is the ringed seal. Encounters with bowhead and gray whales are expected to be limited to particular regions and seasons, as discussed in Shell's application.

Four additional cetacean species and one pinniped species-the killer, minke, humpback, and fin whales and ribbon seals-could occur in the project area, but each of these species is uncommon or rare in the survey area and relatively few encounters with these species are expected during Shell's operations. Descriptions of the biology, distribution, and population status of the marine mammal species under NMFS' jurisdiction can be found in Shell's application and the NMFS SARs. The Alaska SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2008.pdf*. Please refer to those documents for information on these species.

**Potential Effects of Survey Activities on Marine Mammals**

The only anticipated impacts to marine mammals associated with Shell's proposed activities (primarily resulting from noise propagation) are from vessel movements and airgun operations. Aircraft may provide a potential secondary source of sound. The physical presence of vessels and aircraft could also potentially lead to non-acoustic effects on marine mammals involving visual or other cues.

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.*, 1995). As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any TTS in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

The Notice of Proposed IHA (74 FR 36217, June 1, 2009) included a discussion of the effects of sounds from airguns on mysticetes, odontocetes, and pinnipeds, including tolerance, masking, behavioral disturbance, hearing impairment and other physical effects, and non-auditory physiological effects, as well as a discussion on stranding and mortality events. The initial discussion of the potential effects of airguns on marine mammals presented in the Notice of Proposed IHA were presented without consideration of the mitigation measures proposed by Shell and required by NMFS. However, NMFS' preliminary determinations were made only after evaluation of Shell's proposed mitigation measures. When these measures are taken into account, it is unlikely that this project would result in temporary, or especially, permanent hearing impairment or any significant non-auditory physical or physiological effects.

The Notice of Proposed IHA also included a discussion of the potential effects of the sonar equipment (e.g., multi-beam bathymetric sonar) to be used by Shell during the surveys. While the sonar equipment proposed to be used for this project generates high sound energy, the equipment operates at frequencies (≤100 kHz) beyond the effective hearing range of most marine mammals likely to be encountered during the proposed activities (Richardson *et al.*, 1995). Therefore, NMFS believes that effects of signals from sonar equipment to marine mammals will be negligible.

**Estimated Take of Marine Mammals**

The anticipated harassments from the activities described above may involve temporary changes in behavior. There is no evidence that the planned activities could result in serious injury or mortality, for example due to collisions with vessels or strandings. Disturbance reactions, such as avoidance, are very likely to occur among marine mammals in the vicinity of the source vessel. The required mitigation and monitoring measures (described later in this document) will result in, at most, Level B harassment and will reduce even further the already minimal potential for the risk of injury.

The Notice of Proposed IHA (74 FR 26217, June 1, 2009) included an in-depth discussion of the methodology used by Shell to estimate incidental take by harassment by its seismic activities and the numbers of marine mammals that might be affected during the site clearance and shallow hazards surveys in the Chukchi Sea. Additional information was included in Shell's IHA application and application addenda. Moreover, further explanations have been provided in the ''Comments and Responses'' section earlier in this document based on comments received during the 30–day public comment period. A summary is provided here.

The estimates are based on data obtained during marine mammal surveys in and near the proposed survey area and on estimates of the sizes of the areas where effects could potentially occur. In some cases, these estimates were made from data collected in regions, habitats, or seasons that differ from those in the proposed survey areas. Adjustments to reported population or density estimates were made to account for these differences insofar as possible.

Although several systematic surveys of marine mammals have been

conducted in the southern Beaufort Sea, few data (systematic or otherwise) are available on the distribution and numbers of marine mammals in the Chukchi Sea beyond the 200 m (656 ft) bathymetry contour. The main sources of distributional and numerical data used in deriving the estimates are described below and in Shell's application. While there is some uncertainty related to the use of regional population densities for applications that are local in focus, these estimates are based on the best available scientific data and represents standard practice.

*Marine Mammal Density Estimates*

This section provides estimates of the number of individuals potentially exposed to sound levels at or above 160 dB re 1 Pa (rms). The estimates are based on a consideration of the number of marine mammals that might be disturbed appreciably by operations in the Chukchi Sea.

For the Chukchi Sea, cetacean densities during the summer (July-August) were estimated from effort and sightings data in Moore *et al.* (2000b) while pinniped densities were estimated from Bengtson *et al.* (2005). Because few data are available on the densities of marine mammals other than large cetaceans in the Chukchi Sea in the fall (September-October), density estimates from the summer period have been adjusted to reflect the expected ratio of summer-to-fall densities based on the natural history characteristic of each species. Alternatively, some densities from data collected aboard industry vessels in 2006 and 2007 in the Chukchi Sea have been used.

As noted above, there is some uncertainty about the representativeness of the data and assumptions used in the calculations. To provide some allowance for the uncertainties, ''maximum estimates'' as well as ''average estimates'' of the numbers of marine mammals potentially affected have been derived and provided by Shell in their application. For a few marine mammal species, several density estimates were available, and in those cases, the average and maximum estimates were calculated from the survey data. In other cases, only one, or no applicable estimate was available so correction factors were used to arrive at ''average'' and ''maximum'' estimates. These are described in detail in Shell's application and the Notice of Proposed IHA (74 FR 26217, June 1, 2009). Except where noted, the ''maximum'' estimates have been calculated as twice the ''average'' estimates. The densities presented are believed to be similar to, or in most cases higher than, the densities that will actually be encountered during the survey.

Detectability bias, quantified in part by [f(0)], is associated with diminishing sightability with increasing lateral distance from the survey trackline. Availability bias [g(0)] refers to the fact that there is less than 100 percent probability of sighting an animal that is present along the survey trackline. These correction factors were applied to the data from Moore *et al.* (2000b) and were already included in data provided by Richardson and Thompson (2002) on beluga and bowhead whales, and where possible were applied to the available data for other species.

Estimated densities of marine mammals in the Chukchi Sea during the ''summer'' (July and August) site clearance and shallow hazards survey are presented in Table 6–1 of Shell's application. Densities of marine mammals estimated for the ''fall'' period of Shell's proposed activities in the Chukchi Sea (September and possibly October) are presented in Table 6–2 of the application. Both ''average'' and ''maximum'' densities are provided in the tables. Unless otherwise noted by Shell in the application, maximum densities are twice the average densities. However, since Shell did not provide a rationale regarding the maximum estimate, NMFS has decided that the average density data of marine mammal populations will be used to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the proposed project area. NMFS only used the ''maximum'' estimates for marine mammal species that are considered rare in the project area and for which little to no density information exists (i.e., killer, fin, humpback, and minke whales and ringed seals).

(1) Cetaceans

Nine species of cetaceans are known to occur in the Chukchi Sea project area. Only four of these (bowhead, beluga, and gray whales and harbor porpoise) are expected to be encountered in meaningful numbers during the proposed survey. Densities of bowhead and beluga whales are expected to be lower in the summer when the majority of the stocks are in the Canadian Beaufort Sea. Later in the season, as the animals begin their westward migration through the Alaskan Beaufort and Chukchi Seas, densities of these species will increase in the survey area. Species specific information for bowhead, beluga, and gray whales and harbor porpoise was contained in the Notice of Proposed IHA.

The remaining four cetacean species that could be encountered in the Chukchi Sea during Shell's proposed open-water marine survey include the humpback, killer, minke, and fin whales. Although there is evidence of the occasional occurrence of these species in the Chukchi Sea, it is unlikely that individuals will be encountered during the proposed survey.

(2) Pinnipeds

Four species of pinnipeds may be encountered in the Chukchi Sea area of Shell's proposed shallow hazards and site clearance program: ringed, bearded, spotted, and ribbon seals. Each of these species, except the spotted seal, is associated with both the ice margin and the nearshore area. Ribbon seals have been reported in very small numbers within the Chukchi Sea by observers on industry vessels (Ireland *et al.*, 2007a; Patterson *et al.*, 2007) so minimal values have been used for expected densities. Additional information for ringed, bearded, and spotted seals can be found in the Notice of Proposed IHA.

*Exposure Calculations of Marine Mammals*

Numbers of marine mammals that might be present and potentially disturbed as a result of the site clearance and shallow hazards surveys are estimated below based on available data about mammal distribution and densities at different locations and times of the year, as described previously. Shell's survey would take place in the Chukchi Sea over two different seasons (i.e., summer, August, and fall, September and possibly October). The estimates of marine mammal densities have therefore been separated both spatially and temporally in an attempt to represent the distribution of animals expected to be encountered over the duration of the survey.

The number of individuals of each species potentially exposed to received sound levels at or above 160 dB re 1 μPa (rms) within the survey region, time period, and habitat zone was estimated by multiplying:

- The expected species density (as provided in Tables 6–1 and 6–2 of Shell's application); by
- The anticipated area to be ensonified to the specified level in the survey region (900 $km^2$), time period, and habitat zone to which that density applies.

The numbers of potential individuals exposed were then summed for each species across the survey region, seasons, and habitat zones. Some of the animals estimated to be exposed,

particularly migrating bowhead whales, might show avoidance reactions before being exposed to 160 dB re 1 μPa (rms). Thus, these calculations actually estimate the number of individuals potentially exposed to sound at or above 160 dB (rms) that would occur if there were no avoidance of the area ensonified to that level.

The area of water potentially exposed to received levels at or above 160 dB (rms) by the proposed operations was calculated by multiplying the planned trackline distance by the cross-track distance of the sound propagation measured during previous field seasons. For site clearance and shallow hazards surveys in 2008 in the Chukchi Sea, the 160 dB radius from the *Cape Flattery*'s four 10 in$^3$ airguns measured in 2008 was 1,400 m (0.87 mi), and the single 10 in$^3$ airgun was 440 m (0.27 mi).

Closely spaced survey lines and large cross-track distances of the 160 dB radii can result in repeated exposure of the same area of water. Excessive amounts of repeated exposure can lead to overestimation of the number of animals potentially exposed through double counting. However, the relatively short cross-track distances of the 160 dB radii associated with the site clearance and shallow hazards surveys result in little overlap of exposed waters during the survey, so multiple exposures due to overlap of ensonified areas have not been removed from the area calculations.

Shallow hazards and site clearance surveys in the Chukchi Sea are planned to occur along approximately 480 km (298 mi) of survey lines (plus approximately 120 km (74.6 mi) of mitigation gun activity between survey lines) from August-September (and possibly early to mid-October) exposing approximately 900 km$^2$ (347.5 mi2) of water to sounds at or above 160 dB re 1 Pa (rms). Additional information on the calculations for estimating take can be found in Shell's application and the Notice of Proposed IHA.

Based on the operational plans and marine mammal densities described above, the estimates of marine mammals potentially exposed to sounds at or above 160 dB (rms) in the Chukchi Sea are presented in Table 6–7 of Addendum 2 to Shell's application. A discussion of the number of potential exposures is summarized by species in the following subsections.

(1) Cetaceans

Based on density estimates, one ESA-listed cetacean species (the bowhead whale) is expected to be exposed to received sound levels at or above 160 dB (rms) unless bowheads avoid the survey vessel before the received levels reach 160 dB. Migrating bowheads are likely to avoid the survey vessel, though many of the bowheads engaged in other activities, particularly feeding and socializing may not. Using average density estimates, Shell estimates that one bowhead whale may potentially be exposed to sounds at or above 160 dB (rms) in the Chukchi Sea project area during the site clearance and shallow hazards survey (see Table 6–7 of Addendum 2 to Shell's application). Two other cetacean species listed as endangered under the ESA that may be encountered in the project area (fin and humpback whales) are unlikely to be exposed given their low ''average'' density estimates in the area. However, Shell has estimated that a ''maximum'' of five humpback whales and five fin whales may be exposed to sound levels at or above 160 dB (rms) during the proposed survey (see Table 6–7 in Addendum 2). NMFS' reasoning for using the ''maximum'' estimate for these species was explained earlier in this document.

Most of the cetaceans exposed to survey sounds with received levels greater than or equal to 160 dB (rms) would involve bowhead, gray, and beluga whales and harbor porpoise. Average and maximum estimates of the number of exposures of cetaceans other than bowheads are: beluga whale (10 and 19, respectively), gray whale (19 and 37, respectively), and harbor porpoise (6 and 11, respectively). Average estimates for the other cetacean species are zero (see Table 6–7 in Addendum 2 to Shell's application) since accurate density estimates are not possible given the paucity of sightings. However, maximum estimates are provided for these species (Table 6–7). For the common species, the requested numbers are calculated as described previously in this document and based on the average densities from the data reported in the different studies mentioned previously.

(2) Pinnipeds

The ringed seal is the most widespread and abundant pinniped in ice-covered Arctic waters, and there is a great deal of annual variation in population size and distribution of these marine mammals. Ringed seals account for the vast majority of marine mammals expected to be encountered and hence exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) during the site clearance and shallow hazards survey. The average (and maximum) exposure estimate is that 692 (1,078) ringed seals might be exposed to marine survey sounds with received levels at or above 160 dB (rms).

Two additional pinniped species (other than Pacific walrus) are expected to be encountered. They are the bearded seal (31 and 43, average and maximum estimates, respectively) and the spotted seal (6 and 11, average and maximum estimates, respectively; Table 6–7 in Addendum 2 to Shell's application). The ribbon seal is unlikely to be encountered. Therefore, only a maximum estimate (5) has been provided for this species based on the minimal density data and extremely low density estimates for this species in the Chukchi Sea. NMFS' reasoning for using the ''maximum'' estimate for this species was explained earlier in this document.

*Conclusions*

(1) Cetaceans

Most of the bowhead whales encountered during the summer will likely show overt disturbance (avoidance) if they receive airgun sounds with levels at or above 160 dB re 1 Pa (rms). The small airgun array proposed for use in this survey greatly limits the size of the 160 dB zone around the ship (1,400 m (0.87 mi)). The use of this smaller array will result in fewer bowhead whales being disturbed by the survey when compared to the use of larger arrays.

Seismic operators sometimes see dolphins and other small toothed whales near operating airgun arrays, but in general, there seems to be a tendency for most delphinds to show some limited avoidance of operating seismic vessels (Stone, 2003; Moulton and Miller, 2005; Holst *et al.*, 2006; Stone and Tasker, 2006). Studies that have reported cases of small toothed whales close to the operating airguns include Duncan (1985), Arnold (1996), Stone (2003), and Holst *et al.* (2006). However, at least when in the Canadian Beaufort Sea in summer, belugas appear to be fairly responsive to seismic energy, with few being sighted within 10–20 km (6.2–12.4 mi) of seismic vessels during aerial surveys. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 10–20 km (6.2–12.4 mi; Miller *et al.*, 2005). The study conducted by Miller *et al.* (2005) was aboard a vessel conducting a 3D seismic survey, utilizing two identical 2,250 in$^3$ airgun arrays with each array containing 24 guns. Since the acoustic sources to be used during Shell's survey are significantly smaller

(total discharge volume of 40 in$^3$) than the ones described in the Miller *et al.* (2005) study, deflections of that magnitude are not expected.

Taking into account the mitigation measures that are planned, effects on cetaceans are generally expected to be restricted to avoidance of a limited area around the survey operation and short-term changes in behavior, falling within the MMPA definition of ''Level B harassment''. Furthermore, the estimated numbers of animals potentially exposed to sound levels sufficient to cause appreciable disturbance are relatively low percentages of the population sizes in the Bearing-Chukchi-Beaufort seas, as described next.

Based on the 160 dB (rms) disturbance criterion, the best (average) estimates of the numbers of cetacean exposures to sounds at or above 160 dB re 1 μPa (rms) represent varying proportions of the populations of each species in the Chukchi Sea and adjacent waters (cf. Table 6–1 in Shell's application). For species listed as endangered under the ESA, Shell's estimates suggest it is unlikely that fin or humpback whales will be exposed to received levels greater than or equal to 160 dB rms, but that approximately one bowhead may be exposed at this level. The latter is less than 0.01 percent of the Bering-Chukchi-Beaufort population of greater than 13,779 individuals assuming 3.4 percent annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005).

Beluga whales may be exposed to sounds produced by the airgun arrays during the survey, and the numbers potentially affected are small relative to the population size (Table 6–7 in Addendum 2 to Shell's application). The best estimate of the number of belugas that might be exposed to sounds at or above 160 dB (10) represents 0.27 percent of the eastern Chukchi Sea population of approximately 3,710 individuals (Angliss and Allen, 2009).

Gray whales and harbor porpoise may also be exposed to sounds produced by the airguns. The best (average) estimate of the number of gray whales and harbor porpoise that might be exposed to sounds at or above 160 dB (rms) represents 0.11 percent of the Eastern North Pacific stock of gray whales and less than 0.01 percent of the Bering Sea stock of harbor porpoise.

In addition, killer, fin, humpback, and minke whales could also be taken by Level B harassment as a result of the survey. However, the possibility is low. The numbers of ''average'' estimated take of these species are not available because they are rare in the project area and little density data exist for these species in the project area. Since the Chukchi Sea represents only a small fraction of the North Pacific and Arctic basins where these animals occur, and these animals do not regularly congregate in the vicinity of the project area, NMFS has determined that only relatively small numbers, if any, of these marine mammal species would be potentially affected by Shell's activities.

Varying estimates of the numbers of marine mammals that might be exposed to sounds from the airgun array during the 2009 Shell shallow hazards and site clearance surveys have been presented (average vs. maximum). The relatively short-term exposures that will occur are not expected to result in any long-term negative consequences for the individuals or their populations.

The many reported cases of apparent tolerance by cetaceans of seismic exploration, vessel traffic, and some other human activities show that co-existence is possible. Mitigation measures such as controlled vessel speed, dedicated MMOs, non-pursuit, shutdowns or power-downs when marine mammals are seen within defined ranges, and avoiding migration pathways when animals are likely most sensitive to noise will further reduce short-term reactions and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence. Subsistence issues are addressed later in this document.

*Potential Bowhead Disturbance at Lower Received Levels* – Aerial surveys during fall seismic surveys in the Beaufort Sea showed that migrating bowhead whales appeared to avoid seismic activities at distances of 20–30 km (12.4–18.6 mi) and received sound levels of 120–130 dB rms (Miller *et al.*, 1999; Richardson *et al.*, 1999). Therefore, it is possible that a larger number of bowhead whales than estimated above may be disturbed to some extent if reactions occur at or near approximately 130 dB (rms). Using the same method of calculation as described earlier in this document for estimating take, the number of migrating bowhead whales exposed to sounds greater than or equal to 120 dB by the proposed survey would be approximately 8.5 the number estimated at 160 dB. (It should be noted though that this calculation is more accurate for the Beaufort Sea where the bowhead whale migration pathway is narrower and more clearly defined than in the Chukchi Sea.) However, acoustic data collected in the vicinity of seismic surveys in the Beaufort Sea in 2007 indicated that bowhead whales did not avoid the sound source at distances equivalent to 120 dB (rms) and instead tolerated sounds at higher levels while likely changing their calling behavior (Blackwell *et al.*, 2008).

Reducing operations during the bowhead whale subsistence harvest is meant to accomplish two mitigation objectives. It greatly reduces the potential for conflicts with subsistence hunting activities, and it allows a large proportion of the bowhead population to migrate past the survey area without being exposed to survey sounds at or above 160 dB (rms) or 120 dB (rms).

The western Arctic stock of bowhead whales usually begins its westward migration through the Beaufort Sea in late August. Westbound bowheads typically reach the Barrow area in mid-September and remain in that area until late October (Brower, 1996). Therefore, migrating bowhead whales are not expected in the proposed Chukchi Sea survey area until the second half of the survey, as the project is expected to occur for approximately 50 days between August and September, not including weather delays. Shell's seismic vessel left Dutch Harbor on July 27, 2009. Through September 30, 2009, Shell had completed 34 days of active data acquisition. Also during this period, Shell experienced 13 down-days due to weather, and there were 19 days of transit to both Nome and Dutch Harbor for crew transfers and resupplying the vessel. Shell expects to complete active seismic operations on October 10, 2009, and to return to Dutch Harbor on October 15 (G. Horner, 2009, Shell, pers. comm.).

(2) Pinnipeds

A few pinniped species are likely to be encountered in the study area, but the ringed seal is by far the most abundant marine mammal species in the survey area. The best (average) estimates of the numbers of individual seals likely to be exposed to airgun sounds at received levels at or above 160 dB re 1 μPa (rms) during the open-water marine survey in the Chukchi Sea are as follows: ringed seals (692), bearded seals (31), and spotted seals (6), (representing 0.3 percent, 0.6 percent, and 0.01 percent, respectively, of the Bering-Chukchi-Beaufort populations for each species). It is probable that only a small percentage of the animals exposed to sound levels at 160 dB would actually be disturbed. For example, Moulton and Lawson (2002) indicate that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound, and, therefore, pinnipeds are not likely to react to seismic sounds unless they are

greater than 170 dB re 1 μPa (rms). Consequently, the take estimates presented in this document may be an overestimation. The short-term exposures of pinnipeds to airgun sounds are not expected to result in any long-term negative consequences for the individuals or their populations, as observations have shown pinnipeds to be rather tolerant of (or habituated to) underwater seismic sounds.

**Potential Impacts on Habitat**

Shell's activities will not result in any permanent impact on habitats used by marine mammals or to their prey sources. Any effects would be temporary and of short duration at any one place. The primary potential impacts to marine mammals are associated with acoustic sound levels from the site clearance and shallow hazards surveys discussed earlier in this document.

The Notice of Proposed IHA (74 FR 26217, June 1, 2009) contained a discussion of the potential impacts to the marine mammal habitat in the survey area. The activities are not expected to have any habitat-related effects that would produce long-term impacts to marine mammals or their habitat due to the limited extent of the acquisition areas and timing of the activities.

**Effects of Seismic Noise and Other Related Activities on Subsistence**

The disturbance and potential displacement of marine mammals by sounds from seismic activities are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears . The importance of each of these species varies among the communities and is largely based on availability.

Communities that participate in subsistence hunts that have the potential to be affected by Shell's open-water marine survey program in the Chukchi Sea survey areas are Point Hope, Point Lay, Wainwright, Barrow and possibly Kotzebue (however, this community is much farther to the south of the project area).

Point Hope residents subsistence hunt for bowhead and beluga whales, polar bears, and walrus. Bowhead and beluga whales are hunted in the spring and early summer along the ice edge. Beluga whales may also be hunted later in the summer along the shore. Walrus are harvested in late spring and early summer, and polar bears are hunted from October to April (MMS, 2007). Seals are available from October through June, but are harvested primarily during the winter months, from November through March, due to the availability of other resources during the other periods of the year (MMS, 2007).

With Point Lay situated near Kasegaluk Lagoon, the community's main subsistence focus is on beluga whales. Each year, hunters from Point Lay drive belugas into the lagoon to a traditional hunting location. The belugas have been predictably sighted near the lagoon from late June through mid- to late July (Suydam *et al.*, 2001). Seals are available year-round, and polar bears and walruses are normally hunted in the winter. Hunters typically travel to Barrow, Wainwright, or Point Hope to participate in bowhead whale harvest, but there is interest in reestablishing a local Point Lay harvest. Shell's activities are scheduled to avoid the traditional subsistence beluga hunt, which annually occurs in July, and Shell will not begin data acquisition until the close of the hunt.

Wainwright residents subsist on both beluga and bowhead whales in the spring and early summer. During these two seasons the chances of landing a whale are higher than during other seasons. Seals are hunted by this community year-round, and polar bears are hunted in the winter.

Barrow residents' main subsistence focus is concentrated on biannual bowhead whale hunts. They hunt these whales during the spring and fall. Westbound bowheads typically reach the Barrow area in mid-September and are in that area until late October (e.g., Brower, 1996). Autumn bowhead whaling near Barrow normally begins in mid-September to early October but may begin as early as late-August if whales are observed and ice conditions are favorable (USDI/BLM, 2005). Whaling near Barrow can continue into October, depending on the quota and conditions. Other animals, such as seals, walruses, and polar bears are hunted outside of the whaling season, but they are not the primary source of the subsistence harvest (URS Corporation, 2005).

There could be an adverse impact on the Inupiat bowhead subsistence hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads. This potential impact is mitigated by application of the procedures established in the 4MP. Adaptive mitigation measures may be employed during times of active scouting and whaling within the traditional subsistence hunting areas of the potentially affected communities. Shell did not begin activities until the close of the spring bowhead hunts. However, there is a possibility that their data acquisition will not be completed prior to the start of the fall bowhead hunt in Barrow. However, it is not expected that the whales will be deflected further offshore before reaching Barrow since Shell's survey will occur approximately 225 km (140 mi) west of Barrow. The whales will be traveling westward through the Beaufort Sea from Canada and will reach Barrow before entering the survey area in the Chukchi Sea. Based on these factors, Shell's Chukchi Sea survey is not expected to interfere with the fall bowhead harvest in Barrow. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small.

Shell has adopted a spatial and temporal operational strategy for its Chukchi Sea operations that should minimize impacts to subsistence hunters. Operations will not begin prior to the close of the spring bowhead hunt in the Chukchi coastal villages and will closely coordinate with and avoid impacts to beluga whale hunts and walrus hunts through subsistence advisors.

The timing (late summer and fall after many of the Chukchi Sea communities have harvested sizeable portions of their marine mammal quota) and distance (approximately 113 km (70 mi) or more) from shore, as well as the low volume airguns to be used and the required mitigation measures described later in this document, are expected to mitigate any adverse effects of the surveys on the availability of marine mammals for subsistence uses. NMFS does not expect subsistence users to be directly displaced by the surveys because subsistence hunters usually do not travel this far (113 km [70 mi]) offshore to harvest marine mammals. Also, because of the significant distance offshore and the lack of hunting in these areas, there is no expectation that any physical barriers would exist between

marine mammals and subsistence users. Based on this information, as well as the fact that Shell signed the 2009 Open-water CAA, NMFS has determined that Shell's site clearance and shallow hazards surveys in the Chukchi Sea in 2009/2010 will not have an unmitigable adverse impact on subsistence uses.

**Plan of Cooperation (POC) and Conflict Avoidance Agreement (CAA)**

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. Shell has prepared and will implement a draft POC for its 2009 activities. The POC also describes concerns received during 2008. Shell developed the POC to mitigate and avoid any unreasonable interference from their planned activities with North Slope subsistence uses and resources. The POC is, and has been in the past, the result of numerous meetings and consultations between Shell, affected subsistence communities and stakeholders, and Federal agencies. The POC identifies and documents potential conflicts and associated measures that will be taken to minimize any adverse effects on the availability of marine mammals for subsistence use. The Draft POC document was distributed to the communities, subsistence users groups, NMFS, and USFWS on May 15, 2009. To be effective, the POC must be a dynamic document which will expand to incorporate the communications and consultation that will continue to occur throughout 2009 and 2010. Outcomes of POC meetings are typically included in updates attached to the POC as addenda and distributed to Federal, state, and local agencies as well as local stakeholder groups that either adjudicate or influence mitigation approaches for Shell's open-water programs.

Shell has held and plans to hold additional community meetings in Barrow, Wainwright, Point Hope, Point Lay, and Kotzebue regarding its 2009 Chukchi open-water marine survey program. Some of the community POC meetings that have already occurred include: February 2, 2009, in Barrow; March 24, 2009, in Point Hope; March 25, 2009, in Kotzebue; March 26, 2009, in Wainwright; April 22, 2009, in Point Lay, and April 23, 2009, in Kivalina. Shell plans to focus on lessons learned from the 2008 open-water program to avoid potential conflicts. During 2009, Shell will continue to meet with the marine mammal commissions and committees including the AEWC, Eskimo Walrus Commission (EWC), Alaska Beluga Whale Committee (ABWC), Alaska Ice Seal Committee (AISC), and the Alaska Nanuuq Commission (ANC). Throughout 2009, Shell anticipates meeting with the marine mammal commissions and committees active in the subsistence harvests and marine mammal research.

Also during 2009, Shell will meet at least twice with the commissioners and committee heads of ABWC, ANC, EWC, and AISC jointly in co-management meetings. During a pre-season co-management meeting Shell presented pre-season planning to the commissioners and committee leads in order to gather their input on subsistence use concerns, consider their traditional knowledge in the design of project mitigations, and to hear about their involvement in research on marine mammals and/or traditional use. Following the season, Shell will have a post-season co-management meeting with the commissioners and committee heads to discuss results of mitigation measures and outcomes of the preceding season. The goal of the post-season meeting is to build upon the knowledge base, discuss successful or unsuccessful outcomes of mitigation measures, and possibly refine plans or mitigation measures if necessary.

In addition, Shell will meet with North Slope officials and community leaders on an as-requested basis before the 2009 open-water season in order to discuss the proposed activities. Lastly, Shell intends to discuss adaptive conflict avoidance mechanisms to address concerns expressed by subsistence users in the North Slope communities.

The POC also specifies times and areas to avoid in order to minimize possible conflicts with traditional subsistence hunts by North Slope villages for transit and open-water activities. As mentioned elsewhere in this document, Shell waited to begin its 2009 activities until the close of Point Lay's spring beluga hunt. Additionally, Shell has stated that vessel transits in the Chukchi Sea spring lead system will not occur prior to July 1, 2009, and July 1, 2010.

In regard to the CAA, the AEWC submitted a draft CAA to the industry earlier this spring and was signed by Shell on June 24, 2009. The 2009 CAA incorporated all appropriate measures and procedures regarding the timing and areas of the Shell's planned activities (e.g., places where seismic operations will be curtailed or moved in order to avoid potential conflicts with active subsistence whaling and sealing); a communications system between Shell's vessels and whaling and hunting crews (i.e., the communications center will be located in strategic areas); provision for MMOs/Inupiat communicators aboard all project vessels; conflict resolution procedures; and provisions for rendering emergency assistance to subsistence hunting crews. If requested, post-season meetings will also be held to assess the effectiveness of the 2009 CAA between Shell, the AEWC, and the Whaling Captains Associations, to address how well conflicts (if any) were resolved; and to receive recommendations on any changes (if any) that may be needed in the implementation of future CAAs. In addition, NMFS has included in Shell's IHA, those mitigation and monitoring measures contained in the CAA that it determined would ensure that Shell's activities will not have an unmitigable adverse impact on subsistence uses of marine mammals.

Based on the signed CAA, the mitigation and monitoring measures included in the IHA (see next sections), and the project design itself, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from Shell's activities.

**Mitigation and Monitoring**

As part of its application, Shell has implemented a 4MP that will consist of monitoring and mitigation during their open-water shallow hazards data acquisition activities in the Chukchi Sea during the 2009/2010 open-water season. The program consists of monitoring and mitigation during Shell's various activities related to survey data acquisition, including transit and data acquisition. This program will provide information on the numbers of marine mammals potentially affected by the survey program and real-time mitigation to prevent possible injury or mortality of marine mammals by sources of sound and other vessel-related activities. Monitoring efforts will be initiated to collect data to address the following specific objectives: (1) improve the understanding of the distribution and abundance of marine mammals in the Chukchi Sea project areas; and (2) assess the effects of sound and vessel activities on marine mammals inhabiting the project areas and their distribution relative to the local people that depend on them for subsistence hunting. These objectives and the monitoring and mitigation goals will be addressed through the utilization of vessel-based MMOs on the survey source vessels. Additional

information can be found in Shell's application.

*Mitigation Measures*

The survey program incorporates both design features and operational procedures for minimizing potential impacts on cetaceans and pinnipeds and on subsistence hunts. The design features and operational procedures are described in the IHA application submitted to NMFS summarized here. Survey design features include:

- Timing and locating survey activities to avoid interference with the annual fall bowhead whale and other marine mammal hunts;
- Selecting and configuring the energy source array in such a way that it minimizes the amount of energy introduced into the marine environment and, specifically, so that it minimizes horizontal propagation;
- Limiting the size of the acoustic energy source to only that required to meet the technical objectives of the survey; and
- Early season field assessment to establish and refine (as necessary) the appropriate 180 dB and 190 dB safety zones, and other radii relevant to behavioral disturbance.

The potential disturbance of cetaceans and pinnipeds during survey operations will be minimized further through the implementation of several ship-based mitigation measures, which include establishing and monitoring safety and disturbance zones, speed and course alterations, ramp-up (or soft start), power-down, and shutdown procedures, and provisions for poor visibility conditions.

(1) Safety and Disturbance Zones

Safety radii for marine mammals around airgun arrays are customarily defined as the distances within which received pulse levels are greater than or equal to 180 dB re 1 μPa (rms) for cetaceans and greater than or equal to 190 dB re 1 μPa (rms) for pinnipeds. These safety criteria are based on an assumption that seismic pulses at lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might have such effects. It should be understood that marine mammals inside these safety zones will not be seriously injured or killed as these zones were established prior to the current understanding that significantly higher levels of impulse sounds would be required before injury or mortality could occur (see Southall *et al.*, 2007).

Monitoring similar to that conducted in the Chukchi Sea in 2007/2008 is required in 2009/2010. Shell is required to use MMOs onboard the survey vessel to monitor the 190 and 180 dB (rms) safety radii for pinnipeds and cetaceans, respectively, and to implement appropriate mitigation as discussed in this document.

In addition, a 160–dB (rms) vessel monitoring zone for bowhead and gray whales shall be established and monitored during all survey activities. Whenever an aggregation of 12 or more bowhead or gray whales are observed during a vessel-monitoring program within the 160–dB zone around the source vessel, the survey will not commence or will shutdown until MMOs confirm they are no longer present within the 160–dB safety radius of surveying operations (see the ''Power-downs and Shutdowns'' subsection later in this document). The radius of the 160–dB isopleth based on modeling is 1,400 m (0.87 mi).

During previous survey operations in the Chukchi Sea, Shell utilized early season sound source verification (SSV) to establish safety zones for the previously mentioned sound level criteria. As the equipment being utilized in 2009 is similar to that used in 2008, Shell will initially utilize the derived (i.e., measured) sound criterion distances from 2008. An acoustics contractor performed the direct measurements of the received levels of underwater sound versus distance and direction from the energy source arrays using calibrated hydrophones. The acoustic data was analyzed and used to verify (and if necessary adjust) the safety distances.

(2) Ramp-up

A ramp-up of an energy source array provides a gradual increase in energy levels, and involves a step-wise increase in the number and total volume of energy released until the full complement is achieved. The purpose of a ramp-up (or ''soft start'') is to ''warn'' cetaceans and pinnipeds in the vicinity of the energy source and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the survey program, the operator is required ramp up energy sources slowly, if the energy source being utilized generates sound energy within the frequency spectrum of cetacean or pinniped hearing. Full ramp-ups (i.e., from a cold start after a shut down, when no airguns have been firing) shall begin by firing one small airgun. Ramp-ups are required at any time electrical power to the airgun array has been discontinued for a period of 10 min or more and the MMO watch has been suspended

Ramp-up, after a shutdown, will not begin until there has been a minimum of a 30 min period of observation by MMOs of the safety zone to assure that no marine mammals are present. The entire safety zone must be visible during the 30 min lead-in to a full ramp-up. If the entire safety zone is not visible, then ramp-up from a cold start cannot begin. If a marine mammal(s) is sighted within the safety zone during the 30–min watch prior to ramp-up, ramp-up will be delayed until the marine mammal(s) is sighted outside of the safety zone or the animal(s) is not sighted for at least 15 min for small odontocetes and pinnipeds or 30 min for baleen whales (large odontocetes do not occur within the project area).

During periods of turn around and transit between survey transects, at least one airgun (or energy source) shall remain operational. The ramp-up procedure still must be followed when increasing the source levels from one gun to the full array. Keeping air gun firing, however, avoids the prohibition of a cold start during darkness or other periods of poor visibility. Through use of this approach, survey operations can resume upon entry to a new transect without a full ramp-up and the associated 30–min lead-in observations. MMOs must be on duty whenever the airguns are firing during daylight and during the 30–min periods prior to ramp-ups as well as during ramp-ups. Daylight will occur for 24 hr/day until mid-August, so until that date, MMOs will automatically be observing during the 30–min period preceding a ramp-up. Later in the season, MMOs will be called out at night to observe prior to and during any ramp-up. The vessel operator and MMOs shall maintain records of the times when ramp-ups start and when the airgun arrays reach full power.

(3) Power-downs and Shutdowns

A power-down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays shall be immediately powered down whenever a marine mammal is sighted approaching near or close to the applicable safety zone of the full arrays but is outside the applicable safety zone of the single source. If a marine mammal is sighted within the applicable safety zone of the single energy source, the entire array will be shut down (i.e., no sources firing). Although MMOs will be located on the bridge ahead of the center of the airgun array, the shutdown criterion for animals ahead of the vessel will be

based on the distance from the bridge (vantage point for MMOs) rather than from the airgun array a precautionary approach. For marine mammals sighted alongside or behind the array, the distance is measured from the array.

Following a power-down or shutdown, operation of the airgun array will not resume until the marine mammal has cleared the applicable safety zone. The animal will be considered to have cleared the safety zone if it:

(1) Is visually observed to have left the safety zone;

(2) Has not been seen within the zone for 15 min in the case of small odontocetes and pinnipeds; or

(3) Has not been seen within the zone for 30 min in the case of mysticetes.

For the aggregation of 12 or more mysticete whales, the acoustic equipment will not be turned back on or return to full power until the aggregation has left the 160–dB isopleth or the animals forming the aggregation are reduced to fewer than 12 mysticete whales.

In the unanticipated event that an injured or dead marine mammal is sighted within an area where the operator deployed and utilized airguns within the past 24 hours, the airguns must be shutdown immediately and the Marine Mammal Stranding Network notified.

(4) Operations at Night and in Poor Visibility

Shell plans to conduct the site clearance and shallow hazards survey 24 hr/day. Regarding nighttime operations, note that there will be no periods of total darkness until mid-August. When operating under conditions of reduced visibility attributable to darkness or to adverse weather conditions, infra-red or night-vision binoculars will be available for use. It is recognized, however, that their effectiveness is limited. For that reason, MMOs will not routinely be on watch at night, except in periods before and during ramp-ups. As stated earlier, if the entire safety zone is not visible for at least 30 min prior to ramp-up, then ramp-up may not proceed. It should be noted that if one small energy source has remained firing, the rest of the array can be ramped up during darkness or in periods of low visibility. Survey operations may continue under conditions of darkness or reduced visibility.

(5) Speed and Course Alterations

If a marine mammal (in water) is detected outside the safety radius and, based on its position and the relative motion, is likely to enter the safety radius, the vessel's speed and/or direct course shall be changed in a manner that does not compromise safety requirements. The animal's activities and movements relative to the source vessel shall be closely monitored to ensure that the individual does not approach within the safety radius. If the mammal is sighted approaching near or close to the applicable safety radius, further mitigative actions must be taken, i.e., either further course alterations or power-down or shutdown of the airgun(s).

(6) Determination on Mitigation

NMFS has determined that the combination of the use of the mitigation gun, ramp-up of the airgun array, and the slow vessel speed (to allow marine mammals sufficient time to take necessary avoidance measures), the use of trained MMOs, shutdown procedures (to avoid potential injury if the animal is close to the vessel), and the behavioral response of marine mammals (especially bowhead whales) to avoid areas of high anthropogenic noise all provide protection to marine mammals from serious injury or mortality. As a result, NMFS has determined that it is not necessary to require termination of survey activities during darkness or reduced visibility and that the current level of mitigation will achieve the least practicable impact on marine mammal species or stocks.

*Marine Mammal Monitoring*

Vessel-based monitoring for marine mammals shall be conducted throughout the period of survey operations. The 4MP is required to be implemented by a team of experienced MMOs, including both biologists and Inupiat personnel. All MMOs must be approved by NMFS prior to the start of operations. At least one observer on the survey vessel will be an Inupiat who will have the responsibility of communicating with the Inupiat community and (during the whaling season) directly with the Subsistence Advisors in coastal villages.

The MMOs shall be stationed aboard the survey source vessel throughout the active field season. The duties of the MMOs include watching for and identifying cetaceans and pinnipeds; recording their numbers, distances, and reactions to the survey operations; initiating mitigation measures when appropriate; and reporting the results. MMOs aboard the survey source vessel must be on watch during all daylight periods when the energy sources are in operation and when energy source operations are to start up at night. Each MMO shift shall not exceed more than 4 consecutive hours, and no MMO shall work more than 3 shifts in a 24 hr period (i.e., 12 hours total per day) in order to avoid fatigue. Shell is required to have five MMOs on-board the source vessel at any one time during all survey operations.

Crew leaders and most other biologists serving as observers in 2009 are individuals with experience as observers during one or more of the 1996–2008 monitoring projects for Shell, WesternGeco, or BP and/or subsequent offshore monitoring projects for other clients in Alaska, the Canadian Beaufort, or other offshore areas. Biologist-observers have previous marine mammal observation experience and field crew leaders are highly experienced with previous vessel-based monitoring projects. Qualifications for those individuals have been provided to NMFS for review and acceptance. Inupiat observers shall be experienced in the region and familiar with the marine mammals of the area. An MMO handbook, adapted for the specifics of the survey programs from the handbooks created for previous monitoring projects were prepared and distributed to all MMOs (see Shell's 4MP for additional details on the handbook). All observers completed a 2–day training and refresher session on marine mammal monitoring shortly before the start of the 2009 open-water season.

(1) Monitoring Methodology

The observer(s) shall watch for marine mammals from the best available vantage point on the operating source vessel, which is usually the bridge or flying bridge. The observer(s) will scan systematically with the naked eye and 7 x 50 reticle binoculars, supplemented with 20 x 50 image stabilized binoculars, and night-vision equipment when needed. Personnel on the bridge will assist the MMOs in watching for pinnipeds and cetaceans.

The observer(s) will give particular attention to the areas within the ''safety zone'' around the source vessel. These zones are the maximum distances within which received levels may exceed 180 dB re 1 μPa (rms) for cetaceans or 190 dB re 1 μPa (rms) for pinnipeds. MMOs shall also monitor the 160 dB re 1 μPa (rms) radius for Level B harassment takes, as this radius is expected to be a maximum of 1,400 m (0.87 mi). The 160–dB isopleth (1,400 m [0.87 mi]) will also be monitored for the presence of aggregations of 12 or more bowhead or gray whales.

Information required to be recorded by MMOs includes the same types of information that were recorded during previous monitoring programs (1998–2008) in the Chukchi and Beaufort seas

(Moulton and Lawson, 2002; Patterson *et al.*, 2007). When a mammal sighting is made, the following information about the sighting shall be recorded:

(1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the source vessel, apparent reaction to the source vessel (e.g., none, avoidance, approach, paralleling, etc.), closest point of approach, and behavioral pace;

(2) Time, location, heading, speed, activity of the vessel, and operational state (e.g., operating airguns, ramp-up, etc.), sea state, ice cover, visibility, and sun glare; and

(3) The positions of other vessel(s) in the vicinity of the source vessel. This information will be recorded by the MMOs at times of whale (but not seal) sightings.

The ship's position, heading, and speed, the operational state (e.g., number and size of operating energy sources), and water temperature (if available), water depth, sea state, ice cover, visibility, and sun glare shall also be recorded at the start and end of each observation watch and, during a watch, every 30 min and whenever there is a change in one or more of those variables.

Distances to nearby marine mammals, e.g., those within or near the 190 dB (or other) safety zone applicable to pinnipeds, will be estimated with binoculars (7 x 50) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon.

Observers will use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. Previous experience showed that this Class 1 eye-safe device was not able to measure distances to seals more than about 70 m (230 ft) away. (Previous SSV measurements indicate that the 190–dB safety radius for the 4 x 10 $in^3$ airgun array proposed for use during Shell's site clearance and shallow hazards survey is approximately 50 m (164 ft), well within the range of 70 m (230 ft)). However, it was very useful in improving the distance estimation abilities of the observers at distances up to about 600 m (1968 ft)-the maximum range at which the device could measure distances to highly reflective objects such as other vessels.

When a marine mammal is seen within the safety radius applicable to that species, the geophysical crew shall be notified immediately so that the required mitigation measures described previously in this document can be implemented. As in 1996–2001 and in 2006–2008, it is expected that the airgun arrays will be shut down within several seconds-often before the next shot would be fired, and almost always before more than one additional shot is fired. The MMO shall then maintain a watch to determine when the mammal(s) is outside the safety zone such that airgun operations can resume.

Night vision equipment (''Generation 3'' binocular image intensifiers or equivalent units) will be available for use when needed. Prior to mid-August, there will be no hours of total darkness in the project area. The operators shall provide or arrange for the following specialized field equipment for use by the onboard MMOs: reticule binoculars, 20 x 50 image stabilized binoculars, ''Big-eye'' binoculars, laser rangefinders, inclinometer, laptop computers, night vision binoculars, and possibly digital still and digital video cameras.

(2) Field Data-recording and Verification

The observers shall record their observations onto datasheets or directly into handheld computers. During periods between watches and periods when operations are suspended, those data will be entered into a laptop computer running a custom computer database. The accuracy of the data entry will be verified in the field by computerized validity checks as the data are entered and by subsequent manual checking of the database printouts. These procedures allow initial summaries of data to be prepared during and shortly after the field season and will facilitate transfer of the data to statistical, graphical, or other programs for further processing. Quality control of the data will be facilitated by the start-of-season training session, subsequent supervision by the onboard field crew leader, and ongoing data checks during the field season.

(3) Acoustic Sound Source Verification Measurements

As part of the IHA application process for similar shallow hazards and marine survey acquisition in 2006–2008, Shell contracted JASCO Research Ltd. to conduct acoustic measurements of vessel and energy source arrays on source and support to broadband received levels of 190, 180, 170, 160, and 120 dB re 1 μPa (rms; see Table 1 of Attachment A in Shell's application).

The radii measured by these previous SSV tests will be utilized as temporary safety radii until current SSV measurements of the actual airgun array sound are available as mentioned earlier in this document. The measurements wer made at the beginning of the field season and the measured radii are to used for the remainder of the survey period.

The objectives of the SSV tests planned for 2009 in the Chukchi Sea and the methods used to conduct the tests were described in Shell's 4MP and the Notice of Proposed IHA (74 FR 26217, June 1, 2009).

(4) Chukchi Sea Acoustic Arrays

Shell and ConocoPhillips are jointly funding an extensive acoustic monitoring program in the Chukchi Sea in 2009. This program incorporates the acoustic programs of 2006–2008 with a total of 44 recorders distributed both broadly across the Chukchi lease area and the nearshore environment and intensively on the Burger and Klondike lease areas. The broad area arrays are designed to capture both general background soundscape data and marine mammal call data across the lease area. From these recordings, it is anticipated that Shell (and others) may be able to gain insights into large-scale distribution of marine mammals, identification of marine mammal species present, movement and migration patters, and general abundance data.

The intense area arrays are designed to support localization of marine mammal calls on and around the leasehold areas. In the case of the Burger prospect, where Shell intends to conduct shallow hazards data acquisition, localized calls will enable investigators to understand response of marine mammals to survey operations both in terms of distribution around the operation and behavior (i.e., calling behavior).

(5) Aerial Surveys

No manned aerial overflights are anticipated during the 2009 shallow hazards and marine survey activities. In the Chukchi Sea, all shallow hazards activities will be conducted beyond 113 km (70 mi) from shore and well away from coastal communities or nearshore concentrations of subsistence resources. The strudel scour survey will be conducted beyond 8 km (5 mi) from shore and will utilize sources of low energy and frequencies outside the hearing ranges of cetacean and pinniped species in the area. Additionally, the energy source to be utilized by Shell for the survey operations is minimal by comparison to larger scale seismic operations. It is not anticipated that manned overflights would accomplish any direct mitigative effects or monitoring purpose. Additionally, aerial surveys are not required in the Chukchi Sea because they have currently been

determined to be impracticable due to lack of adequate landing facilities, the prevalence of fog and other inclement weather in that area, potentially resulting in an inability to return to the airport of origin, thereby resulting in safety concerns. Although no manned aerial surveys are planned as part of the 4MP, NMFS has determined that the monitoring and mitigation measures proposed by Shell in its 4MP and required in the IHA will be sufficient to reduce impacts on marine mammals to the lowest level practicable.

(6) Monitoring Plan Independent Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)). Shell's 4MP was discussed by meeting participants at the Arctic Stakeholder Open-water Workshop in Anchorage, Alaska, on April 6–8, 2009. On April 24, 2009, NMFS received a letter from the AEWC, which noted that while there was discussion of the 4MP at the workshop, they do not believe that there was ample review of the plan and wanted to know NMFS' plans to hold an independent peer review in order to meet its statutory requirement.

NMFS established an independent peer review panel to review Shell's monitoring plan for the 2009/2010 open-water season activities. NMFS asked the AEWC, the Marine Mammal Commission, and Shell to recommend independent subject matter experts to take part in the panel. NMFS selected and contacted the panelists from the names submitted by the aforementioned organizations. NMFS received comments from two of the reviewers. NMFS considered the recommendations of the reviewers and modified the monitoring plan, as appropriate.

The comments from the independent peer reviewers focused on the following: (1) the number of MMOs; (2) qualifications and training of MMOs; (3) standardization of methods and gear; (4) the inability of MMOs to monitor at night; (5) the efficacy of ramp-up and the minimum period for shutdowns; and (6) acoustic monitoring. The reviewers also addressed concerns similar to those raised by the public about the density estimates and take calculations and estimates. Those concerns are addressed in the ''*Density and Take Estimate Concerns*'' subsection of the ''Comments and Responses'' section earlier in this document.

Shell has clarified some of the ambiguities in the 4MP, which address some of the concerns of the reviewers. Five MMOs will be on-board the site clearance and shallow hazards vessel for the duration of the survey. This will allow for two MMOs to be on duty during all pre-ramp-up and ramp-up periods and for as large a portion of active surveying during daylight hours for no more than 12 hours per day. Clarification has also been provided on the training and qualifications of the MMOs. The MMO handbook contains information on all species expected to occur in the project area, and post-training exams are required to verify proficiencies. Concerns regarding monitoring at night and the efficacy of ramp-up were addressed in the responses to the public comments. Ramp-up must occur if the airguns have been shutdown for 10 minutes or more. The reviewers also suggested the use of PAM as an alternate monitoring measure at night and in poor visibility conditions. The explanation for not requiring PAM was discussed earlier in this document and NMFS' EA.

**Reporting**

*SSV Report*

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190-, 180-, and 160–dB (rms) radii of the airgun sources, shall be submitted within 120 hr after collection and analysis of those measurements at the start of the field season. This report will specify the distances of the safety zones that were adopted for the survey.

*Technical Reports*

The results of the 2009 Shell vessel-based monitoring, including estimates of ''take'' by harassment, shall be presented in the ''90–day'' and Final Technical reports, as required by NMFS in the IHA. The Technical Reports shall include: (1) summaries of monitoring effort (e.g., total hours, total distances, and marine mammal distribution through study period versus operational state, sea state, and other factors affecting visibility and detectability of marine mammals); (2) summaries of the occurrence of power-downs, shutdowns, ramp-ups, and ramp-up delays; (3) analyses of the effects of various factors, influencing detectability of marine mammals (e.g., sea state, number of observers, and fog/glare); (4) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (5) sighting rates of marine mammals versus operational state (and other variables that could affect detectability); (6) initial sighting distances versus operational state; (7) closest point of approach versus operational state; (8) observed behaviors and types of movements versus operational state; (9) numbers of sightings/individuals seen versus operational state; (10) distribution around the acoustic source vessel versus operational state; and (11) estimates of take by harassment. The take estimates will be calculated using two different methods to provide both minimum and maximum estimates. The minimum estimate will be based on the numbers of marine mammals directly seen within the relevant radii (160, 180, and 190 dB (rms)) by observers on the source vessel during survey activities. The maximum estimate will be calculated using densities of marine mammals determined for non-acoustic areas and times. These density estimates will be calculated from data collected during (a) vessel based surveys in non-operational areas, or (b) observations from the source vessel or supply boats during non-operational periods. The estimated densities in areas without data acquisition activity will be applied to the amount of area exposed to the relevant levels of sound to calculate the maximum number of animals potentially exposed or deflected. This report shall be due 90 days after termination of the 2009 open-water season and shall include the results from any seismic work conducted in the Chukchi/Beaufort Seas in 2009 under the previous IHA, which expired on August 19, 2009.

*Comprehensive Monitoring Reports*

In November, 2007, Shell (in coordination and cooperation with other Arctic seismic IHA holders) released a final, peer-reviewed edition of the 2006 Joint Monitoring Program in the Chukchi and Beaufort Seas, July-November 2006 (LGL, 2007). This report is available on the NMFS Protected Resources website (see **ADDRESSES**). In March, 2009, Shell released a final, peer-reviewed edition of the Joint Monitoring Program in the Chukchi and Beaufort Seas, Open Water Seasons, 2006–2007 (Ireland *et al.*, 2009). This report is also available on the NMFS

Protected Resources website (see **ADDRESSES**). A draft comprehensive report for 2008 (Funk *et al.*, 2009) was provided to NMFS and those attending the Arctic Stakeholder Open-water Workshop in Anchorage, Alaska, on April 6–8, 2009. The 2008 report provides data and analyses from a number of industry monitoring and research studies carried out in the Chukchi and Beaufort Seas during the 2008 open-water season with comparison to data collected in 2006 and 2007. Once Shell is able to incorporate reviewer comments, the final 2008 report will be made available to the public.

Following the 2009 open-water season, a comprehensive report describing the acoustic and vessel-based monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the program into an assessment of 2009 industry activities and their impacts on marine mammals. The report will help to establish long term data sets that can assist with the evaluation of changes, if any, in the Chukchi Sea ecosystem. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution, and behavior.

This report will consider data from many different sources including differing types of acoustic systems for data collection (net array and OBH systems) and vessel based observations. Collection of comparable data across the wide array of programs will help with the synthesis of information and allow integration of the data sets over a period of years. Data protocols for the acoustic operations will be similar to those used in 2006–2008 to facilitate this integration.

**Endangered Species Act**

NMFS previously consulted under section 7 of the ESA on the issuance of IHAs for seismic survey activities in the Beaufort and Chukchi Seas. In a Biological Opinion issued on July 17, 2008, NMFS concluded that the issuance of seismic survey permits by MMS and the issuance of the associated IHAs for seismic surveys are not likely to jeopardize the continued existence of threatened or endangered species (specifically the bowhead, humpback, and fin whales) under the jurisdiction of NMFS or destroy or adversely modify any designated critical habitat. The 2008 Biological Opinion takes into consideration all oil and gas related activities that are reasonably likely to occur, including exploratory (but not production) oil drilling activities. NMFS has reviewed Shell's proposed activities in light of the 2008 Biological Opinion and believes that Shell's 2009/2010 open-water season activities and their effects are adequately analyzed in the 2008 Biological Opinion. NMFS has issued an ITS under this Biological Opinion which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of listed species.

**National Environmental Policy Act (NEPA)**

NMFS prepared an EA that includes an analysis of potential environmental effects associated with NMFS' issuance of an IHA to Shell to take marine mammals incidental to conducting its open-water marine survey program in the Chukchi Sea during 2009–2010. NMFS has finalized the EA and prepared a FONSI for this action. Therefore, preparation of an EIS is not necessary.

**Determinations**

Based on the information provided in Shell's application, Shell's application addenda, this document, Shell's 2009 4MP, the 2006 and 2007 Final Comprehensive Reports, the 2008 Draft Comprehensive Report, NMFS' 2009 EA, and other relevant documents, NMFS has determined that the impact of Shell conducting its proposed open-water marine survey program (site clearance and shallow hazards and strudel scour surveys) in the Chukchi Sea during the 2009/2010 open-water season may result, at worst, in a temporary modification in behavior (Level B Harassment) of small numbers of 12 species of marine mammals, will have no more than a negligible impact on the affected species or stocks, and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence purposes, provided the mitigation measures described previously in this document are implemented.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of survey operations, the number of potential harassment takings is estimated to be small (less than one percent of any of the estimated population sizes) and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document. NMFS anticipates the actual take of individuals to be lower than the numbers presented in the analysis because those numbers do not reflect either the implementation of the required mitigation measures or the fact that some animals will avoid the sound at levels lower than those expected to result in harassment.

In addition, no take by death and/or serious injury is anticipated, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the mitigation and monitoring measures described earlier in this document. This determination is supported by the fact that: (1) given sufficient notice through slow ship speed and ramp-up of acoustic equipment, marine mammals are expected to move away from a sound source prior to it becoming potentially injurious; (2) TTS is unlikely to occur, especially in odontocetes and pinnipeds, until sound levels above 180 dB re 1 μPa (rms) and 190 dB re 1 μPa (rms), respectively, are reached; and (3) animals are unlikely to be exposed to potentially injurious levels of sound unless they get very close to the vessel (approximately 160 m (525 ft) for the 180 dB (rms) radius and 50 m (164 ft) for the 190 dB (rms) radius). However, as stated earlier in this document, based on the configuration of the airgun array and streamers, it is highly unlikely that a marine mammal would approach within 160 m (525 ft) of the seismic vessel. No rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals occur within the area of operations during the season of operations.

NMFS has determined that Shell's open-water marine survey program in the Chukchi Sea in 2009/2010 will not have an unmitigable adverse impact on the subsistence uses of bowhead whales and other marine mammals. This determination is supported by the information in this **Federal Register** Notice, including: (1) Survey activities will not begin prior to the closure of the spring bowhead hunt in Chukchi coastal villages; (2) Shell will closely coordinate with and avoid impacts to beluga whale hunts through subsistence advisors; (3) activities are scheduled to avoid the traditional subsistence beluga hunt, which annually occurs in July in the community of Point Lay; (4) Barrow is east of the project area, so the animals will reach Barrow before entering the project area on their fall westward migration through the Beaufort and Chukchi Seas; (5) the fact that survey activities will occur more than 113 km

(70 mi) or more from shore, and most cetaceans and pinnipeds are hunted much closer to the shore; and (6) that several of the required mitigation and monitoring conditions in the IHA (described earlier in this document) are designed to ensure that there will not be an unmitigable adverse impact on subsistence uses of marine mammals.

## Authorization

As a result of these determinations, NMFS has issued an IHA to Shell for conducting an open-water marine survey program in the Chukchi Sea during the 2009/2010 Arctic open-water season.

Dated: October 19, 2009.

**James H. Lecky,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

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# Part IV

# Department of Education

## 34 CFR Parts 600 and 602

## Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies; Final Rule

**DEPARTMENT OF EDUCATION**

**34 CFR Parts 600 and 602**

**RIN 1840–AD00**

**[Docket ID ED–2009–OPE–0009]**

## Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies

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

**ACTION:** Final rule.

**SUMMARY:** The Secretary amends its regulations governing institutional eligibility and the Secretary's recognition of accrediting agencies. The Secretary is amending these regulations to implement changes to the Higher Education Act of 1965, as amended (HEA), resulting from enactment of the Higher Education Reconciliation Act of 2005 (HERA), and the Higher Education Opportunity Act (HEOA), and to clarify, improve, and update the current regulations.

**DATES:** These regulations are effective July 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Ann Clough, U.S. Department of Education, 1990 K Street, NW., Room 8043, Washington, DC 20006–8542. Telephone: (202) 502–7484 or via the Internet at: *ann.clough@ed.gov.*

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

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed in this section.

**SUPPLEMENTARY INFORMATION:** On August 6, 2009, the Secretary published a notice of proposed rulemaking (NPRM) for the regulations governing institutional eligibility and the Secretary's recognition of accrediting agencies in the **Federal Register** (74 FR 39498).

In the preamble to the NPRM, the Secretary discussed on page 39499 the major regulations proposed in that document to implement the changes made to the HEA by the HERA and the HEOA, including the following:

- Amending §§ 600.2 and 602.3 to include the statutory definition of ''distance education'', and adding a definition of ''correspondence education'' to § 600.3.
- Amending § 602.3 to include a definition of a ''direct assessment program'', an instructional program that uses or recognizes direct assessment of a student's learning in lieu of credit or clock hours.
- Amending § 602.3 to include a definition of a ''teach-out plan'' and § 602.24 to require agencies to require the institutions they accredit to submit a teach-out plan to the agency under certain circumstances.
- Amending §§ 602.16, 602.17, 602.18 and 602.27 to implement several new requirements pertaining to distance education and correspondence education.
- Amending §§ 602.18, 602.23 and 602.25 to expand due process requirements for agencies.
- Amending § 602.24 to require agencies to confirm that institutions they accredit have transfer of credit policies.
- Amending § 602.15 to require that accreditation team members be well-trained and knowledgeable about their responsibilities regarding distance education.
- Amending § 602.19 to require that agencies monitor enrollment growth at institutions they accredit.
- Amending § 602.26 to expand agency disclosure requirements. (*See* section 496(c)(7) of the HEA).

In addition, on pages 39499 through 39500 of the preamble to the NPRM, the Secretary discussed proposed changes to existing regulations governing institutional eligibility by amending the definition of ''correspondence course'' to be compatible with the new definition of ''correspondence education'' in the accrediting agency recognition regulations.

Further, the Secretary discussed the following proposed changes to existing regulations governing the process for recognizing accrediting agencies:

- Amending § 602.3 to include a definition of ''recognition''.
- Amending §§ 602.15 and 602.27 to modify record-keeping and confidentiality requirements.
- Amending subpart C by combining current subparts C and D into one subpart in order to streamline procedures for agency review; establishing the senior Department official as the deciding official, with appeal to the Secretary; and providing a list of various laws regarding public requests for information with which the Secretary must comply.
- Amending § 602.22 to clarify existing requirements related to substantive change and add flexibility to accrediting agencies in granting prior approval of additional locations under specified circumstances.

As the result of public comment, the final regulations contain a significant change in the due process provisions regarding appeals panels. In addition to these changes, these final regulations make a number of minor technical corrections and conforming changes. Changes that are statutory or that involve only minor technical corrections are generally not discussed in the *Analysis of Comments and Changes* section.

### Analysis of Comments and Changes

The regulations in this document were developed through the use of negotiated rulemaking. Section 492 of the HEA requires that, before publishing any proposed regulations to implement programs under title IV of the HEA, the Secretary must obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations, the Secretary must conduct a negotiated rulemaking process to develop the proposed regulations. All proposed regulations must conform to agreements resulting from the negotiated rulemaking process unless the Secretary reopens that process or explains any departure from the agreements to the negotiated rulemaking participants.

These regulations were published in proposed form on August 6, 2009, in conformance with the consensus of the negotiated rulemaking committee. Under the committee's protocols, consensus meant that no member of the committee dissented from the agreed-upon language. The Secretary invited comments on the proposed regulations by September 8, 2009. Twenty-one parties submitted comments. An analysis of the comments and the changes in the regulations since publication of the NPRM follows.

We group major issues according to subject, with appropriate sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes and suggested changes the law does not authorize the Secretary to make. We also do not address comments pertaining to issues that were not within the scope of the NPRM.

### Definitions

*Correspondence Course (§ 600.2)*

*Comment:* Several commenters expressed their support for the revised definition of ''correspondence course'' in 34 CFR 600.2, noting that it draws a useful distinction between this mode of educational delivery and distance education.

*Discussion:* We appreciate the commenters' support.

*Changes:* None.

*Compliance Report (§ 602.3)*

*Comment:* One commenter questioned the meaning of the phrase ''demonstrate that the agency has addressed deficiencies specified'' in the definition of ''compliance report'' in § 602.3. The commenter noted that ''deficiencies'' could range from an agency's complaint procedure not including contact information to an agency's finances being in precarious shape and questioned whether in all cases an agency would be expected to submit a compliance report.

*Discussion:* The definition provides that a compliance report must address deficiencies that are specified in a decision letter from the senior Department official or the Secretary. The senior Department official or Secretary will make a judgment, based on the record and the recommendations of the Advisory Committee and staff, about what must be addressed in the compliance report.

*Changes:* None.

*Recognition (§ 602.3)*

*Comment:* One commenter asked for further information about what the term ''effective'' means in the phrase ''is effective in its application of those criteria.''

*Discussion:* The phrase ''apply effectively'' is taken directly from section 496(l) of the HEA and pertains to the Secretary's recognition decision. ''Effective application'' requires a demonstration on the part of the agency that it has followed through on its written policies and standards to provide, through its accrediting activities and each accrediting decision, a reliable judgment about the quality of postsecondary education. Under the statute, the Secretary is required to determine whether an agency is in compliance with the criteria for recognition. Compliance is determined based on a review of an agency's policies and its effective application of those policies. The discussion regarding subpart C later in this preamble explains this concept more thoroughly.

*Changes:* None.

**Other Major Issues**

*Administrative and Fiscal Responsibilities (§ 602.15)*

*Comment:* Two commenters raised concerns about the potential for an increase in the volume of information an agency will have to maintain under § 602.15(b)(2). This provision requires an agency to maintain records of all decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of any institution or program and substantive changes, including all correspondence that is significantly related to those decisions. One of the commenters, while generally supporting the changes made to this section, requested that the Department strike the phrase ''including all correspondence that is significantly related to those decisions;'' and apply the requirement only to final agency determinations. The second commenter made a similar request. Another commenter, while supportive of the reduction in the amount of material an agency will have to retain over the long term, indicated that the description of which records must be retained was ambiguous.

Another commenter raised a concern about the language in § 602.15(a)(2), regarding the requirement for an agency to ensure that those individuals conducting on-site reviews are adequately trained. The commenter stated that use of the word ''trained'' may lead to the Department establishing minimum standards for an acceptable training program.

*Discussion:* An important change to this section of the regulations includes the change in timeframe (one full accreditation cycle) for which an agency must maintain records. Under current regulations, an agency must maintain complete and accurate records for the last two full accreditation or preaccreditation reviews of each institution or program it accredits. The amended § 602.15(b) requires the maintenance of records for only the last full accreditation or preaccreditation review. Additionally, the requirement that an agency maintain all decisions regarding the accreditation and preaccreditation of any institution or program, including all correspondence that is significantly related to those decisions, is not new; it has been in the regulations for a number of years. Similarly, although the current regulations do not explicitly mention documents relating to substantive change decisions, the requirement for agencies to maintain these documents exists under the regulatory requirement that agencies maintain all documents related to accrediting decisions and special reports. While the amended regulations now explicitly include a retention requirement for decisions relating to substantive changes, they create no additional burden, and the reduction in the number of cycles for which information must be maintained should significantly reduce the overall burden for agencies.

Agencies must retain key records pertaining to each decision in order to fulfill their role as gatekeepers for Federal programs. Agencies have not always been able to provide the Department with information related to substantive changes. Given the significant increase in substantive changes over time, this documentation is critical. The Department does not agree that the description of the required documents is ambiguous, as an agency is fully aware of its requirements for accreditation, preaccreditation, and substantive change decisions and will be expected to retain those and the other required documents.

Finally, the use of the word ''trained'' in § 602.15(a)(2) is not new. Current regulations contain the same requirement. The language in the new regulations makes clear that the training provided by the agency should be appropriate for the individual's role.

*Changes:* None.

*Accreditation and Preaccreditation Standards (§ 602.16)*

*Comment:* One commenter raised concerns about the effects of the statutory change on § 602.16(a)(1)(i). The statute allows an agency to apply different standards for different institutions and programs, established by the institution. The commenter expressed confusion about how this provision relates to existing regulatory language that an agency's standards assess an institution's or program's success with respect to student achievement in relation to the institution's mission and to the new statutory provision reflected in § 602.16(f)(2). The commenter inquired whether an accrediting agency would be required to permit an institution to set its own standards for student achievement in light of a self-defined mission. For example, the commenter asked, would an agency have to permit an institution to set its own standards for job placement for an institution whose self-defined mission involves serving an economically challenged city or region? Further, the commenter asked whether an agency would be required to accept an institution's demand that it apply different standards to one or more of an institution's approved additional locations. A second commenter expressed ''ardent support'' of the revisions to §§ 602.16(a)(1)(i) and 602.16(f).

*Discussion:* As provided in § 602.16(f)(1), an accrediting agency has the authority to set, with the involvement of its members, and to

apply accreditation standards for or to institutions or programs that seek review by the agency. This accrediting agency authority remains even if, as provided in § 602.16(f)(2), an institution develops and uses its own standards to demonstrate its success with respect to student achievement, which may be considered as part of any accreditation review. In that case, the accrediting agency would need to make a judgment about whether an institution developed and used reasonable standards to demonstrate its success with respect to student achievement. Likewise, an accrediting agency would not be required to accept an institution's demand that it apply different standards to one or more of an institution's approved locations. We appreciate the second commenter's support.

*Changes:* None.

**Distance Education and Correspondence Education (§ 602.17)**

*Comment:* None.

*Discussion:* The Department determined that there was an error in § 602.17(g)(1)(iii) with the use of the word ''identification'' in the phrase ''that are effective in verifying student identification.'' The appropriate word to use in the phrase is ''identity'', not ''identification.'' Verifying student identification is making certain that an ID card is not a fake. Verifying student identity is making certain that the student is who he or she is purporting to be. Under the statute, agencies are required to do the latter.

*Changes:* Section 602.17(g)(1)(iii) has been amended by replacing the word ''identification'' with the word ''identity''.

*Comment:* One commenter questioned whether the requirements proposed in § 602.17 for verifying the identity of distance education and correspondence education students go far enough. The commenter noted a distinction between systems that verify the identity of an individual through the use of measures such as personal identification numbers (PINs), passwords, and knowledge-based questions, and those that authenticate an individual's identity by means of anatomical or behavioral characteristics unique to the individual, such as fingerprints or unique patterns of movement. The commenter suggested that continued use of secure logins and passwords as the sole means of identification is inconsistent with the intent of the statutory change, and claimed that only biometric-based authentication can provide positive identification. The commenter described software that can be used to capture a student's movements and create a unique biometric student identity that can be used to ensure that the person who registers for an online course is the person who does the work and receives the credit. A second commenter supported the proposed language and called the provision a common-sense rule.

*Discussion:* The regulations governing verification of student identity were developed using information provided during the negotiated rulemaking discussions and the explanation of the new requirement that was included in the conference report accompanying the HEOA (H. Rep. 110–803, p. 567). In explaining the intent of the new statutory provision that agencies require institutions that offer distance education or correspondence education to have processes for establishing that the students who register for courses are the same students who complete the program and receive the credit, the conference report stated that institutions are expected to have security mechanisms, such as identification numbers or other pass code information, in place and to use them each time a student participates online. Therefore, the continued use of PINs and passwords is consistent with both the statutory language and the intent of the Congress.

In the conference report, it is clear that Congress anticipated that as new identification technologies are developed and become more mainstream and less expensive, agencies and institutions would consider using them. For this reason, the regulations provide for the use of new technologies and practices that are effective in verifying the identity of students, in addition to methods such as secure logins, pass codes, and proctored examinations. There are at least two reasons for not mandating specific types of identity verification procedures in the regulations: Cost and availability. Different types of institutions have different levels of risk, and a technology that one institution considers necessary and affordable may be neither needed nor cost-effective at another institution. It would also be inappropriate for the Department to include specific institutional requirements in its regulations that govern the recognition of accrediting agencies.

*Changes:* None.

*Due Process (§§ 602.18; 602.25)*

*Comment:* One commenter noted the addition to § 602.18, Ensuring consistency of decision making, of new paragraphs (a) and (e), which require agencies to have written specification of the requirements for accreditation that include clear standards for an institution or program to be accredited and to provide an institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards. This commenter asked about the standards and the reporting requirements for non-compliance that are envisioned under these paragraphs. The commenter asked whether consistency was expected among classrooms, programs, or campuses.

Regarding the due process provisions set forth in § 602.25, several commenters recommended changes to the regulations governing appeals panels, specifically § 602.25(f)(1)(iii). A number of commenters provided alternate language. Many of the commenters recommended permitting the appeals panel to remand cases to the original decision-making body. Most of the commenters who made this suggestion wanted to delete the authority of the appeals panel to amend or reverse the adverse action of the original decision-making body; other commenters wanted the appeals panel to also have the authority to remand cases as a fourth option. In addition, most of the commenters who provided alternate language wanted to amend the language that requires the original decision-making body to act in a manner consistent with the appeals panel's findings or decision, by requiring instead that the original decision-making body give deference or due consideration to the appeals panel's decision. One commenter wanted to delete this language.

The rationale provided to support the recommended changes varied, but there were several major points. Many commenters questioned the authority of the appeals panel to render a final decision. Several commenters suggested that the reading of the statute to imply that appeals panels have the authority to make final accreditation decisions rested solely on the lack of a comma in the language of the final bill. They claimed that the appeals panel was not intended to render a final adverse decision; rather, they claimed, the panel was to conduct a hearing prior to the final decision of the accrediting body. One commenter specifically stated that the new provisions for findings of appeals panels are not in the statute and expressed the view that the findings of the appeals panels would compete with the independent, decision-making role of agencies.

One commenter opined that the new appeals panel provisions would create a problem because final accreditation

decisions may be made by an entity, an appeals panel, that is not recognized by the Secretary. Other commenters claimed that the new provision conflicts with regulatory provisions for recognition of accrediting agencies and said that neither the law nor the regulations provide for the Secretary to recognize appeals panels. A few commenters stated that requiring appeals panels to make decisions is inconsistent with the Department's prior position that accreditation decisions may be made only by properly composed decision-making bodies recognized by the Department. Another commenter opined that the new provisions undermine the traditional purpose served by accrediting appeals and violate the independence of the accrediting body.

Some commenters said the new requirements for appeals panels would impair the normal function of the accreditation process because even though accreditation decisions are based on a number of factors, an institution or program may appeal only one or two factors; thus, they claimed, even if those one or two findings are overturned, an adverse action may still be warranted. Other commenters said that an action to amend or reverse a decision can occur only if an appeals panel conducts a new substantive review, rather than a review of the decision-making process, and that appeals panels typically lack the expertise to assess content-specific compliance with accreditation standards. One commenter said that accrediting bodies do not produce a record that allows for reconsideration of matters of substance. Another commenter noted that because the original body conducts a significant amount of research and spends time making decisions, that body has an intimate and comprehensive understanding of the factual situation at hand and it would not be appropriate for an appeals panel to make a final decision.

Commenters also expressed concern that decisions will be made by smaller and less diverse bodies, ones that typically meet infrequently and do not have the experience of the original decision-making body; that the new provision will create situations in which decisions of appeals panels may be inconsistent with other agency decisions; that the change to the regulations will lead to many unwarranted appeals; and that the change will require training of appeals panels.

Several commenters supported allowing an appeals panel to remand a case to the original decision-making body.

Several commenters referenced appellate court processes and suggested that some accrediting agencies might prefer that appeals panels remand cases back to the original decision-making body with instructions either for implementation of a decision or for the consideration of factors to be used to render a decision consistent with the appeals panel decision.

One commenter said that providing the option to remand cases would provide more flexibility to agencies in developing their appeal process. This commenter suggested a change to provide agencies with the option of either giving appeals panels final decision-making authority or requiring that the appeals panel either affirm the original decision or remand the case. The commenter suggested that a remand could include a modification of the original decision.

One commenter questioned whether reversal of a denial of recognition means that an appeals panel would be empowered to determine the period of accreditation. Another commenter appreciated the Department's attempt to provide for implementation of the appeals panel's decision by the original decision-making body, but said it was not clear what was meant by requiring that the original decision-making body's action must be consistent with the appeals panel decision. One other commenter asked about the scope of authority retained by an accrediting agency that reserves the right to implement appeals panel decisions.

One commenter requested that § 602.25(h)(1)(iii), regarding reconsideration of adverse actions based solely on financial criteria, be deleted from the regulations, but cited no authority for the request.

*Discussion:* It is important to note that the HEOA, in amending section 496(a)(6) of the HEA, included the requirement for clear and consistent accreditation standards and specification of any deficiencies, in addition to providing additional requirements regarding the appeal process. Clear and consistent standards, which let institutions and programs know what they are being measured against, and detailed written descriptions of any deficiencies identified by the accrediting agency, are critical to providing an effective due process procedure. An agency is expected to apply its standards consistently across either the programs or the institutions it accredits, as applicable.

The Department acknowledges that there are situations, such as reversal of a decision to withdraw accreditation, in which it is appropriate, and may be necessary, to involve the original decision-making body in a revised decision. Because of these situations, the Department agreed that agencies would have the option of giving the original decision-making bodies the responsibility to implement decisions, as long as the implementation was consistent with the appeals panel's decision. However, several commenters made a persuasive argument that appeals panels should also have the option of remanding a case to the original decision-making body. Therefore, the language in the proposed regulations has been changed to give appeals panels the option of remanding cases.

However, the Department is concerned that without making additional changes, the regulations would be ambiguous and subject to an interpretation that would allow agencies to write their procedures to provide that their appeals panels are authorized only to affirm a decision or order a remand. This reading would not be consistent with Congressional intent, as the appeal would then be simply an additional procedural step involving a body that has no ultimate authority to effect a change in the accrediting decision. Therefore, the language in the proposed regulations has been changed to specify that an appeals panel has and uses the authority to affirm, amend, or reverse adverse actions of the original decision-making body, and does not serve only an advisory or procedural role. The language regarding affirmation, reversal, or amendment reflects a straightforward reading of Congress's directives to agencies to provide for appeals in front of a different decision-maker.

The Department agrees with those commenters who note that the new regulations may necessitate changes in agency procedures and the structure of the appeals panels. To implement the HEOA, some agencies may need to seek recognition of their appeals panels. Appeals panels will need to meet the requirements for agency recognition, such as having a public member, as provided in §§ 602.14(b)(2) and 602.15(a)(3).

Under the HEOA, appeals panels are subject to a conflict of interest policy and may not include any current members of the underlying decision-making body that made the adverse decision. The Department reads these new provisions as reflecting Congressional intent that appeals panels be decision-making bodies that address

substantive matters, as necessary, not just matters relating to process. Therefore, the entire accreditation process, including accreditation decisions, must be well-documented. The Department recognizes that agencies may need to adopt new procedures for documenting decisions and to ensure that appeals panel members have knowledge of prior agency decisions so the panel's actions and decisions are consistent with agency policies and requirements. Under § 602.15(a)(2), agencies also must provide sufficient training to appeals panel members to ensure that these members have the requisite background to make sound decisions.

We disagree with the commenter who suggested that we remove § 602.25(h)(1)(iii). This section is needed to implement the new statutory provision that an institution or program otherwise subject to a final adverse action may seek agency review of significant new financial information if it meets certain conditions, including that the review take place before a final adverse action that is based solely upon failure to meet financial criteria.

*Changes:* Section 602.25(f)(1) has been amended by adding a new section 602.25(f)(1)(iii) that requires appeals panels to have and use the authority to make decisions to affirm, amend, or reverse actions of the original decision-making body, and specifies that an appeals panel does not serve only an advisory or procedural role. Section 602.25(f)(1)(iii) in the proposed regulations has been renumbered and amended to allow appeals panels the option of remanding the accrediting action to the original decision-making body. The amendments to this provision require that a decision to remand identify the specific issues to be addressed and that the original decision-making body must act in a manner consistent with the appeals panel's decision or instructions.

*Monitoring and Reevaluation of Accredited Institutions and Programs (§ 602.19)*

*Comment:* Several commenters raised concerns about the monitoring provisions in § 602.19 and the impact the regulations would have on smaller accrediting agencies. These commenters requested that the regulations reflect the differences in size and scope of accreditors. One commenter noted that, although these regulations may have no real impact on agencies that recognize hundreds or thousands of institutions, an agency that recognizes 50 institutions may find them impossible to implement. Another commenter raised a different concern related to the scale of the monitoring required of accrediting agencies, stating that monitoring will not capture all non-compliance, and asked the Department to clarify its intent with these regulations.

Still another commenter contended that the Department is exceeding its authority by requiring agencies to collect and analyze measures of student achievement, because the Department is not permitted to regulate student achievement. Another commenter asked for clarification about the implementation of the growth monitoring provisions contained in § 602.19(e) of the regulations. Additionally, two commenters expressed support for the monitoring provisions contained in these regulations with one citing the ability of institutions to establish their own standards of student achievement and the other stating that these monitoring regulations will serve as a possible safeguard against waste, fraud, and abuse in the title IV student aid programs.

Finally, one commenter raised a concern with the reporting requirement that applies to accrediting agencies that have added distance education or correspondence education to their scope of recognition by means of notification to the Department. The commenter asked if an institution that experiences an enrollment increase of distance education students from ten students to fifteen students must go through what the commenter described as an elaborate process.

*Discussion:* These regulations recognize the need for flexibility raised by the commenters and provide this flexibility. The preamble to the NPRM addressed the Department's desire to ensure flexibility for accrediting agencies in their monitoring of institutions and programs while meeting the intent of the law. These regulations reflect statutory requirements and provide for greater consistency in identifying noncompliant institutions and programs while also accommodating the differences that exist across institutions and programs.

The Department recognizes that accrediting agencies and the institutions and programs they accredit are diverse. Therefore, in addition to providing a framework for monitoring, the Department requires each agency to demonstrate why the approaches it takes to monitoring and evaluating its accredited institutions or programs are effective given the particular circumstances. Moreover, we expect reasonable and prudent implementation of the statute and regulations by the agencies. For each institution or program accredited, an agency should consider factors such as the size of the institution or program, the number of students, the nature of the programs offered, past history, and other knowledge the agency has about that institution or program, including previous reviews. The regulatory language provides accrediting agencies with flexibility regarding their monitoring of institutions and programs and at the same time ensures they review and analyze key data and indicators.

The Department does not agree that it is exceeding its authority by requiring an agency to monitor measures of student achievement. The Department is not specifying, defining, or prescribing the standards that accrediting agencies use to assess an institution's success with respect to student achievement. Rather, student achievement is one of several areas that an agency must review when monitoring the institutions or programs it accredits. Further, under these regulations the approaches taken by the agency must be consistent with § 602.16(f). This section provides that an agency is not restricted from setting and applying accreditation standards for or to institutions or programs seeking review and that an institution is not restricted from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

Finally, the growth monitoring provision in § 602.19(e) requires certain agencies to report to the Secretary information about any institution they accredit that experiences an increase in institutional headcount enrollment of 50 percent or more within one institutional fiscal year, not a 50 percent increase in headcount enrollment in a particular program or particular educational delivery modality. It is important to note that § 602.19(e) only affects institutional accrediting agencies and predominantly programmatic accrediting agencies that accredit freestanding institutions that notify the Secretary of a change in scope of recognition to include distance education or correspondence education in accordance with § 602.27(a)(5).

*Changes:* None.

*Operating Procedures All Agencies Must Have (§ 602.23)*

*Comment:* One commenter did not understand the rationale for the removal of the phrase ''upon request'' from § 602.23(a), regarding making certain written materials and information

available to the public. The same commenter expressed support for the additional language added to the end of § 602.23(c)(1), which seeks to ensure that institutions have sufficient opportunity to provide a response to a third-party complaint before an accrediting agency completes the review of the complaint and makes a decision.

*Discussion:* The phrase ''upon request'' was removed in response to a statutory change. Section 496(a)(8) of the HEA requires agencies to make available to the public, upon request, a summary of any review resulting in a final accrediting decision involving denial, termination, or suspension of accreditation, together with the comments of the affected institution. Section 496(c)(7) of the HEA, which was added in the 2008 reauthorization, requires agencies to make available to the public a summary of agency or association actions, which includes a final denial, withdrawal, suspension, or termination of accreditation, and any findings made in connection with the action taken, together with the official comments of the affected institution. We consider the most recent language to reflect Congressional intent and, accordingly, made the provision of information to the public without a specific request for the information a regulatory requirement. We appreciate the support for the change to § 602.23(c)(1).

*Teach-Out Plans and Agreements (§ 602.24)*

*Comment:* Two commenters noted that agencies must require the institutions they accredit to submit a ''teach-out plan'' to the agency under the circumstances specified in § 602.24(c)(1) and expressed concern that agencies may have little or no ability to enforce such a requirement. One of these commenters stated that the requirement is unrealistic. The other commenter concluded that an agency must have a written policy to require plans from all institutions that meet the regulatory provisions, even institutions that do not participate in the title IV, HEA programs. Regarding ''teach-out agreements,'' one commenter asserted that the regulations specify that an agency may not approve an agreement unless it is with a qualified teach-out institution and characterized that requirement as a matter over which the accrediting agency may have no control.

Two commenters supported the new teach-out provisions. The commenters noted that the regulations regarding ''teach-out plans'' and ''teach-out agreements'' will benefit the affected students and the institutions serving those students, as well as protect both their interests and the interests of agencies and the Department.

*Discussion:* The teach-out regulations reflect statutory provisions in section 496(c)(3) of the HEA. The statute does not distinguish between participating and non-participating institutions with regard to teach-out plan policies. Therefore, agencies must have a policy to require ''teach-out plans'' from all institutions that meet one of the circumstances described, even if the institution at issue does not have a program participation agreement with the Department. The Department does not agree with the assertion that an agency may lack control over the approval of a ''teach-out agreement.'' The regulations specify that agencies must require the institutions they accredit and that enter into ''teach-out agreements'' to submit those agreements for approval. The agency has control over whether it approves a ''teach-out agreement,'' and the agency may approve a ''teach-out agreement'' only if the agreement complies with the requirements of § 602.24(c)(5).

*Changes:* None.

*Transfer of Credit (§ 602.24)*

*Comment:* One commenter recommended deleting § 602.24(e)(2), which requires that agencies confirm that institutions have transfer of credit policies that include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education. The commenter stated that conforming transfer of credit policies is impossible due to the variety of situations in which transfers of credit may arise. The commenter also said that requiring institutions to specify detailed transfer of credit criteria could inadvertently reduce student mobility. Another commenter supported the wording in the proposed regulations regarding public disclosure of transfer of credit policies.

*Discussion:* Section 496(c)(7) of the HEA requires accrediting agencies to confirm that an institution has transfer of credit policies that include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution. The regulations reflect this requirement, and we do not have the authority to modify the requirement.

*Changes:* None.

*Other Information an Agency Must Provide the Department (§ 602.27)*

*Comment:* Several commenters expressed concern about § 602.27(b). This provision requires any agency that has a policy regarding notification to an institution or program of contact with the Department, as it pertains to information provided to the Secretary about an institution it accredits failing to meet its title IV program responsibilities or possibly engaging in fraud or abuse, to review on a case-by-case basis the need for confidentiality of the contact with the Department. This section also requires that, in the event the Department specifically requests the contact remain confidential, the agency consider that contact confidential. The commenters stated that failing to inform an institution of a contact or inquiry made by the Department adversely affects the relationship between the institution or program and the agency by undermining the trust relationship between the two. Another commenter raised a concern that the changes to § 602.27(b), taken together with the authority provided the Department in § 602.27(a)(7) to request information that may bear upon an institution's compliance with its title IV program responsibilities, is inconsistent with the obligation of an agency to allow its institutions to respond to allegations made against them. Two commenters requested that § 602.27(b) be removed and another commenter requested that all of § 602.27 be removed.

*Discussion:* The Department understands and respects the need for an honest and open exchange between an institution or program and its accreditor. During negotiated rulemaking the Department agreed to change its initial approach to this regulation, which would have prohibited an agency from having a policy providing notice to an institution when the agency was contacted by the Department. We do not agree that these regulations, as amended, undermine the relationship between the accreditor and its institutions or programs or that the language is inconsistent with an agency's obligation to afford its institutions or programs an opportunity to respond to allegations. Rather, they honor that relationship by ensuring that, absent a specific request for confidentiality from the Department, an agency may notify an institution of inquiries it receives from the Department as long as the agency has concluded, based on a careful consideration of the circumstances, that disclosure is appropriate. Moreover, the Department also has a fiduciary responsibility to protect the Federal fiscal interest as well as the interest of students. These regulations ensure that the Federal fiscal interest is not put at risk by compromising the Department's

investigations of potential fraud or abuse in the title IV programs. As a condition of participating in the title IV programs, each institution acknowledges the authority of the Department, accrediting agencies, and other gatekeepers to share information about the institution.

*Changes:* None.

**Subpart C—The Recognition Process**

*Comment:* Several commenters asked for clarification about how Department staff will evaluate an agency's effective application of its standards. One commenter expressed concern about the subjectivity of the evaluation and the lack of bright-line standards for Department staff to enforce. Another commenter asked for clarification about what constituted the submission of ''evidence, including documentation'' under § 602.31(a)(2) and expressed concern that the requirement to provide evidence to Department staff could evolve into an unreasonable requirement for agencies.

*Discussion:* The concept of ''effective application'' comes from section 496(l) of the HEA and is not new. It is discussed here alongside the provision of evidence because the two concepts are related. The phrase ''effective application'' in these new regulations replaces the phrase ''performance with respect to the criteria'' in the current regulations. The Department selected the phrase ''effective application'' based on its origin in the statute and its greater specificity in describing the standard for an agency's compliance. The Department's evaluation of an agency is based on a review of the evidence provided by the agency that it has compliant policies and standards and that it effectively applies those standards.

Evidence is submitted primarily in the form of documentation that substantiates the agency's claim that it effectively applies its standards. For example, agencies provide sample self-studies and team reports to substantiate that they apply their policies for requiring an in-depth self-study and an on-site review of their institutions or programs. Evidence may also be in the form of direct observation by Department staff during its on-site reviews of an agency's decision meeting or training session. Although testimony, written or oral, may accompany an agency's application for initial or continued recognition, a description of processes alone does not meet the Department's standard for evidence. This is illustrated in the example of an agency seeking initial recognition that provides evidence of policies and standards that appear to be compliant but that, upon further examination, are not effectively applied. Accordingly, review of whether agency standards are effectively applied is critical to ensure the quality of training and education offered by institutions and programs accredited by agencies that are recognized by the Secretary.

The concept of ''effective application'' also allows for a reasonable degree of judgment in cases where a particular policy involves circumstances that do not occur with any regularity. For example, an agency may have compliant ''teach-out'' policies, but its accredited institutions may never have had to submit a teach-out plan or agreement for approval by the agency. In this example, no evidence of application of standards would be necessary.

The standard for evaluating an agency's ''effective application of standards'' on the basis of ''evidence, including documentation,'' strikes a balance between the commenters' concerns about the absence of bright-line standards and the potential for unreasonable standards of evidence.

*Changes:* None.

*Comment:* One commenter objected to the entirety of subpart C and suggested that no changes be made to the current regulations.

*Discussion:* Changes to subpart C were necessary to incorporate the new provisions of the HEA, including the procedures for review of agencies that have expanded their scope of recognition by notice, following receipt by the Department of information of an increase in headcount enrollment, and the authority of the National Advisory Committee on Institutional Quality and Integrity (''NACIQI'') in establishing the agenda. Other changes were necessary because the current regulations do not include procedures for review of applications for expansion of scope, procedures for review of agencies during the period of recognition, appeal procedures, and procedures for review of compliance reports defined under § 602.3. Subpart C outlines and clarifies these procedures, making the Department's review process more transparent and increasing due process for agencies.

*Changes:* None.

*Comment:* Several commenters raised concerns about § 602.31(f), which clarifies the limits on the Department's ability to keep confidential records submitted to the Department for the purposes of agency recognition by the Secretary. Some commenters stated their belief that all information institutions provide to their accreditors is subject to public disclosure. Other commenters stated their belief that the regulations require all documents submitted to the Department to be available for public disclosure via the Freedom of Information Act (FOIA). Some commenters want the Department to change the regulations to permit Department review of necessary documents to occur at agency offices, instead of requiring submission of the documents to the Department. Another commenter suggested that documents be submitted to the Department and later returned to the agency without copies being made or maintained by the Department.

*Discussion:* The commenters misunderstand the requirements of § 602.31(f). The regulation applies to records the Department obtains during an agency's recognition proceedings, not to all documents an institution submits to its accrediting agency. The Department must comply with the HEA, the FOIA, the Federal Advisory Committee Act (FACA), and other applicable laws. These regulations reference the most commonly invoked of public disclosure laws and state that an agency may designate or identify information that the agency believes in good faith is exempt from disclosure in the event of a FOIA request. The regulations also make clear that agencies should submit only those documents required for Department review or specifically requested by Department officials.

The Department understands the need for confidentiality between institutions and accrediting agencies. However, it is necessary for the Department both to maintain a complete and accurate record of documents to substantiate its review, and to comply with FOIA and other disclosure laws. The regulations provide several methods an agency can use to make it less likely that sensitive information it provides in recognition proceedings about the institutions or programs it accredits will be publicly disclosed, including redacting information that would identify individuals or institutions that is not essential to the Department's review of the agency.

*Changes:* None.

**Executive Order 12866**

*Regulatory Impact Analysis*

Under Executive Order 12866, the Secretary must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant

regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this final regulatory action will not have an annual effect on the economy of more than $100 million. Therefore, this action is not ''economically significant'' and not subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, the Secretary has assessed the potential costs and benefits of this regulatory action and has determined that the benefits justify the costs.

*Need for Federal Regulatory Action*

As discussed in the proposed regulations, these regulations are needed to implement the provisions of the HEA, as amended. In particular, these regulations address the provisions related to the recognition of accrediting agencies by the Secretary.

In addition, these regulations are needed to ensure that the Department fulfills its fiduciary responsibility regarding the appropriate use of Federal funds made available by the Department to institutions of higher education under title IV of the HEA. The Secretary grants recognition to accrediting agencies that are considered by the Department to be reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit. Congress requires that an institution of higher education be accredited by an agency recognized by the Secretary in order to receive Federal funds authorized under title IV, HEA programs.

*Regulatory Alternatives Considered*

Alternatives to the regulations were considered as part of the rulemaking process. These alternatives were reviewed in detail in the preamble to the proposed regulations under both the Regulatory Impact Analysis and the Reasons sections accompanying the discussion of each proposed regulatory provision. To the extent that they were addressed in response to comments received on the proposed regulations, alternatives are also considered elsewhere in the preamble to these final regulations under the Discussion sections related to each provision. No comments were received related to the Regulatory Impact Analysis discussion of these alternatives.

As discussed above in the Analysis of Comments and Changes section, the final regulations reflect statutory amendments included in the HEOA and one substantive revision made in response to public comments. The change did not result in revisions to cost estimates prepared for and discussed in the Regulatory Impact Analysis of the proposed regulations.

**Benefit-Cost Analysis**

*Benefits*

The benefits of these final regulations include: ensuring that accrediting agencies are reliable authorities as to the quality of education or training offered by an institution or program they accredit; ensuring that the Department fulfills its fiduciary responsibility for institutional funding under title IV, HEA programs; and establishing consistency between statutory language and regulatory language. An additional benefit of the final regulations is providing accrediting agencies with greater clarity on regulations regarding the following: distance and correspondence education; accreditation team members; transfer of credit; teach-out plan approval; definition of recognition; demonstration of compliance; recognition procedures, including procedures for NACIQI; direct assessment programs; monitoring; substantive change; record keeping and confidentiality; and due process and appeals.

*Costs*

These final regulations do not require accrediting agencies and institutions to develop new disclosures, materials, or accompanying dissemination processes. Other regulations generally require discrete changes in specific parameters associated with existing guidance rather than wholly new requirements. Overall, the Department believes that accrediting agencies wishing to continue to be recognized by the Secretary and institutions wishing to continue to participate in title IV, HEA programs have already absorbed most of the administrative costs related to implementing these final regulations. Marginal costs over this baseline are primarily related to one-time changes that are not expected to be significant.

Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading *Paperwork Reduction Act of 1995.*

*Accounting Statement*

In Table 1, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these final regulations. As shown in the table, the Department estimates that these final regulations will increase expenditure by accrediting agencies, institutions of higher education, and the Department by a total of $114,850.

TABLE 1—ESTIMATED EXPENDITURES ASSOCIATED WITH THE PROVISIONS OF FINAL REGULATIONS

| Entity | Costs |
|---|---|
| U.S. Department of Education | $55,300 |
| Accrediting agencies and institutions of higher education | 59,550 |
| Total | 114,850 |

*Regulatory Flexibility Act Certification*

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities. These final regulations affect accrediting agencies and institutions of higher education that participate in title IV, HEA programs. The U.S. Small Business Administration (SBA) Size Standards define organizations as ''small entities'' if they are for-profit or nonprofit organizations with total annual revenue below $5,000,000 or if they are organizations controlled by governmental entities with populations below 50,000.

A significant percentage of the accrediting agencies and institutions participating in title IV, HEA programs meet the definition of ''small entities''. The Department estimates that approximately 40 accrediting agencies and 2,310 postsecondary institutions meet the definition of ''small entity''.

While these accrediting agencies and institutions fall within the SBA size guidelines, these final regulations do not impose significant new costs on these entities. Specific burden concerns are discussed in more detail elsewhere in this preamble, primarily in the *Paperwork Reduction Act of 1995* section.

*Paperwork Reduction Act of 1995*

Sections 602.15, 602.19, 602.24, 602.25, 602.26, 602.27, 602.31, and 602.32 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of these sections to OMB for its review.

*Section 602.15—Administrative and Fiscal Responsibilities*

The final regulations require accrediting agencies to demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution or program the agency accredits from the last full accreditation or preaccreditation review and all documents regarding substantive change decisions.

The Department has determined that this modification to the current document retention requirements reduces the administrative burden to maintenance of only one full accreditation or preaccreditation review. Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, the reduced hours for maintaining only one complete review cycle are negligible because the agencies already collect the information.

*Section 602.19—Monitoring and Reevaluation of Accredited Institutions and Programs*

The final regulations require agencies to collect data to ensure that the institutions they accredit remain in compliance with their accrediting standards. Agencies must periodically collect and analyze key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement.

In addition, the final regulations require agencies to annually monitor the enrollment growth of institutions or programs they accredit.

The final regulations also require accrediting agencies that expanded their scope to include distance education or correspondence education by notice to the Secretary to monitor enrollment growth of the institutions they accredit that offer distance education or correspondence education. These agencies must report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. The regulation only affects institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition.

The Department estimates that the final monitoring regulations will increase burden on accrediting agencies by a total of 182 hours under OMB Control Number 1840–0788.

*Section 602.24—Additional Procedures Certain Institutional Accreditors Must Have*

The final regulations mandate that an accrediting agency require an institution it accredits to submit a teach-out plan for approval by the accrediting agency if any of following events occurs: The Department initiates an emergency action against an institution, or an action by the Secretary to limit, suspend, or terminate an institution participating in any title IV, HEA program; the accrediting agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution; the institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or a State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. If the teach-out plan requires a teach-out agreement, the regulations identify the components of the teach-out agreement.

The Department estimates that the requirements related to submission of teach-out plans in the final regulations will place an additional burden on 70 institutions each year for a total of 280 hours under OMB Control Number 1840–0788.

*Section 602.25—Due Process*

The final regulations provide for an institution's or program's right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body. An institution or program is provided a right for the review of new financial information, if it meets certain conditions, before the accrediting agency takes a final adverse action.

The Department estimates that the appeals process in the final regulations will increase the burden on accrediting agencies by 3,050 hours under OMB Control Number 1840–0788.

*Section 602.26—Notification of Accrediting Decisions*

The final regulations require agencies to provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action and of final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Agencies are also required to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include either the official comments from the affected institution or program regarding that decision or evidence that the affected institution or program was offered the opportunity to provide comments.

The Department has determined that the notification requirements in the final regulations do not represent any additional burden on accrediting agencies under OMB Control Number 1840–0788.

*Section 602.27—Other Information an Agency Must Provide the Department*

The final regulations require an accrediting agency to provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes to its policies, procedures, or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, an agency must provide a summary of the major accrediting activities conducted during the year. The final regulations also require an accrediting agency to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities. The final regulations remove the requirement for institutional accrediting agencies, and programmatic accrediting agencies that accredit freestanding institutions, to submit an application to the Department if an agency wishes to add distance education or correspondence education to its scope of recognition; the final regulations only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education.

The Department estimates the reporting burden on accrediting agencies will be reduced by 300 hours under OMB Control Number 1840–0788.

*Section 602.31—Agency Submissions to the Department*

The final regulations require accrediting agencies to submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years, and clarify what documents should be provided with an agency's application for recognition. The application must demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 part 602. The final regulations also specify that accrediting agencies that wish to expand their scope of recognition must submit an application to the Secretary and describe the contents of the application. They further require agencies to provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered by their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602, subpart B. Therefore, although no requirement to submit a compliance report exists in the current regulations, the language reflects the existing practice of the Department.

The final regulations also require agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education to annually monitor enrollment growth of the institutions they accredit that offer distance education. Agencies must submit a report to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. This provision of the final regulations will only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition.

The Department estimates that the requirements for submitting information to the Department in the final regulations will increase the burden on accrediting agencies by 60 hours under OMB Control Number 1840–0788.

*Section 602.32—Procedures for Department Review of Applications for Recognition or for Change in Scope, Compliance Reports, and Increases in Enrollment*

The final regulations require the Department to forward to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency will then provide a written response to the draft staff analysis and the third-party comments. The current regulations also require that the Department invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department.

The procedures for the review of applications in the final regulations will not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

**Collection of Information**

Consistent with the discussion in this Paperwork Reduction Act of 1995 section, the following chart describes the sections of the final regulations involving information collections, the information being collected, and the collections that the Department has submitted or will submit to the Office of Management and Budget for approval and public comment under the Paperwork Reduction Act of 1995.

| Regulatory section | Information section | Collection |
|---|---|---|
| 602.15 | Accrediting agencies must demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution from the last full accreditation or preaccreditation review. Previously, agencies were required to maintain this information covering the previous two accreditation or preaccreditation reviews. Although the current regulation does not explicitly mention documents relating to substantive change decisions, the requirement for agencies to maintain these documents was covered under the current regulation's requirement to maintain all documents related to accrediting decisions and special reports. A substantive change request would be considered a special report that had to be submitted to the agency for a decision. Further, an agency's decision regarding the substantive change request was, in fact, an accreditation decision and was reflected in a decision letter that either allowed the substantive change to be covered under the agency's grant of accreditation or denied the request and did not allow the change to be covered under the agency's grant of accreditation. Section 496(c)(1) of the HEA. | OMB 1840–0788—Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, since the agencies already collect the information, the reduced hours for maintaining only one complete review cycle is negligible. |
| 602.19(b) | Agencies must collect data to ensure that the institutions or programs they accredit remain in compliance with their accrediting standards. The final regulations clarify the language in the current regulations regarding the data agencies should collect to ensure that institutions and programs remain in compliance with their accrediting standards. Section 496(a)(4)(A) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |
| 602.19(c) | Agencies must monitor the enrollment growth of institutions each year. The final regulations represent a change in the information that accrediting agencies must collect. They require that agencies collect information to monitor enrollment growth for the institutions or programs that they accredit. Section 496(c)(2) of the HEA. | OMB 1840–0788—It is estimated that this regulation would increase the burden to the 61 recognized accrediting agencies by 122 hours. |

| Regulatory section | Information section | Collection |
|---|---|---|
| 602.19(e) | Accrediting agencies that expand their scope to include distance education or correspondence education by notice to the Secretary must monitor enrollment growth of institutions that offer distance education or correspondence education and report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. Section 496(q) of the HEA. | OMB 1840–0788—It is estimated that this regulation would increase the burden for 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future. |
| 602.24 | Institutions are required to submit a teach-out plan to their accrediting agency. Approximately 70 institutions per year will be required to do so. Most of the institutions and locations that close offer only one or two programs. For some institutions, the plan will be very simple: The institution will teach out its students. For other institutions, preparing a plan may involve doing some research to determine what nearby schools offer similar programs but in most cases, the institution will already know, as the nearby schools will have been their competitors. In a few cases, more work may be needed to develop a plan. Given the wide variety of situations, our best estimate is that the average amount of time needed to complete a plan is four hours. Therefore, the total amount of time is 280 hours (70 institutions x 4 hours). | OMB 1840–0788—It is estimated that this regulation would increase the burden on 70 institutions each year for a total of 280 hours. |
| 602.25(f) | The final regulations provide institutions and programs with a right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body.<br>Agencies are already required to have an appeal process; the negligible burden is estimated to be 610 hours, which is based on 61 accrediting agencies x 10 hours. | OMB 1840–0788—It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 610 hours. |
| 602.25(h) | The final regulations provide institutions and programs with a right to seek review of new financial information, if it meets current provisions, before the accrediting agency takes a final adverse action. The estimated burden is associated primarily with implementing the regulation in the initial year as agencies establish new procedures. The time is estimated to be 2440 hours, based on 61 accrediting agencies x 40 hours. | OMB 1840–0788—It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 2440 hours. |
| 602.26(b) | Agencies must provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action as well as final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Section 496(c)(7) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |
| 602.26(d) | Agencies are required to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include any comments that affected institutions or programs want to make with regard to that decision or evidence that the institution or program was offered the opportunity to provide official comments. The final regulations clarify the requirements and add a requirement that the statement must provide evidence that an institution or program was offered an opportunity to provide comments if no comments were received. Section 496(c)(7) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |
| 602.27(a) | Every agency must provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes in an agency's policies procedures or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, agencies must provide a summary of the major accrediting activities conducted during the year. The final regulations also require agencies to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities. Although the final regulations primarily clarify language that is in the current regulations, the changes would impact the reporting requirement regarding adding distance education or correspondence education to an agency's scope of recognition. The final regulations would remove the requirement for institutional accrediting agencies to submit an application to the Department if an agency wished to add distance education or correspondence education to its scope of recognition and only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education. Sections 496(a)(4) and 487(a)(15) of the HEA. | OMB 1840–0788—It is estimated that burden on the 15 agencies that would be affected by the final regulations would be reduced by 300 hours if all the agencies decided to add distance education or correspondence education to their scope of recognition. |
| 602.31(a) | Accrediting agencies must submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years. The application must demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 part 602. The final regulations clarify what documents should be provided with an agency's application for recognition. Section 496(d) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |

| Regulatory section | Information section | Collection |
|---|---|---|
| 602.31(b) | Accrediting agencies that wish to expand their scope of recognition must submit an application to the Secretary. The requirement does not place any additional reporting burden on accrediting agencies since the current regulations also require the submission of an application when an agency seeks to expand its scope of recognition. Section 496(a)(4)(B) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |
| 602.31(c) | Accrediting agencies must provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered through by their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602 subpart B. Therefore, while the requirement to submit a compliance report is not identified in the current regulation, the final regulations place in writing what has been the practice of the Department in order to comply with Higher Education Act, as amended. Sections 496(a) and (c) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |
| 602.31(d) | Agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education must annually monitor enrollment growth of the institutions they accredit that offer distance education and submit a report to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. These final regulations would only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Section 496(a)(4)(B) and (q) of the HEA. | OMB 1840–0788—It is estimated that this regulation would increase the burden of 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future. Based on prior experiences with institutions experiencing significant growth, the burden is estimated to apply to 3 institutions per year. |
| 602.32 | The Department forwards to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency could then provide a written response to the draft staff analysis and the third-party comments. The final regulations simplify the language of the current regulations, which also require the Department to invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department. Section 496(o) of the HEA. | OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation. |

## Assessment of Educational Impact

In the NPRM, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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

## List of Subjects in 34 CFR Parts 600 and 602

Colleges and universities, Education, Reporting and recordkeeping requirements.

Dated: October 15, 2009.

**Arne Duncan,**

*Secretary of Education.*

■ For the reasons discussed in the preamble, the Secretary amends parts 600 and 602 of title 34 of the Code of Federal Regulations as follows:

## PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

■ 1. The authority citation for part 600 continues to read as follows:

**Authority:** 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

■ 2. Section 600.2 is amended by:

■ A. Revising the definition of *Correspondence course.*

■ B. Adding in alphabetical order a new definition of *Distance education.*

■ C. Removing the definition of *Telecommunications course.*

The addition and revision read as follows:

### § 600.2 Definitions.

* * * * *

*Correspondence course:* (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. Interaction between the instructor and student is limited, is not regular and substantive, and is primarily initiated by the student. Correspondence courses are typically self-paced.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

* * * * *

*Distance education* means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

* * * * *

## PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

■ 3. The authority citation for part 602 continues to read as follows:

**Authority:** 20 U.S.C. 1099b, unless otherwise noted.

■ 4. Section 602.3 is amended by:

■ A. Adding in alphabetical order a new definition of *Compliance report.*

■ B. Adding in alphabetical order a new definition of *Correspondence education.*

■ C. Adding in alphabetical order a new definition of *Designated Federal Official.*

■ D. Adding in alphabetical order a new definition of *Direct assessment program.*

■ E. Revising the definition of *Distance education.*

■ F. Adding in alphabetical order a new definition of *Recognition.*

■ G. Revising paragraph (5) of the definition of *Scope of recognition.*

■ H. Revising the definition of *Teach-out agreement.*

■ I. Adding in alphabetical order a new definition of *Teach-out plan.*

The additions and revisions read as follows:

### § 602.3 What definitions apply to this part?

* * * * *

*Compliance report* means a written report that the Department requires an agency to file to demonstrate that the agency has addressed deficiencies specified in a decision letter from the senior Department official or the Secretary.

*Correspondence education* means:

(1) Education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor.

(2) Interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student.

(3) Correspondence courses are typically self-paced.

(4) Correspondence education is not distance education.

*Designated Federal Official* means the Federal officer designated under section 10(f) of the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1.

*Direct assessment program* means an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, and meets the conditions of 34 CFR 668.10. For title IV, HEA purposes, the institution must obtain approval for the direct assessment program from the Secretary under 34 CFR 668.10(g) or (h) as applicable. As part of that approval, the accrediting agency must—

(1) Evaluate the program(s) and include them in the institution's grant of accreditation or preaccreditation; and

(2) Review and approve the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

*Distance education* means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

* * * * *

*Recognition* means an unappealed determination by the senior Department official under § 602.36, or a determination by the Secretary on appeal under § 602.37, that an accrediting agency complies with the criteria for recognition listed in subpart B of this part and that the agency is effective in its application of those criteria. A grant of recognition to an agency as a reliable authority regarding the quality of education or training offered by institutions or programs it accredits remains in effect for the term granted except upon a determination made in accordance with subpart C of this part that the agency no longer complies with the subpart B criteria or that it has become ineffective in its application of those criteria.

* * * * *

*Scope of recognition* or *scope* * * *

(5) Coverage of accrediting activities related to distance education or correspondence education.

* * * * *

*Teach-out agreement* means a written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study.

*Teach-out plan* means a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

* * * * *

■ 5. Section 602.15 is amended by:

■ A. Revising paragraph (a)(2).

■ B. In paragraph (b)(1), removing the word ''two'' and removing the letter ''s'' from the word ''reviews'' the first time it appears.

■ C. Revising paragraph (b)(2).

The revisions read as follows:

### § 602.15 Administrative and fiscal responsibilities.

* * * * *

(a) * * *

(2) Competent and knowledgeable individuals, qualified by education and experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles, regarding the agency's standards, policies, and procedures, to conduct its on-site evaluations, apply or establish

its policies, and make its accrediting and preaccrediting decisions, including, if applicable to the agency's scope, their responsibilities regarding distance education and correspondence education;

* * * * *

(b) * * *

(2) All decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of any institution or program and substantive changes, including all correspondence that is significantly related to those decisions.

* * * * *

■ 6. Section 602.16 by amended by:

■ A. Revising paragraph (a)(1)(i).

■ B. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively.

■ C. Adding new paragraphs (c) and (f).

The additions and revision read as follows:

**§ 602.16 Accreditation and preaccreditation standards.**

(a) * * *

(1) * * *

(i) Success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates.

* * * * *

(c) If the agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, the agency's standards must effectively address the quality of an institution's distance education or correspondence education in the areas identified in paragraph (a)(1) of this section. The agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education.

* * * * *

(f) Nothing in paragraph (a) of this section restricts—

(1) An accrediting agency from setting, with the involvement of its members, and applying accreditation standards for or to institutions or programs that seek review by the agency; or

(2) An institution from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

* * * * *

■ 7. Section 602.17 is amended:

■ A. In paragraph (e), by removing the word ''and'' at the end of the paragraph.

■ B. In paragraph (f)(2), by removing the punctuation ''.'' and adding, in its place, the words ''; and''.

■ C. By adding a new paragraph (g).

The addition reads as follows:

**§ 602.17 Application of standards in reaching an accrediting decision.**

* * * * *

(g) Requires institutions that offer distance education or correspondence education to have processes in place through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. The agency meets this requirement if it—

(1) Requires institutions to verify the identity of a student who participates in class or coursework by using, at the option of the institution, methods such as—

(i) A secure login and pass code;

(ii) Proctored examinations; and

(iii) New or other technologies and practices that are effective in verifying student identity; and

(2) Makes clear in writing that institutions must use processes that protect student privacy and notify students of any projected additional student charges associated with the verification of student identity at the time of registration or enrollment.

* * * * *

■ 8. Section 602.18 is amended by:

■ A. Revising the introductory text.

■ B. Redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d), respectively.

■ C. In newly redesignated paragraph (c), removing the word ''and'' at the end of the paragraph.

■ D. In newly redesignated paragraph (d), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

■ E. Adding new paragraphs (a) and (e).

The additions and revision read as follows:

**§ 602.18 Ensuring consistency in decision-making.**

The agency must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission, and that ensure that the education or training offered by an institution or program, including any offered through distance education or correspondence education, is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency. The agency meets this requirement if the agency—

(a) Has written specification of the requirements for accreditation and preaccreditation that include clear standards for an institution or program to be accredited;

* * * * *

(e) Provides the institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards.

* * * * *

■ 9. Section 602.19 is amended by:

■ A. Revising paragraph (b).

■ B. Adding new paragraphs (c), (d), and (e).

The revision and additions read as follows:

**§ 602.19 Monitoring and reevaluation of accredited institutions and programs.**

* * * * *

(b) The agency must demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables the agency to identify problems with an institution's or program's continued compliance with agency standards and that takes into account institutional or program strengths and stability. These approaches must include periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of § 602.16(f). This provision does not require institutions or programs to provide annual reports on each specific accreditation criterion.

(c) Each agency must monitor overall growth of the institutions or programs it accredits and, at least annually, collect headcount enrollment data from those institutions or programs.

(d) Institutional accrediting agencies must monitor the growth of programs at institutions experiencing significant enrollment growth, as reasonably defined by the agency.

(e) Any agency that has notified the Secretary of a change in its scope in accordance with § 602.27(a)(5) must monitor the headcount enrollment of each institution it has accredited that offers distance education or correspondence education. If any such institution has experienced an increase in headcount enrollment of 50 percent or more within one institutional fiscal year, the agency must report that

information to the Secretary within 30 days of acquiring such data.

* * * * *

■ 10. Section 602.22 is amended by:

■ A. In paragraph (a)(2)(iii), removing the words '', in either content'' and adding, in their place, the words ''from the existing offerings of educational programs,''.

■ B. In paragraph (a)(2)(iv), removing the words ''courses or'', adding the words ''of study'' after the word ''programs'' the first time it appears, and removing the word ''above'' and adding, in its place, the words ''different from''.

■ C. Revising paragraph (a)(2)(vii).

■ D. Adding new paragraphs (a)(2)(viii), (a)(2)(ix), and (a)(2)(x).

■ E. Adding a new paragraph (a)(3).

■ F. Revising paragraph (b).

■ G. Revising paragraph (c), introductory text.

■ H. In paragraph (c)(2), adding the words ''a representative sample of'' immediately after the words ''visits to''.

The additions and revisions read as follows:

**§ 602.22 Substantive change.**

(a) * * *

(2) * * *

(vii) If the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the entering into a contract under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 percent of one or more of the accredited institution's educational programs.

(viii)(A) If the agency's accreditation of an institution enables it to seek eligibility to participate in title IV, HEA programs, the establishment of an additional location at which the institution offers at least 50 percent of an educational program. The addition of such a location must be approved by the agency in accordance with paragraph (c) of this section unless the accrediting agency determines, and issues a written determination stating that the institution has—

(*1*) Successfully completed at least one cycle of accreditation of maximum length offered by the agency and one renewal, or has been accredited for at least ten years;

(*2*) At least three additional locations that the agency has approved; and

(*3*) Met criteria established by the agency indicating sufficient capacity to add additional locations without individual prior approvals, including at a minimum satisfactory evidence of a system to ensure quality across a distributed enterprise that includes—

(*i*) Clearly identified academic control;

(*ii*) Regular evaluation of the locations;

(*iii*) Adequate faculty, facilities, resources, and academic and student support systems;

(*iv*) Financial stability; and

(*v*) Long-range planning for expansion.

(B) The agency's procedures for approval of an additional location, pursuant to paragraph (a)(2)(viii)(A) of this section, must require timely reporting to the agency of every additional location established under this approval.

(C) Each agency determination or redetermination to preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section may not exceed five years.

(D) The agency may not preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section after the institution undergoes a change in ownership resulting in a change in control as defined in 34 CFR 600.31 until the institution demonstrates that it meets the conditions for the agency to preapprove additional locations described in this paragraph.

(E) The agency must have an effective mechanism for conducting, at reasonable intervals, visits to a representative sample of additional locations approved under paragraph (a)(2)(viii)(A) of this section.

(ix) The acquisition of any other institution or any program or location of another institution.

(x) The addition of a permanent location at a site at which the institution is conducting a teach-out for students of another institution that has ceased operating before all students have completed their program of study.

(3) The agency's substantive change policy must define when the changes made or proposed by an institution are or would be sufficiently extensive to require the agency to conduct a new comprehensive evaluation of that institution.

(b) The agency may determine the procedures it uses to grant prior approval of the substantive change. However, these procedures must specify an effective date, which is not retroactive, on which the change is included in the program's or institution's accreditation. An agency may designate the date of a change in ownership as the effective date of its approval of that substantive change if the accreditation decision is made within 30 days of the change in ownership. Except as provided in paragraph (c) of this section, these procedures may, but need not, require a visit by the agency.

(c) Except as provided in paragraph (a)(2)(viii)(A) of this section, if the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the agency's procedures for the approval of an additional location where at least 50 percent of an educational program is offered must provide for a determination of the institution's fiscal and administrative capacity to operate the additional location. In addition, the agency's procedures must include—

* * * * *

■ 11. Section 602.23 is amended by:

■ A. Revising paragraph (a) introductory text.

■ B. Revising paragraph (c)(1).

The revisions read as follows:

**§ 602.23 Operating procedures all agencies must have.**

(a) The agency must maintain and make available to the public written materials describing—

* * * * *

(c) * * *

(1) Review in a timely, fair, and equitable manner any complaint it receives against an accredited institution or program that is related to the agency's standards or procedures. The agency may not complete its review and make a decision regarding a complaint unless, in accordance with published procedures, it ensures that the institution or program has sufficient opportunity to provide a response to the complaint;

* * * * *

■ 12. Section 602.24 is amended by:

■ A. Revising paragraph (c).

■ B. Adding new paragraphs (d) and (e).

The addition and revision read as follows:

**§ 602.24 Additional procedures certain institutional accreditors must have.**

* * * * *

(c) *Teach-out plans and agreements.* (1) The agency must require an institution it accredits or preaccredits to submit a teach-out plan to the agency for approval upon the occurrence of any of the following events:

(i) The Secretary notifies the agency that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required.

(ii) The agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution.

(iii) The institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program.

(iv) A State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked.

(2) The agency must evaluate the teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency, specifies additional charges, if any, and provides for notification to the students of any additional charges.

(3) If the agency approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency, it must notify that accrediting agency of its approval.

(4) The agency may require an institution it accredits or preaccredits to enter into a teach-out agreement as part of its teach-out plan.

(5) The agency must require an institution it accredits or preaccredits that enters into a teach-out agreement, either on its own or at the request of the agency, to submit that teach-out agreement for approval. The agency may approve the teach-out agreement only if the agreement is between institutions that are accredited or preaccredited by a nationally recognized accrediting agency, is consistent with applicable standards and regulations, and provides for the equitable treatment of students by ensuring that—

(i) The teach-out institution has the necessary experience, resources, and support services to—

(A) Provide an educational program that is of acceptable quality and reasonably similar in content, structure, and scheduling to that provided by the institution that is ceasing operations either entirely or at one of its locations; and

(B) Remain stable, carry out its mission, and meet all obligations to existing students; and

(ii) The teach-out institution demonstrates that it can provide students access to the program and services without requiring them to move or travel substantial distances and that it will provide students with information about additional charges, if any.

(d) *Closed institution.* If an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

(e) *Transfer of credit policies.* The accrediting agency must confirm, as part of its review for initial accreditation or preaccreditation, or renewal of accreditation, that the institution has transfer of credit policies that—

(1) Are publicly disclosed in accordance with § 668.43(a)(11); and

(2) Include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education.

* * * * *

■ 13. Section 602.25 is revised to read as follows:

**§ 602.25 Due process.**

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. The agency meets this requirement if the agency does the following:

(a) Provides adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited.

(b) Uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.

(c) Provides written specification of any deficiencies identified at the institution or program examined.

(d) Provides sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken.

(e) Notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis for the action.

(f) Provides an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final.

(1) The appeal must take place at a hearing before an appeals panel that—

(i) May not include current members of the agency's decision-making body that took the initial adverse action;

(ii) Is subject to a conflict of interest policy;

(iii) Does not serve only an advisory or procedural role, and has and uses the authority to make the following decisions: to affirm, amend, or reverse adverse actions of the original decision-making body; and

(iv) Affirms, amends, reverses, or remands the adverse action. A decision to affirm, amend, or reverse the adverse action is implemented by the appeals panel or by the original decision-making body, at the agency's option. In a decision to remand the adverse action to the original decision-making body for further consideration, the appeals panel must identify specific issues that the original decision-making body must address. In a decision that is implemented by or remanded to the original decision-making body, that body must act in a manner consistent with the appeals panel's decisions or instructions.

(2) The agency must recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, including to make any presentation that the agency permits the institution or program to make on its own during the appeal.

(g) The agency notifies the institution or program in writing of the result of its appeal and the basis for that result.

(h)(1) The agency must provide for a process, in accordance with written procedures, through which an institution or program may, before the agency reaches a final adverse action decision, seek review of new financial information if all of the following conditions are met:

(i) The financial information was unavailable to the institution or program until after the decision subject to appeal was made.

(ii) The financial information is significant and bears materially on the financial deficiencies identified by the agency. The criteria of significance and materiality are determined by the agency.

(iii) The only remaining deficiency cited by the agency in support of a final adverse action decision is the institution's or program's failure to meet an agency standard pertaining to finances.

(2) An institution or program may seek the review of new financial information described in paragraph (h)(1) of this section only once and any determination by the agency made with respect to that review does not provide a basis for an appeal.

(Authority: 20 U.S.C. 1099b)

■ 14. Section 602.26 is amended:

■ A. In paragraph (b)(2), by removing the punctuation ''\;'' and adding, in its place, the punctuation ''.''.

■ B. By adding a new paragraph (b)(3).

■ C. In paragraph (c), by removing the words ''(b)(1) and (b)(2)'' and adding, in

their place, the words ''(b)(1), (b)(2), and (b)(3)''.

■ D. Revising paragraph (d).

The addition and revision read as follows:

**§ 602.26 Notification of accrediting decisions.**

* * * * *

(b) * * *

(3) A final decision to take any other adverse action, as defined by the agency, not listed in paragraph (b)(2) of this section;

* * * * *

(d) For any decision listed in paragraph (b)(2) of this section, makes available to the Secretary, the appropriate State licensing or authorizing agency, and the public, no later than 60 days after the decision, a brief statement summarizing the reasons for the agency's decision and the official comments that the affected institution or program may wish to make with regard to that decision, or evidence that the affected institution has been offered the opportunity to provide official comment;

* * * * *

■ 15. Section 602.27 is revised to read as follows:

**§ 602.27 Other information an agency must provide the Department.**

(a) The agency must submit to the Department—

(1) A copy of any annual report it prepares;

(2) A copy, updated annually, of its directory of accredited and preaccredited institutions and programs;

(3) A summary of the agency's major accrediting activities during the previous year (an annual data summary), if requested by the Secretary to carry out the Secretary's responsibilities related to this part;

(4) Any proposed change in the agency's policies, procedures, or accreditation or preaccreditation standards that might alter its—

(i) Scope of recognition, except as provided in paragraph (a)(5) of this section; or

(ii) Compliance with the criteria for recognition;

(5) Notification that the agency has expanded its scope of recognition to include distance education or correspondence education as provided in section 496(a)(4)(B)(i)(I) of the HEA. Such an expansion of scope is effective on the date the Department receives the notification;

(6) The name of any institution or program it accredits that the agency has reason to believe is failing to meet its title IV, HEA program responsibilities or is engaged in fraud or abuse, along with the agency's reasons for concern about the institution or program; and

(7) If the Secretary requests, information that may bear upon an accredited or preaccredited institution's compliance with its title IV, HEA program responsibilities, including the eligibility of the institution or program to participate in title IV, HEA programs.

(b) If an agency has a policy regarding notification to an institution or program of contact with the Department in accordance with paragraph (a)(6) or (a)(7) of this section, it must provide for a case-by-case review of the circumstances surrounding the contact, and the need for the confidentiality of that contact. Upon a specific request by the Department, the agency must consider that contact confidential.

(Authority: 20 U.S.C. 1099b)

■ 16. Subpart C is revised to read as follows:

**Subpart C—The Recognition Process**

**Application and Review by Department Staff**

Sec.
602.30 Activities covered by recognition procedures.
602.31 Agency submissions to the Department.
602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.
602.33 Procedures for review of agencies during the period of recognition.

**Review by the National Advisory Committee on Institutional Quality and Integrity**

602.34 Advisory Committee meetings.
602.35 Responding to the Advisory Committee's recommendation.

**Review and Decision by the Senior Department Official**

602.36 Senior Department official's decision.

**Appeal Rights and Procedures**

602.37 Appealing the senior Department official's decision to the Secretary.
602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.

## Subpart C—The Recognition Process

## Application and Review by Department Staff

**§ 602.30 Activities covered by recognition procedures.**

Recognition proceedings are administrative actions taken on any of the following matters:

(a) Applications for initial or continued recognition submitted under § 602.31(a).

(b) Applications for an expansion of scope submitted under § 602.31(b).

(c) Compliance reports submitted under § 602.31(c).

(d) Reviews of agencies that have expanded their scope of recognition by notice, following receipt by the Department of information of an increase in headcount enrollment described in § 602.19(e).

(e) Staff analyses identifying areas of non-compliance based on a review conducted under § 602.33.

(Authority: 20 U.S.C. 1099b)

**§ 602.31 Agency submissions to the Department.**

(a) *Applications for recognition or renewal of recognition.* An accrediting agency seeking initial or continued recognition must submit a written application to the Secretary. Each accrediting agency must submit an application for continued recognition at least once every five years, or within a shorter time period specified in the final recognition decision. The application must consist of—

(1) A statement of the agency's requested scope of recognition;

(2) Evidence, including documentation, that the agency complies with the criteria for recognition listed in subpart B of this part and effectively applies those criteria; and

(3) Evidence, including documentation, of how an agency that includes or seeks to include distance education or correspondence education in its scope of recognition applies its standards in evaluating programs and institutions it accredits that offer distance education or correspondence education.

(b) *Applications for expansions of scope.* An agency seeking an expansion of scope by application must submit a written application to the Secretary. The application must—

(1) Specify the scope requested;

(2) Include documentation of experience in accordance with § 602.12(b); and

(3) Provide copies of any relevant standards, policies, or procedures developed and applied by the agency and documentation of the application of these standards, policies, or procedures.

(c) *Compliance reports.* If an agency is required to submit a compliance report, it must do so within 30 days following the end of the period for achieving compliance as specified in the decision of the senior Department official or Secretary, as applicable.

(d) *Review following an increase in headcount enrollment.* If an agency that

has notified the Secretary in writing of its change in scope to include distance education or correspondence education in accordance with § 602.27(a)(5) reports an increase in headcount enrollment in accordance with § 602.19(e) for an institution it accredits, or if the Department notifies the agency of such an increase at one of the agency's accredited institutions, the agency must, within 45 days of reporting the increase or receiving notice of the increase from the Department, as applicable, submit a report explaining—

(1) How the agency evaluates the capacity of the institutions or programs it accredits to accommodate significant growth in enrollment and to maintain educational quality;

(2) The specific circumstances regarding the growth at the institution(s) or programs(s) that triggered the review and the results of any evaluation conducted by the agency; and

(3) Any other information that the agency deems appropriate to demonstrate the effective application of the criteria for recognition or that the Department may require.

(e) *Consent to sharing of information.* By submitting an application for recognition, the agency authorizes Department staff throughout the application process and during any period of recognition—

(1) To observe its site visits to one or more of the institutions or programs it accredits or preaccredits, on an announced or unannounced basis;

(2) To visit locations where agency activities such as training, review and evaluation panel meetings, and decision meetings take place, on an announced or unannounced basis;

(3) To obtain copies of all documents the staff deems necessary to complete its review of the agency; and

(4) To gain access to agency records, personnel, and facilities.

(f) *Public availability of agency records obtained by the Department.* (1) The Secretary's processing and decision making on requests for public disclosure of agency materials reviewed under this part are governed by the Freedom of Information Act, 5 U.S.C. 552; the Trade Secrets Act, 18 U.S.C. 1905; the Privacy Act of 1974, as amended, 5 U.S.C 552a; the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1; and all other applicable laws. In recognition proceedings, agencies may—

(i) Redact information that would identify individuals or institutions that is not essential to the Department's review of the agency;

(ii) Make a good faith effort to designate all business information within agency submissions that the agency believes would be exempt from disclosure under exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). A blanket designation of all information contained within a submission, or of a category of documents, as meeting this exemption will not be considered a good faith effort and will be disregarded;

(iii) Identify any other material the agency believes would be exempt from public disclosure under FOIA, the factual basis for the request, and any legal basis the agency has identified for withholding the document from disclosure; and

(iv) Ensure documents submitted are only those required for Department review or as requested by Department officials.

(2) The Secretary processes FOIA requests in accordance with 34 CFR part 5 and makes all documents provided to the Advisory Committee available to the public.

(Authority: 20 U.S.C. 1099b)

**§ 602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.**

(a) After receipt of an agency's application for initial or continued recognition, or change in scope, or an agency's compliance report, or an agency's report submitted under § 602.31(d), Department staff publishes a notice of the agency's application or report in the **Federal Register** inviting the public to comment on the agency's compliance with the criteria for recognition and establishing a deadline for receipt of public comment.

(b) The Department staff analyzes the agency's application for initial or renewal of recognition, compliance report, or report submitted under § 602.31(d) to determine whether the agency satisfies the criteria for recognition, taking into account all available relevant information concerning the compliance of the agency with those criteria and in the agency's effectiveness in applying the criteria. The analysis of an application for recognition and, as appropriate, of a compliance report, or of a report required under § 602.31(d), includes—

(1) Observations from site visit(s), on an announced or unannounced basis, to the agency or to a location where agency activities such as training, review and evaluation panel meetings, and decision meetings take place and to one or more of the institutions or programs it accredits or preaccredits;

(2) Review of the public comments and other third-party information the Department staff receives by the established deadline, and the agency's responses to the third-party comments, as appropriate, as well as any other information Department staff assembles for purposes of evaluating the agency under this part; and

(3) Review of complaints or legal actions involving the agency.

(c) The Department staff analyzes the materials submitted in support of an application for expansion of scope to ensure that the agency has the requisite experience, policies that comply with subpart B of this part, capacity, and performance record to support the request.

(d) Department staff's evaluation of an agency may also include a review of information directly related to institutions or programs accredited or preaccredited by the agency relative to their compliance with the agency's standards, the effectiveness of the standards, and the agency's application of those standards.

(e) If, at any point in its evaluation of an agency seeking initial recognition, Department staff determines that the agency fails to demonstrate compliance with the basic eligibility requirements in §§ 602.10 through 602.13, the staff—

(1) Returns the agency's application and provides the agency with an explanation of the deficiencies that caused staff to take that action; and

(2) Recommends that the agency withdraw its application and reapply when the agency can demonstrate compliance.

(f) Except with respect to an application that has been returned or is withdrawn under paragraph (e) of this section, when Department staff completes its evaluation of the agency, the staff—

(1) Prepares a written draft analysis of the agency;

(2) Sends the draft analysis including any identified areas of non-compliance and a proposed recognition recommendation, and all supporting documentation, including all third-party comments the Department received by the established deadline, to the agency;

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation and third-party comments, specifying a deadline that provides at least 30 days for the agency's response;

(4) Reviews the response to the draft analysis the agency submits, if any, and prepares the written final analysis. The final analysis includes a recognition

recommendation to the senior Department official, as the Department staff deems appropriate, including, but not limited to, a recommendation to approve, deny, limit, suspend, or terminate recognition, require the submission of a compliance report and continue recognition pending a final decision on compliance, approve or deny a request for expansion of scope, or revise or affirm the scope of the agency; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and any other available information provided to the Advisory Committee under § 602.34(c).

(g) The agency may request that the Advisory Committee defer acting on an application at that Advisory Committee meeting if Department staff fails to provide the agency with the materials described, and within the timeframes provided, in paragraphs (f)(3) and (f)(5) of this section. If the Department staff's failure to send the materials in accordance with the timeframe described in paragraph (f)(3) or (f)(5) of this section is due to the failure of the agency to submit reports to the Department, other information the Secretary requested, or its response to the draft analysis, by the deadline established by the Secretary, the agency forfeits its right to request a deferral of its application.

(Authority: 20 U.S.C. 1099b)

**§ 602.33 Procedures for review of agencies during the period of recognition.**

(a) Department staff may review the compliance of a recognized agency with the criteria for recognition at any time—

(1) At the request of the Advisory Committee; or

(2) Based on any information that, as determined by Department staff, appears credible and raises issues relevant to recognition.

(b) The review may include, but need not be limited to, any of the activities described in § 602.32(b) and (d).

(c) If, in the course of the review, and after provision to the agency of the documentation concerning the inquiry and consultation with the agency, Department staff notes that one or more deficiencies may exist in the agency's compliance with the criteria for recognition or in the agency's effective application of those criteria, it—

(1) Prepares a written draft analysis of the agency's compliance with the criteria of concern. The draft analysis reflects the results of the review, and includes a recommendation regarding what action to take with respect to recognition. Possible recommendations include, but are not limited to, a recommendation to limit, suspend, or terminate recognition, or require the submission of a compliance report and to continue recognition pending a final decision on compliance;

(2) Sends the draft analysis including any identified areas of non-compliance, and a proposed recognition recommendation, and all supporting documentation to the agency; and

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation, specifying a deadline that provides at least 30 days for the agency's response.

(d) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has demonstrated compliance with the criteria for recognition, the staff notifies the agency in writing of the results of the review. If the review was requested by the Advisory Committee, staff also provides the Advisory Committee with the results of the review.

(e) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has not demonstrated compliance, the staff—

(1) Notifies the agency that the draft analysis will be finalized for presentation to the Advisory Committee;

(2) Publishes a notice in the **Federal Register** including, if practicable, an invitation to the public to comment on the agency's compliance with the criteria in question and establishing a deadline for receipt of public comment;

(3) Provides the agency with a copy of all public comments received and, if practicable, invites a written response from the agency;

(4) Finalizes the staff analysis as necessary to reflect its review of any agency response and any public comment received; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and a recognition recommendation and any other information provided to the Advisory Committee under § 602.34(c).

(f) The Advisory Committee reviews the matter in accordance with § 602.34.

(Authority: 20 U.S.C. 1099b)

## Review by the National Advisory Committee on Institutional Quality and Integrity

**§ 602.34 Advisory Committee meetings.**

(a) Department staff submits a proposed schedule to the Chairperson of the Advisory Committee based on anticipated completion of staff analyses.

(b) The Chairperson of the Advisory Committee establishes an agenda for the next meeting and, in accordance with the Federal Advisory Committee Act, presents it to the Designated Federal Official for approval.

(c) Before the Advisory Committee meeting, Department staff provides the Advisory Committee with—

(1) The agency's application for recognition or for expansion of scope, the agency's compliance report, or the agency's report submitted under § 602.31(d), and supporting documentation;

(2) The final Department staff analysis of the agency developed in accordance with § 602.32 or § 602.33, and any supporting documentation;

(3) At the request of the agency, the agency's response to the draft analysis;

(4) Any written third-party comments the Department received about the agency on or before the established deadline;

(5) Any agency response to third-party comments; and

(6) Any other information Department staff relied upon in developing its analysis.

(d) At least 30 days before the Advisory Committee meeting, the Department publishes a notice of the meeting in the **Federal Register** inviting interested parties, including those who submitted third-party comments concerning the agency's compliance with the criteria for recognition, to make oral presentations before the Advisory Committee.

(e) The Advisory Committee considers the materials provided under paragraph (c) of this section in a public meeting and invites Department staff, the agency, and other interested parties to make oral presentations during the meeting. A transcript is made of all Advisory Committee meetings.

(f) The written motion adopted by the Advisory Committee regarding each agency's recognition will be made available during the Advisory Committee meeting. The Department will provide each agency, upon request, with a copy of the motion on recognition at the meeting. Each agency that was reviewed will be sent an electronic copy of the motion relative to that agency as soon as practicable after the meeting.

(g) After each meeting of the Advisory Committee at which a review of agencies occurs, the Advisory Committee forwards to the senior Department official its recommendation with respect to each agency, which may include, but is not limited to, a

recommendation to approve, deny, limit, suspend, or terminate recognition, to grant or deny a request for expansion of scope, to revise or affirm the scope of the agency, or to require the agency to submit a compliance report and to continue recognition pending a final decision on compliance.

(Authority: 20 U.S.C. 1099b)

**§ 602.35 Responding to the Advisory Committee's recommendation.**

(a) Within ten days following the Advisory Committee meeting, the agency and Department staff may submit written comments to the senior Department official on the Advisory Committee's recommendation. The agency must simultaneously submit a copy of its written comments, if any, to Department staff. Department staff must simultaneously submit a copy of its written comments, if any, to the agency.

(b) Comments must be limited to—

(1) Any Advisory Committee recommendation that the agency or Department staff believes is not supported by the record;

(2) Any incomplete Advisory Committee recommendation based on the agency's application; and

(3) The inclusion of any recommendation or draft proposed decision for the senior Department official's consideration.

(c)(1) Neither the Department staff nor the agency may submit additional documentary evidence with its comments unless the Advisory Committee's recognition recommendation proposes finding the agency noncompliant with, or ineffective in its application of, a criterion or criteria for recognition not identified in the final Department staff analysis provided to the Advisory Committee.

(2) Within ten days of receipt by the Department staff of an agency's comments or new evidence, if applicable, or of receipt by the agency of the Department staff's comments, Department staff, the agency, or both, as applicable, may submit a response to the senior Department official. Simultaneously with submission, the agency must provide a copy of any response to the Department staff. Simultaneously with submission, Department staff must provide a copy of any response to the agency.

(Authority: 20 U.S.C. 1099b)

**Review and Decision by the Senior Department Official**

**§ 602.36 Senior Department official's decision.**

(a) The senior Department official makes a decision regarding recognition of an agency based on the record compiled under §§ 602.32, 602.33, 602.34, and 602.35 including, as applicable, the following:

(1) The materials provided to the Advisory Committee under § 602.34(c).

(2) The transcript of the Advisory Committee meeting.

(3) The recommendation of the Advisory Committee.

(4) Written comments and responses submitted under § 602.35.

(5) New evidence submitted in accordance with § 602.35(c)(1).

(6) A communication from the Secretary referring an issue to the senior Department official's consideration under § 602.37(e).

(b) In the event that statutory authority or appropriations for the Advisory Committee ends, or there are fewer duly appointed Advisory Committee members than needed to constitute a quorum, and under extraordinary circumstances when there are serious concerns about an agency's compliance with subpart B of this part that require prompt attention, the senior Department official may make a decision in a recognition proceeding based on the record compiled under § 602.32 or § 602.33 after providing the agency with an opportunity to respond to the final staff analysis. Any decision made by the senior Department official absent a recommendation from the Advisory Committee may be appealed to the Secretary as provided in § 602.37.

(c) Following consideration of an agency's recognition under this section, the senior Department official issues a recognition decision.

(d) Except with respect to decisions made under paragraph (f) or (g) of this section and matters referred to the senior Department official under § 602.37(e) or (f), the senior Department official notifies the agency in writing of the senior Department official's decision regarding the agency's recognition within 90 days of the Advisory Committee meeting or conclusion of the review under paragraph (b) of this section.

(e) The senior Department official's decision may include, but is not limited to, approving, denying, limiting, suspending, or terminating recognition, granting or denying an application for an expansion of scope, revising or affirming the scope of the agency, or continuing recognition pending submission and review of a compliance report under §§ 602.32 and 602.34 and review of the report by the senior Department official under this section.

(1)(i) The senior Department official approves recognition if the agency complies with the criteria for recognition listed in subpart B of this part and if the agency effectively applies those criteria.

(ii) If the senior Department official approves recognition, the recognition decision defines the scope of recognition and the recognition period. The recognition period does not exceed five years, including any time during which recognition was continued to permit submission and review of a compliance report.

(iii) If the scope or period of recognition is less than that requested by the agency, the senior Department official explains the reasons for approving a lesser scope or recognition period.

(2)(i) Except as provided in paragraph (e)(3) of this section, if the agency either fails to comply with the criteria for recognition listed in subpart B of this part, or to apply those criteria effectively, the senior Department official denies, limits, suspends, or terminates recognition.

(ii) If the senior Department official denies, limits, suspends, or terminates recognition, the senior Department official specifies the reasons for this decision, including all criteria the agency fails to meet and all criteria the agency has failed to apply effectively.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, if a recognized agency fails to demonstrate compliance with or effective application of a criterion or criteria, but the senior Department official concludes that the agency will demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less, the senior Department official may continue the agency's recognition, pending submission by the agency of a compliance report, review of the report under §§ 602.32 and 602.34, and review of the report by the senior Department official under this section. In such a case, the senior Department official specifies the criteria the compliance report must address, and a time period, not longer than 12 months, during which the agency must achieve compliance and effectively apply the criteria. The compliance report documenting compliance and effective application of criteria is due not later than 30 days after the end of the period specified in the senior Department official's decision.

(ii) If the record includes a compliance report, and the senior Department official determines that an agency has not complied with the criteria for recognition, or has not effectively applied those criteria, during the time period specified by the senior Department official in accordance with paragraph (e)(3)(i) of this section, the senior Department official denies, limits, suspends, or terminates recognition, except, in extraordinary circumstances, upon a showing of good cause for an extension of time as determined by the senior Department official and detailed in the senior Department official's decision. If the senior Department official determines good cause for an extension has been shown, the senior Department official specifies the length of the extension and what the agency must do during it to merit a renewal of recognition.

(f) If the senior Department official determines, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application of, a criterion or criteria of recognition not identified earlier in the proceedings as an area of noncompliance, the senior Department official provides—

(1) The agency with an opportunity to submit a written response and documentary evidence addressing the finding; and

(2) The staff with an opportunity to present its analysis in writing.

(g) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the senior Department official's attention while a decision regarding the agency's recognition is pending before the senior Department official, and if the senior Department official concludes the recognition decision should not be made without consideration of the information, the senior Department official either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and consideration by the Advisory Committee under § 602.34; or

(2)(i) Provides the information to the agency and Department staff;

(ii) Permits the agency to respond to the senior Department official and the Department staff in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides Department staff with an opportunity to respond in writing to the agency's submission under paragraph (g)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on the record described in paragraph (a) of this section, as supplemented by the information provided under this paragraph.

(h) No agency may submit information to the senior Department official, or ask others to submit information on its behalf, for purposes of invoking paragraph (g) of this section. Before invoking paragraph (g) of this section, the senior Department official will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(i) If the senior Department official does not reach a final decision to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the senior Department official automatically extends the recognition period until a final decision is reached.

(j) Unless appealed in accordance with § 602.37, the senior Department official's decision is the final decision of the Secretary.

(Authority: 20 U.S.C. 1099b)

## Appeal Rights and Procedures

### § 602.37 Appealing the senior Department official's decision to the Secretary.

(a) The agency may appeal the senior Department official's decision to the Secretary. Such appeal stays the decision of the senior Department official until final disposition of the appeal. If an agency wishes to appeal, the agency must—

(1) Notify the Secretary and the senior Department official in writing of its intent to appeal the decision of the senior Department official, no later than ten days after receipt of the decision;

(2) Submit its appeal to the Secretary in writing no later than 30 days after receipt of the decision; and

(3) Provide the senior Department official with a copy of the appeal at the same time it submits the appeal to the Secretary.

(b) The senior Department official may file a written response to the appeal. To do so, the senior Department official must—

(1) Submit a response to the Secretary no later than 30 days after receipt of a copy of the appeal; and

(2) Provide the agency with a copy of the senior Department official's response at the same time it is submitted to the Secretary.

(c) Neither the agency nor the senior Department official may include in its submission any new evidence it did not submit previously in the proceeding.

(d) On appeal, the Secretary makes a recognition decision, as described in § 602.36(e). If the decision requires a compliance report, the report is due within 30 days after the end of the period specified in the Secretary's decision. The Secretary renders a final decision after taking into account the senior Department official's decision, the agency's written submissions on appeal, the senior Department official's response to the appeal, if any, and the entire record before the senior Department official. The Secretary notifies the agency in writing of the Secretary's decision regarding the agency's recognition.

(e) The Secretary may determine, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application with respect to, a criterion or criteria for recognition not identified as an area of noncompliance earlier in the proceedings. In that case, the Secretary, without further consideration of the appeal, refers the matter to the senior Department official for consideration of the issue under § 602.36(f). After the senior Department official makes a decision, the agency may, if desired, appeal that decision to the Secretary.

(f) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the Secretary's attention while a decision regarding the agency's recognition is pending before the Secretary, and if the Secretary concludes the recognition decision should not be made without consideration of the information, the Secretary either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and review by the Advisory Committee under § 602.34; and consideration by the senior Department official under § 602.36; or

(2)(i) Provides the information to the agency and the senior Department official;

(ii) Permits the agency to respond to the Secretary and the senior Department official in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides the senior Department official with an opportunity to respond in writing to the agency's submission

under paragraph (f)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on all the materials described in paragraphs (d) and (f) of this section.

(g) No agency may submit information to the Secretary, or ask others to submit information on its behalf, for purposes of invoking paragraph (f) of this section. Before invoking paragraph (f) of this section, the Secretary will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(h) If the Secretary does not reach a final decision on appeal to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the Secretary automatically extends the recognition period until a final decision is reached.

(Authority: 20 U.S.C. 1099b)

**§ 602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.**

An agency may contest the Secretary's decision under this part in the Federal courts as a final decision in accordance with applicable Federal law. Unless otherwise directed by the court, a decision of the Secretary to deny, limit, suspend, or terminate the agency's recognition is not stayed during an appeal in the Federal courts.

(Authority: 20 U.S.C. 1099b)

## Subpart D—[Removed]

■ 17. Subpart D, consisting of §§ 602.40 through 602.45, is removed.

## Subpart E—[Redesignated as Subpart D]

■ 18. Subpart E, consisting of § 602.50, is redesignated as subpart D.

[FR Doc. E9–25186 Filed 10–26–09; 8:45 am]

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Vol. 74, No. 206

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**H.R. 1016/P.L. 111–81**
Veterans Health Care Budget Reform and Transparency Act of 2009 (Oct. 22, 2009; 123 Stat. 2137)
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