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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1413

RIN 0560–AH72

Wheat and Oilseed Programs; Durum Wheat Quality Program

AGENCY: Farm Service Agency and Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule implements specific requirements for the Durum Wheat Quality Program (DWQP) authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). The 2008 Farm Bill authorizes the DWQP for fiscal years 2009 through 2012 to partially compensate producers for the cost of fungicides applied to durum wheat to control Fusarium head blight, commonly known as wheat scab.

DATES: *Effective Date:* July 20, 2010.

FOR FURTHER INFORMATION CONTACT: Candace Thompson, Director, Production, Emergencies, and Compliance Division; Farm Service Agency (FSA); U.S. Department of Agriculture (USDA), Mail Stop 0517, 1400 Independence Avenue, SW., Washington, DC 20250–0517; telephone (202) 720–3463; e-mail to: *candy.thompson@wdc.usda.gov.* Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, *etc.*) should contact the USDA Target Center at 202–720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Background

Section 1613 of the 2008 Farm Bill (Pub. L. 110–246) authorizes the Secretary of Agriculture to compensate producers of durum wheat for up to 50 percent of the actual cost of fungicide applied to control Fusarium head blight, a wheat disease caused by the Fusarium genus of fungi.

The 2008 Farm Bill authorizes annual appropriations for DWQP. The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (2010 Agriculture Appropriations Bill, Pub. L. 111–80) provides $3 million for this program in fiscal year 2010. This rule implements specific requirements for the DWQP in 7 CFR part 1413. DWQP is a Commodity Credit Corporation (CCC) program that will be administered by FSA.

The basic eligibility requirements, authorized funding limit, and compensation rates for this program are specified in the 2008 Farm Bill. The details in this rule on eligible fungicides, the application process, and acceptable documentation of the producer's actual cost are discretionary provisions.

Applying for DWQP Payments; DWQP Payment Calculation

Producers must file a completed application in the FSA county office during the application period announced by the Deputy Administrator. To be eligible, a producer must have used an eligible fungicide to control Fusarium head blight on acres certified as planted to durum wheat. This rule specifies that producers must provide documentation to show:

- The total number and location of acres planted to durum wheat to which an eligible fungicide was applied to control Fusarium head blight, and
- The actual cost of the eligible fungicide.

This rule specifies that producers must certify the dates:

- Durum wheat was planted, and
- Eligible fungicide was applied to durum wheat to control Fusarium head blight.

Payments to eligible producers will be based on 50 percent of their actual cost for eligible fungicide or a per-acre national fungicide acquisition payment rate set by the FSA Deputy Administrator, whichever is lower, plus a per-acre State application payment rate, as set by the State committee. The fungicide acquisition payment rate set by the Deputy Administrator will be based on 50 percent of the national average cost of an eligible fungicide applied per acre of durum wheat, for the applicable crop year. The application payment rate set by the State committee will be based on 50 percent of the State's average cost to apply an eligible fungicide per acre of durum wheat, for the applicable crop year. If eligible applications exceed the available funding, FSA plans to prorate the available funds by a national factor to reduce the total expected payments to the amount available for the crop year. The 50 percent of actual cost limit on the payment rate is specified in the 2008 Farm Bill.

Producers may treat the crop with eligible fungicides more than once during the crop year, but only one such treatment per year during the flowering stage will be eligible for DWQP payment. CCC will collect data on reasonable per acre usage and application rates for a single treatment of fungicide, and will take that into consideration when calculating the national fungicide payment rate. As noted above, the payments will be 50 percent of actual cost or the payment rate, whichever is lower.

To be considered an eligible fungicide for DWQP, the fungicide must have been registered with the Environmental Protection Agency (EPA) and be compliant with State pesticide regulations in the State in which benefits are being requested. Information on eligible pesticides in a State is available on State environmental Web sites. The EPA maintains State Resource Locators and contact information for State pesticide programs at *http://www.epa.gov/pesticides/safety/applicators/statepro.htm.*

CCC will announce the period for submitting payment applications under this program. The program application period for a crop year will end September 15 of that crop year. During the application period, durum wheat producers may apply in person at FSA county offices during regular business hours. Applications may also be submitted by mail or fax. Program applications may be obtained in person, by mail, telephone, or fax from any FSA county office or via the Internet at *http://forms.sc.egov.usda.gov/eForms.* Any application received after September 15 of the applicable crop year will not receive consideration and

producers on that application will be ineligible for payment.

The application period for the 2010 crop year will end September 15, 2010. An annual deadline for applications is necessary because CCC must know the total value of requested payments in order to determine if payments will exceed the available funding for that year. We anticipate that for FY 2010, payment applications may exceed the available $3 million in appropriated funding and we will need to prorate the payments. This program is funded by annual appropriations, so in future years there may be more or less funding for this program than is available for FY 2010. No funding was appropriated for this program in FY 2009, so there was no application period in 2009, and subsequently no available payments. Application periods for subsequent years will be announced as funding becomes available. The application periods are expected to be typically at least 60 days, and never, it is anticipated, less than 30 days, as determined by the Deputy Administrator, subject to when the appropriations become available, and will always end on September 15 of the applicable year.

CCC will establish a reserve fund for errors and appeals. These reserve funds are only intended for corrections and payments for disapproved applications that are successfully appealed, and not for late-filed applications.

2008 Farm Bill provisions that mandate an eligibility limit that prevents payments for persons with an average adjusted gross income (AGI) limitation above certain amounts (depending on the program) do not apply to this program and no such test will be applied.

Miscellaneous DWQP Provisions

All producers must meet the eligibility and documentation requirements provided in this rule. False certifications carry serious consequences. CCC will validate applications with random compliance spot-checks.

Producers receiving DWQP payments must keep records and supporting documentation for 3 years following the end of the year in which the application for payment was filed. The discretionary recordkeeping requirement is consistent with other FSA and CCC rules and programs. Payments will only be made for one fungicide treatment as one treatment should suffice and will allow for equal treatment of producers consistent with the spirit and letter of the 2008 Farm Bill.

DWQP producers must have been in compliance with the regulations at 7 CFR part 12, "Highly Erodible Land and Wetland Conservation," during the year for which the person is requesting benefits. Those regulations provide for a denial of benefits for failing to comply with general requirements regarding the handling of highly erodible cropland and wetlands.

Appeal regulations in 7 CFR parts 11 and 780 apply and under those rules it is the program agency's view and position that appeals are not allowed for matters of general applicability rather than factual determination and under that view producers would not be able to appeal CCC determinations that are not limited to particular disputes for a particular producer or producers but are matters of policy. These include, but are not limited to, general regulatory provisions that apply to similarly situated producers.

This Rule and Related Programs

This rule adds a new part 1413, "Commodity Incentive Payment Programs," to Title 7 of the Code of Federal Regulations (CFR). This new part will include regulations for DWQP and two other commodity incentive programs authorized by the 2008 Farm Bill. Subpart A of the new part 1413, which is added with this rule, specifies provisions for DWQP. Subparts B and C will be added later when the hard white wheat and oilseed incentives programs specified in sections 1605 and 1612 of the 2008 Farm Bill are funded and implemented.

Notice and Comment

These regulations are exempt from the notice and comment requirements of the Administrative Procedures Act (5 U.S.C. 553), as specified in section 1601(c) of the 2008 Farm Bill, which requires that the regulations be promulgated and administered without regard to the notice and comment provisions of Section 553 of title 5, United States Code or to the Statement of Policy of the Secretary effective July 24, 1971 (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking.

Executive Order 12866

This final rule has been designated as not significant under Executive Order 12866 and has not been reviewed by the Office of Management and Budget. The cost benefit analysis is summarized below and is available from the contact information listed above.

Summary of Economic Impacts

DWQP is funded by annual appropriations. The appropriated funding for FY 2010 is $3 million, which is the expected maximum cost of this program for FY 2010. The cost of this program, and benefit to producers, will depend upon how many producers apply for the program, but will in no case exceed appropriated funding. Program participation levels will likely increase if weather conditions warrant the application of fungicide to eligible crops. Costs and benefits for FY 2010 are expected to range between $500,000 and $3 million. In FY 2011–2012, costs and benefits could be as much as $10 million per year, the maximum authorized for appropriations, but are expected to average under $1.5 million, based on historical data of fungicide usage. Most of the program participants who will receive the benefits are expected to be durum wheat producers in Montana and North Dakota.

Regulatory Flexibility Act

This rule is not subject to the Regulatory Flexibility Act since CCC is not required to publish a notice of proposed rulemaking for this rule.

Environmental Evaluation

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The changes to the Wheat and Oilseed Programs and Durum Wheat Quality Program required by the 2008 Farm Bill that are identified in this final rule are actions that do not require an assessment or an EIS (7 CFR 799.10(b)(2)(x)). Therefore, FSA will not prepare an environmental assessment or an environmental impact statement.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

Executive Order 12988

This rule has been reviewed under Executive Order 12988. This final rule is not retroactive and it does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be

brought regarding the provisions of this rule the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

The policies contained in this rule do not have Tribal implications that preempt Tribal law.

Unfunded Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, or Tribal governments, or the private sector. In addition, CCC is not required to publish a notice of proposed rulemaking for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Federal Domestic Assistance Program

The title and number of the Federal Domestic Assistance Program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies, is the Durum Wheat Quality Program—10.095.

Paperwork Reduction Act

These regulations are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in section 1601(c)(2)(a) of the 2008 Farm Bill, which provides that these regulations, which are necessary to implement title I of the 2008 Farm Bill, be promulgated and administered without regard to the Paperwork Reduction Act.

E-Government Act Compliance

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

List of Subjects in 7 CFR Part 1413

Agricultural commodities, Oilseeds, Reporting and recordkeeping requirements, Wheat.

■ For the reasons explained above, CCC adds 7 CFR part 1413 to read as follows:

PART 1413—COMMODITY INCENTIVE PAYMENT PROGRAMS

Authority: 7 U.S.C. 8788 and 15 U.S.C. 714.

Subpart A—Durum Wheat Quality Program

Sec.
1413.101 Applicability.
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1413.114 Records and inspections.

Subpart B [Reserved]

Subpart C [Reserved]

Subpart A—Durum Wheat Quality Program

§ 1413.101 Applicability.

(a) This subpart establishes the terms and conditions under which the Durum Wheat Quality Program (DWQP) as authorized by section 1613 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) will be administered.

(b) This program will operate only to the extent appropriated funding is available.

(c) Subject to available funding, eligible producers of durum wheat will be partially compensated for the cost of purchasing and applying fungicides to a crop of durum wheat to control Fusarium head blight on acres accurately certified as planted to durum wheat. "Available funding" requires that there be a specific appropriation for the program that applies to a particular crop for which the producer seeks compensation under this program.

§ 1413.102 Definitions.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

Application period means the dates established by the Deputy Administrator for Farm Programs for producers to apply for program benefits.

CCC means the Commodity Credit Corporation.

Crop year means the calendar year in which the wheat was harvested or intended to be harvested. For example, a reference to the 2010 crop year of wheat means wheat that when planted was intended for harvest in calendar year 2010.

Durum wheat means all varieties of white (amber) durum wheat as defined in the U.S. Standards for Wheat (7 CFR part 810, subpart M) including, but not limited to, hard amber durum wheat and amber durum wheat.

Flowering stage means the period of time during the wheat growth stage, after the head emergence has completed and prior to milk development in the kernel.

State committee, county committee or county office means the respective FSA committee or office.

United States means all 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

USDA means the United States Department of Agriculture.

§ 1413.103 Administration.

(a) DWQP will be administered under the general supervision of the Executive Vice President, CCC (Administrator, Farm Service Agency (FSA)), or a designee, and will be carried out in the field by FSA State and county committees and FSA employees.

(b) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this subpart, except as specified in paragraph (e) of this section.

(c) The State FSA committee will take any action required by the provisions of this subpart that the county FSA committee has not taken. The State FSA committee will also:

(1) Correct, or require a county FSA committee to correct, any action taken by such county FSA committee that is not in compliance with the provisions of this subpart.

(2) Require a county FSA committee to not take an action that is not in compliance with the provisions of this subpart.

(d) No provision or delegation to a State or county FSA committee will preclude the Administrator, Deputy Administrator, or a designee from determining any question arising under the program in this subpart, or from reversing or modifying any determination made by a State or county FSA committee.

(e) The Deputy Administrator may authorize State and county FSA committees to waive or modify non-statutory program requirements of this subpart in cases where failure to meet such requirements does not adversely

affect operation of the program in this subpart. Producers have no right to seek an exception under this provision. The Deputy Administrator's refusal to consider cases or circumstances or decision not to exercise this discretionary authority under this provision will not be considered an adverse decision and is not appealable.

§ 1413.104 Eligibility.

(a) To be considered eligible for DWQP payments, the person or entity must have a share in the treated wheat crop on those acres planted to durum wheat on which an eligible fungicide was applied, as certified on the application, have incurred the cost of acquiring and applying eligible fungicide, and meet the requirements in paragraph (b) of this section.

(b) To be eligible for benefits, a person or entity must be a:

(1) Citizen of the United States;

(2) "Lawful alien" as defined in § 1400.3 of this chapter;

(3) Partnership of citizens of the United States; or

(4) Corporation, limited liability corporation, or other farm organizational structure organized under State law.

(c) A minor child is eligible to apply for DWQP payments if all the eligibility requirements of this subpart are met and the requirements in part 1400 of this chapter that apply to minor children are met.

(d) A person or entity determined to be a foreign person under part 1400 of this title is not eligible to receive benefits under this subpart, unless that person provides land, capital, and a substantial amount of active personal labor in the production of crops on such farm.

(e) State and local governments and their political subdivisions and related agencies are not eligible for DWQP payments.

(f) To be considered an eligible fungicide under this subpart, the fungicide must be:

(1) Registered with the U.S. Environmental Protection Agency, as required under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), unless exempt from FIFRA requirements;

(2) In compliance with State pesticide regulations, if applicable, in the State in which benefits are being requested; and

(3) Applied specifically to control Fusarium head blight on acres certified as planted by the producer to durum wheat for the applicable crop year.

(g) CCC will provide program benefits to reimburse eligible costs for a maximum of one fungicide treatment, including application cost, during the flowering stage, to a crop of durum wheat per crop year. Multiple or additional fungicide treatments, beyond a single treatment, to the same crop of wheat are not eligible for benefits.

§ 1413.105 [Reserved]

§ 1413.106 Application process.

(a) To apply for DWQP payment, the producer must submit, to the FSA county office that maintains the producer's farm records for the agricultural operation, a completed application as specified in paragraph (c) of this section, including any supporting documentation required by FSA, and a report of acreage.

(b) The producer must submit a completed application for payment and required supporting documentation to the administrative FSA county office during the relevant, for the crop, application period announced by FSA which will end no later than September 15 of the crop year in which the fungicide was applied to a crop of durum wheat.

(c) A complete application includes all of the following:

(1) An application form provided by FSA;

(2) Certification of the total number and location of acres planted to durum wheat on which an eligible fungicide was applied specifically to control Fusarium head blight;

(3) Certification of the date durum wheat, on which an eligible fungicide was applied specifically to control Fusarium head blight, was planted;

(4) Certification of the type of eligible fungicide applied to acres certified as planted to durum wheat;

(5) Certification of the date eligible fungicide was applied to acres certified as planted to durum wheat;

(6) Documentation providing adequate proof, as determined by FSA, of the producer's actual cost of purchasing and applying eligible fungicide to acres certified as planted to durum wheat for one treatment; and

(7) Any other documentation as determined by FSA to be necessary to make a determination of eligibility of the producer.

(d) The producer requesting benefits under this program certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information provided is subject to verification by FSA.

(e) Data furnished by the producer will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without all required data program benefits will not be approved or provided.

§ 1413.107 Availability of funds.

(a) The 2008 Farm Bill authorizes up to $10 million to be appropriated for each of the 2009 through 2012 fiscal years for DWQP. Payments will not be made for claims for a particular crop year until after the application deadline, which is September 15 of that crop year, for the crop for which payment for the fungicide application is sought and only if funds are made available through an appropriation.

(b) In the event that approval of all eligible applications for fungicide treatments for a particular crop would result in expenditures in excess of the amounts appropriated for that crop year, the FSA Deputy Administrator will prorate the funds by a national factor to reduce the total expected payments to the amount made available by the Secretary. FSA will prorate the payments in such manner as it determines appropriate and reasonable.

(c) Claims that are unpaid or paid at a reduced rate for a crop year for any reason will not be carried forward for payment under other funds for later crop years, unless provided for by law and approved by the Deputy Administrator. Such unpaid claims will be considered, as to any unpaid amount, void and nonpayable.

§ 1413.108 Payment calculation.

(a) Subject to the availability of DWQP funds, the payment to an eligible producer will be the result of adding (adjusted for the producer's share of the crop):

(1) The lesser of:

(i) The result of multiplying the number of acres certified by the producer as planted to durum wheat on which an eligible fungicide was applied, during the flowering stage, times the per acre national fungicide acquisition payment rate as set by the Deputy Administrator; or

(ii) Fifty percent of the producer's actual cost of purchasing eligible fungicide for acres certified as planted to durum wheat and treated for the applicable crop year in a manner that would otherwise generate a payment under paragraph (a)(1)(i) of this section; plus

(2) The result of multiplying the number of acres certified as planted to durum wheat on which an eligible fungicide was applied during the flowering stage, times the State application per-acre payment rate set by the State committee, with such application payment not to exceed 50

percent of the actual application cost certified to by the producer.

(b) The national fungicide acquisition payment rate set by the Deputy Administrator will be based on 50 percent of the national average cost of eligible fungicide (only including the cost of the chemical itself), applied to one acre of durum wheat for the applicable crop year.

(c) The State application payment rate set by the State committee will be based on 50 percent of the State average cost of applying an eligible fungicide to one acre of durum wheat for the applicable crop year.

§ 1413.109 Refunds, joint and several liability.

(a) Excess payments, payments provided as the result of erroneous information provided by any person, or payments resulting from a failure to comply with any requirement or condition for payment in the application or this subpart, must be refunded to CCC.

(b) A refund required as specified in this section will be due with interest from the date of CCC disbursement and otherwise determined in accordance with paragraph (d) of this section and late payment charges as provided in part 1403 of this chapter.

(c) Persons signing an application for payment as having an interest in an operation will be jointly and severally liable for any refund and related charges found to be due as specified in this section.

(d) Interest will be applicable to any refunds required as specified in parts 792 and 1403 of this title. Such interest will be charged at the rate that the U.S. Department of the Treasury charges CCC for funds, and will accrue from the date CCC made the erroneous payment to the date of repayment.

(e) CCC may waive the accrual of interest if it determines that the cause of the erroneous determination was not due to any action of the person, or was beyond the control of the person committing the violation. Any waiver is at the discretion of CCC alone.

§ 1413.110 Misrepresentation and scheme or device.

(a) In addition to other penalties, sanctions, or remedies as may apply, a producer will be ineligible for payment through the DWQP if the producer is determined by CCC to have:

(1) Adopted any scheme or device that tends to defeat the purpose of the program,

(2) Made any fraudulent representation, or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this subpart to any producer engaged in a misrepresentation, scheme, or device, must be refunded with interest together with such other sums as may become due and all charges including interest will run from the date of disbursement of the CCC funds. Any producer engaged in acts prohibited by this section and any producer receiving payment as specified in this subpart will be jointly and severally liable with other persons or producers involved in such claim for payment for any refund due as specified in this section and for related charges. The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

§ 1413.111 Miscellaneous provisions.

(a) *Other interests.* Any payment to any producer under this part will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government.

(b) *Assignments.* Any producer entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 1404 of this chapter.

(c) *Offsets.* CCC may offset or withhold any amount due to CCC from any benefit provided under this subpart in accordance with the provisions of part 1403 of this chapter and part 792 of this title.

(d) *Violations of highly erodible land and wetland conservation provisions.* The provisions of part 12 of this title apply to this subpart. That part sets out certain conservation requirements as a general condition for farm benefits.

(e) *Violations regarding controlled substances.* The provisions of § 718.6 of this title, which generally limit program payment eligibility for persons who have engaged in certain offenses with respect to controlled substances, will apply to this part.

§ 1413.112 Appeals.

(a) *Appeals.* Appeal regulations set forth at parts 11 and 780 of this title apply to determinations made under this subpart.

(b) *Determinations not eligible for administrative review or appeal.* CCC determinations and policies that are not limited to a specific individual producer's application are not to be construed to be individual program eligibility determinations or adverse decisions and are, therefore, not subject to administrative review or appeal under 7 CFR part 11 or part 780 of this title (but nothing in the regulations for this program will limit the ability of the National Appeals Division to decide its own jurisdiction under part 11). Such determinations include, but are not limited to, application periods, deadlines, crop years, prices, general statutory or regulatory provisions that apply to similarly situated producers, national average payment prices, and payment factors established by CCC for DWQP for which this subpart applies or similar matters requiring CCC determinations.

§ 1413.113 Deceased individuals or dissolved entities.

(a) Payment may be made for an eligible application on behalf of an eligible producer who is now a deceased individual or is a dissolved entity if a representative who currently has authority to enter into a contract on behalf of the producer signs the application for payment.

(b) Legal documents showing proof of authority to sign for the deceased individual or dissolved entity must be provided.

(c) If a producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

§ 760.114 Records and inspections.

(a) Any producer receiving DWQP payments, or any other legal entity or person who provides information for the purposes of enabling a producer to receive a DWQP payment, must:

(1) Maintain any books, records, and accounts supporting the information for 3 years following the end of the year during which the request for payment was submitted, and

(2) Allow authorized representatives of USDA and the U.S. Government Accountability Office, during regular business hours, to inspect, examine, and make copies of such books or records, and to enter the farm and to inspect and verify all applicable acreage in which the producer has an interest for the purpose of confirming the accuracy of information provided by or for the producer.

(b) [Reserved]

Subpart B [Reserved]

Subpart C [Reserved]

Signed in Washington, DC on July 14, 2010.

Jonathan W. Coppess,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2010–17636 Filed 7–19–10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 13, 47, and 91

[Docket No. FAA–2008–0188; Amendment Nos. 13–34, 47–29, 91–318]

RIN 2120–AI89

Re-Registration and Renewal of Aircraft Registration

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends the FAA's regulations concerning aircraft registration. Over a 3-year period, this rule will terminate the registration of all aircraft registered before October 1, 2010, and will require the re-registration of each aircraft to retain U.S. civil aircraft status. These amendments also establish a system for a 3-year recurrent expiration and renewal of registration for all aircraft issued registration certificates on or after October 1, 2010. This final rule amends the FAA's regulations to provide standards for the timely cancellation of registration numbers (N-numbers) for unregistered aircraft. This final rule makes other minor changes to establish consistency and ensure the regulations conform to statute or current Registry practices. These amendments will improve the accuracy of the Civil Aviation Registry database and will ensure that aircraft owners provide information to maintain accurate registration records. These amendments respond to the concerns of law enforcement and other government agencies to provide more accurate, up-to-date aircraft registration information.

DATES: These amendments become effective October 1, 2010.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule contact John Bent, Civil Aviation Registry, AFS–700, FAA Mike Monroney Aeronautical Center, 6500 South MacArthur Boulevard, Oklahoma City, OK 73169; Telephone (405) 954–4331; e-mail *john.g.bent@faa.gov*. For legal questions concerning this final rule contact Robert Hawks, Office of Chief Counsel, (AGC–240); Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; Telephone: (202) 267–7143; e-mail *rob.hawks@faa.gov*.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Chapter 441, Section 44111. Under that section, the FAA is charged with prescribing regulations considered necessary to carry out this part. In that section, Congress mandated the Administrator modify the system for registering and recording aircraft necessary to make the system more effective in serving the needs of its users. The modifications described in this amendment include measures to ensure positive, verifiable, and timely identification of the true owners of aircraft operated in the national airspace system. Thus, these changes are within the scope of the FAA's statutory authority and are a necessary and reasonable exercise of that authority.

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I. Executive Summary

The FAA estimates that approximately one-third of the 357,000 registered aircraft records it maintains are inaccurate and that many aircraft associated with those records are likely ineligible for United States registration. The inaccuracies result from failures in the voluntary compliance based system. Although aircraft owners are required to report the sale of an aircraft, death of an owner, scrapping or destruction of an aircraft, and changes in mailing address; many have not. Without owner initiated action, there has been no means to correct those records. The FAA has been asked by government and law enforcement agencies to provide more accurate and up-to-date aircraft registration information. This rule is intended to support the needs of our system users.

The changes made by this Final Rule provide the FAA Aircraft Registry the tools to improve the currency and accuracy of the Civil Aircraft Registry database and maintain the improvement into the future. Re-registration of all U.S. civil aircraft over a three year period will redraw the Civil Aircraft Register with current data derived from recent contact with aircraft owners. Additionally, the FAA is enabled to cancel the registrations of those aircraft that are not re-registered. These amendments will also ensure that aircraft owners refresh that data by providing information on the status of their aircraft at least once every three years when registration is renewed. The expected reduction in registration data error provided by this rule and the corresponding cost of implementation is shown in the table below with estimates for alternate renewal intervals that were considered.

This rule also eliminates the present Triennial Aircraft Registration Report Program, provides clear time limits and standards for canceling aircraft with registrations that have ended and for which no new registration application has been made or completed. It also makes several administrative changes to conform the regulation to statute and current registration practices.

An NPRM was published in the **Federal Register** on February 28, 2008 (73 FR 10701), requesting input on these goals and the proposed procedures to achieve them. Significant comments addressed concern that the proposed fee for registration renewal, which occurs every third year, would be increased and used as a device to raise revenue:

that the recurrent nature of renewal would create excessive opportunities for administrative failure that would interfere with revenue flights; and that the rule would cause significant new costs for owners, operators and financiers that work with multiple aircraft that had not been accounted for in estimates of the cost of the proposed rule. This final rule is responsive to these and other comments as addressed in the discussion that follows.

SUMMARY OF COSTS AND BENEFITS IN MILLIONS OF 2007 DOLLARS

[Over 20 years]

	Cost	Present value of cost	Benefit
Re-registration and 3-Year Renewal (Triennial Eliminated)	$29.9	$16.3	Reduction in Error Rate by 31%.

Re-registration lowers the error rate from 36.5% to 5.7% for an improvement of 31%.

Renewal every third year maintains this improvement.

II. Background

The Aircraft Registration Branch (the "Registry") is responsible for developing, maintaining, and administering national programs for the registration of United States civil aircraft. First among these responsibilities is maintaining the registration database. The database identifies each registered aircraft by its registration number (N-number), its complete description, and the name and address of its registered owner.

Registration is a prerequisite for obtaining an airworthiness certificate, and together a registration certificate and airworthiness certificate enable operation of an aircraft in U.S. and foreign airspace. The FAA uses the information collected at the time of registration to communicate safety-related information such as Airworthiness Directives to aircraft owners. Similarly, aircraft manufacturers use this information to send out safety notices and other information. The FAA relies on the registration database when responding to an overdue flight or downed aircraft report and when enforcing its regulations. Law enforcement agencies rely on the registration database when investigating improper activities such as drug smuggling. The registration database is used to identify aircraft that could be used by U.S. armed forces. It also is a resource for buyers and sellers of aircraft and for banks that may finance those transactions.

The FAA and other government agencies are increasingly developing sophisticated uses that are enabled by progressing technology. An example is Automatic Detection and Processing Terminal or ADAPT, a program developed by the FAA Strategic Operations Security with the Transportation Security Administration (TSA). (*See* 70 FR 73323, December 9, 2005.) This program continuously draws registration information for combination with other data, satellite feeds, and radar to develop a display of the national airspace complete with the registration status of each aircraft that is operating on a filed flight plan. Using this information, appropriate safety, security, and law enforcement actions can be initiated. The development of the ADAPT program and other safety- and security-related programs demand an accurate database.

Today, approximately one-third of the 357,000 registered aircraft have questionable registrations. There are many causes for this large number of potentially inaccurate aircraft records. Failure to re-register an aircraft after a sale to a new owner, failure to report the death of an owner, failure to report scrapping or destruction of aircraft, and failure to report changes of address erode the accuracy of the records. A requirement for registered owners to notify the Registry of these and other registration-related changes has been part of the registration regulations for many years. The number of questionable records in the registration database grows annually despite these requirements.

In 1988, the FAA mission was expanded to include providing assistance to law enforcement agencies through the passage of the FAA Drug Enforcement Assistance Act of 1988 (the Act) (partially codified at 49 U.S.C. 44111). The Act charged the FAA with making specific modifications to the registration database to more effectively serve the needs of buyers and sellers of aircraft, law enforcement officials, and other users of the system. The FAA has addressed most of the issues identified in the Act and improved service to users through administrative modifications, technology upgrades, and focused enforcement programs. Access to aircraft data and most individual aircraft records is easy and routine.

Although the FAA has worked to keep the registration database accurate and current, the Registry's ability to get timely updates of registration changes from aircraft owners is limited. From March 1970 through January 1978, registered owners were required to file an annual report. Beginning in April 1980, the Triennial Aircraft Registration program required a report from registered owners when 3 years passed without the occurrence of certain aircraft registration activities. Under both programs, failure to send in the required report subjected the aircraft's registration certificate to revocation under 14 CFR part 13.

While a large portion of aircraft owners have and continue to report changes both independently and in response to a report notice, a significant portion of reports continue to be returned as undeliverable or not returned at all. Many orders revoking the prior owner's certificate of registration are returned as undeliverable. Because the new aircraft owner could be operating the aircraft on an ineffective and revoked certificate, the aircraft are kept in the system to prevent reassignment of the N-number to a second active aircraft.

Notwithstanding administrative modifications to the registration system, and enforcement efforts, there is an increasing number of registered aircraft whose status is in question or whose owner cannot be contacted. With approximately one-third of registered aircraft assigned a questionable registration status, the present system of indefinite-duration registration certificates does not achieve the necessary accuracy and currency of aircraft registration data. Modifications to the aircraft registration system must be made to achieve a level of registration data reliability that meets the current and evolving needs of users. The FAA has determined that the most effective method for increasing the accuracy of its records is the establishment of limited-duration aircraft registration with clear standards for canceling N-number assignments when a registration expires or otherwise ends. The 3-year re-registration period will clear the registration database of aircraft with questionable registration.

Recurrent renewal at regular intervals will maintain the improved accuracy.

The NPRM published in the **Federal Register** on February 28, 2008 (73 FR 10701) proposed:

- Expiration of registration for all currently registered aircraft and their re-registration as scheduled over a 3-year period;
- Recurrent expiration and renewal on a 3-year interval of all aircraft registrations issued after the effective date of the proposed rule with a registration renewal process;
- Elimination of the present Triennial Aircraft Registration Report program;
- A 6-month limit on the time an aircraft may remain in the sale reported category without an application being made for registration before its N-number assignment is canceled;
- A 12-month limit on the time an applicant or successive applicants for registration have to complete the registration process, and provisions for reserving the aircraft's N-number if the aircraft is not registered at the end of this time; and,
- Cancellation of the N-number of an aircraft registered under a Dealer's Aircraft Registration Certificate (Dealer's Certificate), if the Dealer's Certificate has expired and application for registration has not been made under § 47.31.

The public comment period closed on May 28, 2008. Late-filed comments posted through June 30, 2008 were accepted for consideration.

III. Summary of Comments

The FAA received 94 comments on the NPRM. The commenters consisted of aviation industry associations, air carriers, banks, finance companies, law firms, and individuals. Most commenters expressed multiple opinions, concerns, and suggestions, which were often repeated by others. Common areas of concern are grouped by subject for response.

IV. Discussion of the Final Rule

A. Aircraft Re-Registration and Periodic Renewal of Registration

As proposed in the NPRM, this rule adopts the expiration and re-registration of all registered aircraft over a 3-year period, followed by the expiration and renewal of aircraft registration at 3-year intervals. This rule establishes the expiration of registration for all aircraft registered before October 1, 2010, and provides for the re-registration of all aircraft over a 3-year period according to the schedule provided in § 47.40(a)(1). It also establishes the recurrent expiration and renewal of registration at 3-year intervals for all aircraft issued registration on or after October 1, 2010, in § 47.40(c). The expiration date printed on the registration certificate of aircraft registered or re-registered after October 1, 2010, will be 3 years from the last day of the month in which registration or re-registration occurred as provided in § 47.40(a) and (b). A renewed aircraft registration will expire 3 years from the previous expiration date in accordance with § 47.40(c). Replacement registration certificates issued on or after October 1, 2010, will display the same expiration date that was shown on the replaced registration certificate. If the replaced registration certificate did not display an expiration date, the replacement certificate will display the expiration date indicated in § 47.40 based on the month of issue of the replaced registration certificate. Replacement certificates are issued after an address update, an N-number change, or the report of a lost or mutilated certificate. A replacement does not constitute re-registration or renewal.

Several commenters, particularly aircraft operators and aviation financing and leasing companies, expressed concern over the re-registration and periodic renewal of registration. Some commenters preferred, as an alternative to the proposal, updating the triennial program by "putting teeth" into its enforcement. This would include enforcing the requirement to return the triennial report even when no change has occurred and imposing fines or canceling registration when there is no compliance. The FAA has considered these alternatives and has determined they would not resolve the issues addressed by this rule. The "teeth" suggested (such as fines or cancellation for an owner not replying to the triennial) are the same options available to the FAA today. In appropriate cases, the FAA has and will continue to pursue enforcement actions as provided for in 14 CFR part 13. However, the purpose of this final rule is to maintain an accurate registry database, and the FAA has determined that re-registration and renewal of all aircraft registrations is the most efficient way to accomplish that purpose.

Existing § 47.51 requires the return of the triennial reports without changes. However, without an effective way of dealing with reports that were not returned or returned as undeliverable, the requirement became an unnecessary expenditure of resources for both the FAA and the public. Consequently, the instructions on the triennial report stated that return was unnecessary if no change had occurred. The FAA has concluded that recurrent registration expiration and renewal is the only way to ensure a regular validation of aircraft registration status and owner contact information. Therefore, as proposed, § 47.51 is removed.

Commercial commenters contended that the FAA underestimated the costs to some aircraft owners because aircraft registration often involves multiple parties. A high percentage of commercial and corporate aircraft, and a large number of general aviation aircraft, are leased to third parties and may be subject to financing agreements. These commenters stated they would need to implement systems to monitor the status of aircraft registrations for re-registration and renewal purposes. They also stated the costs of developing and maintaining such systems would be significant. The costs would include the need to hire an aviation professional to advise on, prepare, and file registration documents. They stated that outside counsel (engaged at a minimum of $350 per hour) would be required to review filings. Also, significant time would be spent by the various parties communicating with each other and with the FAA. Finally, they stated that an appropriate employee (such as a mechanic) must place and document the placement of the registration certificate in the aircraft. The commenters contended the costs associated with taking the actions necessary to comply with the regulations can be substantial for owners, operators, and financial institutions dealing with large aircraft fleets and should have been included in the regulatory evaluation.

The FAA agrees that for certain aircraft owners, the cost in the NPRM was underestimated. The FAA has revised its estimates of recurrent costs to include the time needed to fill out the re-registration or renewal application form, time for a legal review before the owner signs the application, time for the owner to receive a registration certificate and forward it to the aircraft operator, and time for the operator to receive and place the registration certificate in the aircraft. The FAA also has included one-time, start-up costs for documenting in-house re-registration and renewal procedures and the training of key personnel.

Costs for actions not directly imposed by the rule, such as actions a party might take for their own convenience or preference, were not included. Among these were costs for hiring outside personnel to interpret the new rule or assist with re-registration and renewal processing and costs for establishing tracking systems. These were classified as optional tools to assure compliance

that are chosen by the owner or other parties but not directly required by the rule. Many operations already have a tracking system for maintenance or scheduling aircraft. These systems could be modified or adapted to help maintain aircraft registration by those who choose to use this method. New registration certificates will have the expiration dates printed on them to inform the pilot of the approaching expiration. The Registry Web site also will show the expiration date for individual aircraft and list aircraft that are pending re-registration or renewal. Most importantly, aircraft owners who keep their registration address current will receive two timely reminder notices before the scheduled expiration date of their aircraft's registration.

The FAA recalculated the three 20-year scenarios presented in the NPRM to include the additional operating and start-up cost addressed in the previous paragraph. Each scenario starts with the 3-year re-registration followed by 3-, 5-, and 7-year renewal cycles without a triennial program. The chart that follows shows the comparative costs and error rates achieved by these scenarios.

ESTIMATED COSTS AND ERROR RATES FOR RE-REGISTRATION AND RENEWAL

[Over 20 years]

Options	Cost	Present value cost	Error rate (percent)	Inaccurately registered aircraft
Current Program	$8,361,100	$4,428,900	36.5	132,100
Re-registration and 7-Year Renewal (Triennial Eliminated)	7,498,100	5,564,300	21.7	68,900
Re-registration and 5-Year Renewal (Triennial Eliminated)	13,806,600	8,512,700	12.5	37,600
Re-registration and 3-Year Renewal (Triennial Eliminated)	29,946,000	16,264,900	5.7	18,800

After comparing the results of these scenarios, the FAA has determined the best balance between cost and improved accuracy is provided by the 3-year re-registration followed by 3-year renewal cycles and no triennial program. Overall, questionable or erroneous registrations are expected to change from the current total error of approximately 36.5% to a projected total error of approximately 5.7%. While the alternative options cost less, the projected total error rate for each is significantly higher than the 3-year renewal option. The Regulatory Evaluation contains a detailed discussion of how costs were determined with an explanation of the calculations behind these scenarios.

Re-registration of all aircraft and periodic renewal of registration will result in a more accurate database that will benefit all users. Law enforcement and security agencies will have access to more accurate registration records, which should increase their effectiveness in accomplishing their missions. The FAA and manufacturers will realize cost savings when mailing emergency airworthiness directives, safety notices, and surveys to aircraft owners. More reliable notification regarding safety issues should improve aviation safety.

Commenters expressed concern over the opportunity re-registration and periodic renewal creates for administrative error that could ground an aircraft. They believe a renewal interval of 3 years increases this risk. Some commenters suggested a 5-year interval to coincide with fractional contracts or to match Uniform Commercial Code continuation filing. Another commenter suggested a 7-year interval to align with aging aircraft inspections.

The FAA has considered the recommended renewal intervals. However, these events do not relate to, or further the goal of, improving the accuracy of registration information. It is impractical to tie the renewal term to financial events over which the FAA has no control or scheduled inspections that may vary be aircraft. However, the FAA does recognize that regular renewal creates a regulatory obligation that, if missed, could lead to the temporary grounding of an aircraft. To reduce the potential for these events to occur, the FAA is implementing several procedural safeguards introduced in the following discussion.

B. Reminder Notices, Extended Filing Timeframes, and Online Access

The Registry will send owners two reminder notices rather than a single reminder as proposed in the NPRM. The first reminder notice will be sent 180 days before a registration is scheduled to expire. This is 60 days earlier than the 120 days proposed in the NPRM. The reminder will provide basic instructions and identify the aircraft, its expiration date, and the 3-month filing window during which a registration or renewal application should be submitted. Filing the application within the assigned window will enable the new registration certificate to arrive before the old certificate expires. The second reminder notice will be sent at the end of the filing window to owners who have not yet re-registered or renewed registration. The filing window will close 2 months prior to the scheduled expiration date to allow for processing the applications and mailing the new certificates. Applications sent after the filing window closes will still be processed; however, due to processing and mailing times, the aircraft may be without authorization to operate until registration is completed. Section 47.40(a)(1) contains a chart with the schedule established for re-registration. The Registry will post lists on its Web site showing aircraft as they move through the various stages of re-registration and renewal. These changes should help owners keep their aircraft continuously registered and help keep other interested parties informed about the registration status of those aircraft.

In the NPRM, the FAA proposed extending expiration dates past the regulatory expiration date if the FAA or applicant were unable to complete the renewal process in a timely manner. The FAA has concluded that this process would be complicated and costly for both aircraft owners and the Registry. The FAA has determined that moving the first reminder notice and the filing window forward by 2 months and using this additional time for application processing and certificate delivery is a better solution. The earlier filing and additional 2 months for processing provides adequate time for a timely applicant to receive a new registration certificate. The process adopted by this final rule will reduce the uncertainty about registration certificate arrival and the potential burden of coordinating extensions that the proposed process would have created.

The earlier reminder notice and additional processing time also respond

to requests from a few commenters who suggested a temporary operating authority for use with re-registration and renewal applications. The FAA permits temporary operation through the use of the second or "Pink Copy" of the application for registration for a reasonable period of time following a transfer of ownership. Because of statutory limitations, this type of temporary authority cannot be used for re-registration and renewal because these events are not part of a transfer of ownership. Provided an owner files an application for re-registration or renewal in a timely manner during the re-registration and renewal window, an interval of not less than two months will remain on the old certificate. This is sufficient time for an application to be processed and a certificate issued and delivered.

The FAA planned to use the Aircraft Registration Application, AC Form 8050–1 as the application form for aircraft re-registration. To avoid confusion between the normal registration process with its temporary operating authority and the re-registration process, the Aircraft Registration Application, AC Form 8050–1 will not be used for re-registration. A separate application form has been developed and will be available from the Registry at its Web site, *http://registry.faa.gov/renewregistration.* Proposed regulatory language has been changed to keep the two processes separate.

The FAA proposed to require paper forms for all re-registration and to allow online renewal application when no changes were necessary. Several commenters called attention to the convenience and savings that could be achieved with both online re-registration and renewal. One commenter believed that completing the application electronically could save about 25 minutes, providing convenience for owners. Others pointed out the savings in time and costs for the FAA if applications could be processed electronically.

The FAA agrees that online re-registration and electronic processing could reduce costs, but only when there are no changes to be made to the current registration information. Accordingly, the rule provides for both online re-registration and renewal when no changes are required. Extending the online option to those aircraft with information changes to report would be convenient for owners. However, the FAA currently cannot process these information updates electronically. Therefore, at this time, re-registration or renewal applications with updates cannot be made online. However, future online submission is not prohibited by the regulatory text, and we are exploring options for future acceptance of registration information electronically. Regardless of whether information is received electronically or through a paper-based method, address updates and other changes also require review and action by an examiner, so cost savings to the Government in these situations would be minimal or nonexistent.

The changes from the proposed rule discussed to this point extend the timeframes and simplify the procedures of the re-registration and renewal process to the benefit of owners, operators, and the FAA. When these elements of the rule are pulled together re-registration and renewal will operate similarly to the following example.

For the purpose of re-registration, an aircraft registration certificate that does not contain an expiration date and was issued in March of any year has an assigned expiration date of March 31, 2011, as described in § 47.40 of this rule. This example also applies to renewal of an aircraft registration certificate issued with an expiration date of March 31st . On or about October 1, the first reminder notice will be sent to the aircraft owner at the address of record. The notice will remind the owner of the pending expiration and announce that the 3-month filing window will run from November 1st through the last day of January. The notice will include a unique passcode for use with online filing that will be valid until the close of the assigned filing window. It will also provide information for both online and paper form filing. A printable form will be available online and from the Registry. The additional 2 months provided for application processing and certificate delivery run from February 1st through March 31st. Timely applications, meaning those received at the Registry during the filing window, will be processed and issued with sufficient time for the registration certificate to arrive well before expiration on the last day of March. Re-registration and renewal applications that report updates to registration information or are filed after the filing window closes must be made using the paper application. Filing after the end of the 3-month window creates the possibility the new certificate will arrive after the old certificate expires. An owner who has allowed registration to expire may apply for registration in accord with § 47.31, by submitting an Aircraft Registration Application, AC Form 8050–1 and the registration fee identified in § 47.17.

A correct address on file will ensure that the reminder letters will be sent to the aircraft owner and avoid delays and possible loss of registration. There is no fee for updating an address or other information, like a name change, and it can be done at any time during or independent of the registration process.

C. Triennial Aircraft Registration Report No Longer Required

In the NPRM, the FAA proposed to remove § 47.51 and eliminate the requirement for aircraft owners to complete and return a Triennial Aircraft Registration Report. This proposal is adopted without modification in this final rule. The re-registration and renewal requirements adopted in this final rule eliminate the need for the triennial program.

D. Time Limits for Aircraft in Sale Reported and Registration Pending Status

Accuracy and usability of the database require eliminating aircraft from questionable registration statuses such as "Sale Reported" or "Registration Pending." Approximately 17,000 aircraft are reported as sold and have remained in a "Sale Reported" status for more than 6 months. Their registration has ended, but without standards for canceling the assignment of an aircraft registration number, the aircraft remain in the database. With a registration number still assigned, "Sale Reported" aircraft could operate under "Pink Copy" temporary authority at any time if an application for registration is made. Due to normal processing delays, it cannot be known to a system user what the actual status is. Accordingly, "Sale Reported" aircraft are in a perpetually questionable status.

The FAA proposed to implement clear standards for the cancellation of registration number assignments from aircraft with ineffective registration. The basis for these standards is underscored in proposed § 47.15(i). When the ownership of an aircraft is transferred, its registration is no longer effective, and the FAA may cancel the corresponding assignment of registration number. To establish clear time periods in which to complete the registration of a transferred aircraft, proposed § 47.15(i) set forth timelines for cancellation of the assignment of registration number in three ownership transfer scenarios. The FAA will cancel the assignment of registration number if 6 months have passed since notification to the FAA of transfer and no application for registration has been filed. The FAA will cancel the assignment of registration number if 1

year has passed since the application for registration was made, but the applicant or successive applicants have failed to meet the registration requirements of this part. The FAA will cancel the assignment of registration number if 6 months have passed since an aircraft dealer filed evidence of ownership in accord with § 47.67 that did not meet registration requirements, and these requirements have remained unmet. Section 47.15(i) is adopted as proposed in the NPRM without change.

Several commenters thought that automatic cancellation of registration numbers for failing to renew or re-register is a severe penalty. These commenters suggested that the system should accommodate the retention of N-numbers without the complication of an application or fees because it is expensive to put a new N-number on an aircraft.

Section 47.15(i) as adopted provides for the cancellation of an N-number assignment to an aircraft when registration ends. However, the cancellation process is not an automatic action as commenters suggest. When aircraft registration ends, the Registry will wait 30 days to ensure that any recently received requests from the owner have been processed. The Registry will then send a letter about the pending cancellation if a good address for an owner is on file.[1] The letter will inform the owner that the owner may reserve the N-number as provided for in newly adopted § 47.15(j) or register the aircraft under § 47.31 within 60 days from the date of the letter. If a reply is not received within 60 days, the aircraft record will be placed in a work packet and then in queue for an examiner to complete cancellation. If a good address for the aircraft owner is not on file, N-number cancellation will be scheduled for no sooner than 90 days from the date of expiration. During this time, the aircraft will appear on the Registry's webpage list of aircraft pending cancellation. Once cancellation is complete, the N-number will be unavailable for assignment for a period of 5 years in accord with § 47.15(j).

The 5-year hold is related to both safety and customer service. Many aircraft that may be canceled from the registration database belong to owners who have been out of contact with the Registry. These aircraft may be in use or may return to operational status during the next few years. It would be unwise to release an N-number for use on a second aircraft when there is a chance the first aircraft is still operating. The 5-year hold also is responsive to requests from law enforcement agencies. Removing the N-numbers of unregistered aircraft from service for a few years helps them identify and evaluate operating aircraft.

One commenter asked whether the requirement to return expired registration certificates could be modified. The costs to gather and return these certificates could be excessive for owners or operators with large or international fleets. The FAA agrees with this comment and has changed the language of proposed § 47.41(b). Instead of returning an expired registration certificate, the holder must destroy it.

A commenter asked why a limit of 120 days was established for use of the copy of a completed and returned Assignment of Special Registration Numbers, AC Form 8050–64. This commenter suggested a period of 180 days instead.

This form is issued as authority to place a special N-number on a specific aircraft during the next 12 months. Within 5 days of painting the N-number on the aircraft, the form is to be completed with the painting date, signed by the owner, and returned to the Registry. The records will then be updated and a new aircraft registration certificate issued. While waiting for the new certificate, the owner is to keep a copy of the form with the old certificate as authorization to operate with the new N-number. The new certificate should arrive in 60 to 90 days at which time the copy of the form loses its authority. The 12-month and 120-day terms are imposed to establish a specific time limit in response to requests from law enforcement agencies. The FAA chose 120 days to allow response time for the occasional undelivered certificate. Given the time periods required to submit the appropriate documentation and the standard processing time, 180 days is excessive.

E. Conforming Amendments

Since this rule eliminates § 47.51, the rule includes conforming amendments to §§ 13.19 and 13.27 to remove the references to § 47.51. This rule also includes a conforming amendment to § 91.203(a)(2) to eliminate the reference to the "pink copy" of the Aircraft Registration Application.

V. Miscellaneous Comments

A. Re-Registration and Renewal

One commenter suggested sending additional notices to an aircraft's lessee, secured party, or operator as known parties that could ensure re-registration or renewal is accomplished in a timely manner.

The aircraft registration regulations identify the aircraft owner as the responsible party to which the Registry directs any communication. The FAA cannot justify modifying the current system to maintain addresses for parties other than the registered aircraft owner. Identifying these other interested parties might require the FAA to perform a title review of each aircraft's records, which contradicts the registered owner's duty to comply with all obligations it may have under leases, security agreements, or other contracts. Additionally, a system of secondary addresses would create a maintenance burden to keep these addresses current.

One commenter stated that it is not clear how this proposal would create a net time savings for any party as the cost/benefit analysis claims.

Neither the discussion in the NPRM nor the cost/benefit analysis claimed that there would be a net time savings for any party.

One commenter suggested that the FAA review the proposal and analyze its impact on foreign airlines and for conformity with other registration requirements and commitments, such as the Cape Town Convention on International Interests in Mobile Equipment.

The FAA agrees that U.S. civil aircraft operated internationally must comply with FAA as well as foreign operational standards. Leases often state that the lessee will comply with applicable regulations and laws present and future. The U.S. aircraft registration certificate conforms to the model certificate provided by the International Civil Aviation Organization. The addition of an expiration date is an enhancement over the basic requirement. This difference provides more confidence to foreign officials that the aircraft is properly registered. Validating registration and placing a renewal certificate in a U.S. registered aircraft operated in another country has little chance of conflicting with international commitments. This rule has no effect on the Cape Town Convention.

B. Risks and Disruption

Many commenters expressed concern with the time, personnel, and administrative costs associated with implementing the rule as proposed. These commenters thought the increase in workload at the Registry would result in critical backlogs that would negatively affect both normal and rule-related work.

The FAA understands that confidence in the success of this final rule rests on

[1] The Registry has a status it assigns to aircraft records that have had mail returned as undeliverable.

the ability of the Registry to perform without excessive backlogs. A portion of the new work will be offset by the elimination of the triennial report program. Recent staffing changes and upgrades to the electronic documents processing systems will help streamline the new workload. Additionally, online "no-change" re-registration application filing and fee payments will be available. No critical backlogs in re-registration, renewal, or normal workload are expected as a result of this final rule.

Several lessees commented that lenders might modify contract covenants to require additional reports and assurances, or possibly withdraw from lending due to the real or perceived increase in uncertainty created by the proposed rule.

This final rule creates certainty in the registry database. Lenders, insurers, and other interested parties will now be able to verify whether the aircraft owner is complying with any registration terms and conditions contained in those private contracts. The FAA believes this rule will not be a factor in lenders deciding whether to finance aircraft transactions. Verifying or demonstrating successful re-registration or renewal may be done using the searchable aircraft information feature on the FAA Web site. The display for each aircraft will show the issue date for its certificate as well as the next expiration date. Owners can download the registration database and create reports or populate their own fleet management databases. Reports could then be transmitted to a lender. With this information available on the Web site, and the 180-day and 60-day notices of expiration sent to the aircraft owner, investor confidence in the U.S. aviation industry should remain essentially unchanged by the implementation of this final rule.

Several commenters stated that expired registration could result in litigation because the ownership of the aircraft could be questioned. Specifically, these commenters were concerned that security interests filed against the aircraft could be held invalid or subordinate, thus exposing banks and other lenders to economic losses.

The FAA has determined this final rule will have no impact on priorities established by recording those interests at the FAA's Aircraft Registry. The United States ratified the Cape Town Convention which, in addition to other items, established an International Registry for registering covered interests in most commercial-sized aircraft. Article 29 of the Cape Town Convention firmly establishes that "a registered interest has priority over any other interest subsequently registered and over an unregistered interest." The continued priority of an interest established by registering that interest with the International Registry is not dependent upon continued United States civil aircraft registration. For aircraft not covered by the Cape Town Convention, security interests properly filed and recorded at the FAA's Aircraft Registry are arguably provided perpetual validity without further recording. Registration expiration does not change the ownership or otherwise affect interests in an aircraft, but private contract terms may affect those interests. The records for all aircraft that are currently on, or have been on, the United States aircraft registry are permanent records and will remain available for review regardless of registration status.

Several commenters stated that expired registration could leave an aircraft without insurance coverage protecting its owner, lenders, lessee, and passengers. Commenters suggest that if an aircraft registration inadvertently expires, the insurance company might take the position that all or some coverage does not apply.

The FAA is aware that the renewal requirements of the final rule create a recurring event with which an aircraft owner may fail to comply. The additional reminder notice and enhanced registration information available on the Registry Web site should reduce the likelihood of an inadvertent failure to maintain registration. Aircraft owners who keep their addresses up-to-date, respond promptly to the reminder notices, and alert their pilots not to operate aircraft with expired certificates should avoid operating without current registration.

A large number of commenters thought that a lessor, particularly a 'passive' owner-trustee lessor for multiple aircraft, could become liable to the lessee and investors if the lessor failed to obtain renewal certificates and provide them to a lessee in time to place them into the aircraft before expiration. The lessor also might have difficulty collecting any renewal fees fronted for its lessee.

As stated in 49 U.S.C. chapter 441, only the owner of an aircraft is eligible to apply for registration. An owner's choice to assume a passive role does not relieve it of its duties to comply with all applicable registration regulations. The FAA cannot justify tailoring the registration regulations to accommodate owners who choose to assume a passive role. As discussed previously, the FAA has modified this final rule so an owner will have sufficient time to obtain a re-registration or renewal certificate and forward it to the lessee for placement in the aircraft before the old certificate expires.

C. Fees, User Fees, New Taxes

Several commenters saw this rulemaking as an excuse to collect a recurring user fee or tax. Others acknowledged that the current $5 registration fee is too low. Some contended the $45 and $130 fees proposed in the FAA Reauthorization bill were too high, arguing that an equitable fee would be lower. Some express concern the $130 fee would apply every 3 years, claiming that fee is too burdensome. One commenter saw the registration fee as a penalty for those who are late in meeting the deadline for re-registration. Another commenter offered that the full costs of aviation need to be assumed by those rich enough to buy and fly planes, not the general taxpayers.

The NPRM proposed a $5.00 re-registration and renewal fee. This is a new and recurring fee which matches the current registration fee, even though it is less than the estimated direct cost of processing re-registration and renewal actions. The Federal Aviation Administration Reauthorization bill (H.R. 915), if enacted as passed by the House of Representatives on May 21, 2009, will provide the authority to increase registration-related fees. The projected fees are higher than current fees but reflect only the direct and applicable indirect unit costs of the FAA Registry's Aircraft Registration Branch. The $130 registration fee projected in the legislation would not apply as the fee for re-registration or renewal. If estimated by the same method used for the reauthorization bill, the fee for re-registration and renewal would be about $45. Neither the reauthorization bill, nor the NPRM, proposed a registration fee that includes a tax, user fee, or charge to generate revenue for purposes other than maintaining an accurate aircraft registration database.

Two commenters contended the increase in registration and renewal fees might raise the cost of learning to fly beyond the means of some students or otherwise discourage individuals from flying.

The FAA does not believe that these higher fees would cause students not to be able to learn to fly. Because this fee would be paid by aircraft owners, the costs could be prorated among flight instruction sessions. Costs for each student pilot would then be negligible.

One commenter proposed a sliding scale for people who have more than one aircraft. Another mentioned that these fees would affect general aviation more severely than airlines. This same commenter notes that the registration fee for cars is reduced as the car ages. Another requested the registration fee be tied to the aircraft's certificated gross weight or type certification.

The fees discussed are based on the costs to process aircraft registration, re-registration, or renewal. These costs are the same for all aircraft. Therefore, the use of sliding scales, number of aircraft owned, weight, type, age, or value of an aircraft to determine a fee would be inconsistent with the cost recovery nature of the fee.

Many commenters characterized the proposed rule as, "penalizing the law abiding citizens who provide the information required by the Government." They suggest that the FAA penalize those who do not comply and raise revenue through punitive actions focusing on the noncompliant parties.

The FAA does not seek to penalize the innocent and appreciates those aircraft owners who have made a conscientious effort to promptly report any changes in their addresses or the statuses of their aircraft. As discussed earlier, many changes go unreported each year. In light of the arguments presented in the NPRM and this final rule, recurrent expiration and renewal of aircraft registration is the only identified option that can clear accumulated error from the registration records and maintain it at an acceptable level.

D. Alternatives Suggested by Commenters

Several commenters suggested that registration is or can be inspected as part of an aircraft's annual inspection.

Only the aircraft owner has the knowledge sufficient to review, update, and affirm the validity of an aircraft's registration information. Therefore, the FAA has concluded that it is inappropriate to include verification of registration as part of an annual inspection, which may not involve the participation of the aircraft owner.

One commenter suggested a one-stop FAA address change program, and another suggested that the time given to report an address change be extended from 30 to 90 days.

The FAA processes multiple address change requests when these requests indicate the offices that need to be notified. For example, if a pilot provides an address update and indicates that it also affects a specific aircraft that the pilot owns, the FAA updates both the airmen and aircraft databases. Similarly, the Web page for Airmen Certification address updates has a reminder message for pilots to also update any affected aircraft records with a link to instructions on how to do this. The Registry accepts and processes address updates whenever they are reported. Extending the timeframe from 30 to 90 days would not lower the incidence of bad addresses on file. It could however, lower the perception that it is important to promptly report address and other registration changes.

Several commenters suggested the FAA should capture address changes from maintenance forms, DOT Form 6410, the State Registries, the Airmen database, and from spot checks conducted by Airworthiness Inspectors.

The Registry has routinely made use of alternate resources to locate possible current addresses. A few of these include the Airmen Certification files, the U.S. Postal Service Change of Address database, returned surveys, and airworthiness directive forms. The Registry uses addresses from these alternate sources to contact aircraft owners and ask them to verify the correct registration address. It should be noted that while the FAA may be able to locate an aircraft's registered owner, changes to the registration information maintained on their aircraft can be authorized only by the owner.

A few commenters suggested that a title system for aircraft would provide better information.

The commenters did not offer any insight into how a title system would provide better information than the existing Certificate of Registration system as modified by this final rule. The FAA is authorized to modify its system to include a system of titling aircraft. (*See* 49 U.S.C. 44111(c)(1).) However, the costs of converting to a titling system would likely far outweigh any benefits that would be derived. Even with a titling system, some form of initial and periodic updating of information would still be necessary to obtain and maintain the level of accuracy this final rule will provide.

Several commenters suggested exempting aircraft documented on Parts 121 and 135 maintenance certificates or operated by Fractional or Flight Department Operations.

Exempting any class of registered aircraft would reduce the effectiveness of this rule. All categories of aircraft contribute to the registration errors this rule seeks to correct and prevent from accumulating in the future. Exempting any group of registered aircraft would also require the FAA to operate dual registries, which is operationally impractical.

There were a few suggestions that proposed exempting general aviation aircraft, because "they are too small to be a security risk" or "terrorists use big airplanes."

The FAA does not agree. Large aircraft are operated as general aviation aircraft and all aircraft, regardless of size, are important enough to be furnished current safety information. Also, many small and medium-sized aircraft have been found suitable for drug running and similar activities of interest to law enforcement agencies.

Two commenters requested flexibility in choosing renewal dates.

This suggestion was not accepted. Allowing the choice of renewal date would unnecessarily complicate both the workflow of registration renewal and the overall management of the program. Keeping renewal dates linked to an aircraft's registration date ensures that the Registry's workload will occur evenly through the year eliminating potential recurring seasonal backlogs.

One commenter asked the FAA to drop enforcement of the recent change to Section 47.41(b)(3), which requires return of registration certificates within 21 days of termination of registration. This requirement creates a labor-intensive chore when a fleet of aircraft changes hands.

The FAA rejects the commenter's suggestion. The 21 days allowed for the return of an ineffective registration certificate provides a definite and reasonable timeframe to take this action. However, to avoid creating any additional burden, this final rule has changed § 47.41(b)(3) to direct the holder to destroy an expired registration certificate rather than return it to the FAA.

One commenter suggested moving the "Sale Reported" time limit from § 47.15(i)(4) to § 47.35, Aircraft Last Previously Registered in the United States. This would enable a new owner to see at a glance what their certificate requirements are.

The FAA has determined that § 47.15(i), which addresses the 6-month interval between filing an aircraft "Sale Reported" notice and N-number cancellation, is in the appropriate location. Section 47.35 refers the reader to § 47.15 and other sections with which the new owner must comply. Owners are encouraged to review all of part 47 to ensure compliance with registration regulations.

One commenter suggested that an N-number assignment for aircraft entering or re-entering the U.S. registration system should be valid for 180 days

instead of the 90 days presently allowed.

The FAA does not agree. These assignments are made to aircraft that are entering the U.S. registration system and need an N-number to place on their application and supporting documentation. Time is needed only for entering the N-number on their documents, delivering them to the Registry, and for registration processing time. If a delay arises that is out of the applicant's control, the applicant may apply for an extension. Because these aircraft may not operate until a registration certificate is issued, these applications receive priority processing. If a longer lead time is needed, the owner is encouraged to reserve an N-number and make application for assignment at the appropriate time.

One commenter, both a pilot and air traffic controller, cautions that under no circumstances should a controller be concerned with Part 47, nor should an aircraft in flight be denied air traffic service and support.

This rule concerns re-registration, registration, and renewal of aircraft registration certificates. It is not intended to address air traffic control issues.

Several commenters suggested the FAA should require re-registration and renewal applicants to report total airframe flight hours from a specific date with an estimated breakdown of that time by primary mission areas or types of operation. The data collected would enhance safety research and measurement of safety improvement.

This suggestion is beyond the scope of this final rule.

One commenter, an aviation parts provider and Supplemental Type Certificate holder, requests that a primary key be assigned to aircraft records available for download from the Registry's Web site. This would enable data users to track individual records through successive downloads even if N-numbers, model names, or serial numbers change and track which of their products are in use on these aircraft. Similar benefits would be available to manufacturers, government, and law enforcement agencies depending on their applications.

Although this suggestion is beyond the scope of this final rule, it will be forwarded to the appropriate FAA organization for consideration.

One commenter proposed revising § 47.33(a)(2) to allow use of an invoice from a kit manufacturer as evidence of ownership equal to a bill of sale.

This proposal is beyond the scope of this rule. Section 47.33(b) provides an alternative method of establishing aircraft ownership.

One commenter proposed replacing the annual inspection requirement for noncommercial aircraft with an inspection requirement based on a combination of flight hours and time since last inspection. The longest interval before inspection would be 3 years. This would save time and money for the many aircraft owners of low use aircraft without affecting safety.

This proposal is beyond the scope of this rule. The commenter may submit this proposal as its own project in accord with CFR 14 Part 11 Basic Rulemaking Procedures.

One commenter representing a finance company disagreed with the need for additional disclosures in financing documents. The current level of required exposure allows competitors to undercut each others deals, reducing income margins for finance companies.

This proposal is beyond the scope of this rule.

VI. Rulemaking Notices and Analyses

A. Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted a copy of the new information collection requirements in this final rule to the Office of Management and Budget (OMB) for its review. OMB assigned OMB Control Number 2120–0729. An agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

A description of the annual burden is shown below.

Description of Respondents: The likely respondents to the information requirements in this final rule are all aircraft owners who want to continue registration past the expiration date on their Certificate. The FAA estimates the number of renewals will be 65,719 annually; however, the number of aircraft owners and the signature requirements for each aircraft vary depending on the registration type (*e.g.,* individual, partnership, government, or co-ownership).

Estimated Burden: Over 20 years, the FAA estimates 1,308,873 forms will be processed. Of these forms, 191,652 will be for re-registration and 1,117,221 will be for renewal. As described in the Regulatory Evaluation, the FAA estimates its own processing costs will be $9.10 and $5.82, respectively, per form. Over 20 years, these costs sum to $8,246,259.42 (calculation: 191,652 times $9.10 plus 1,117,221 times $5.82), for an annual cost of $412,312.97 (calculation: $8,246,259.42 divided by 20). The FAA estimates that it will take 0.185 hours to process each re-registration form and 0.122 hours to process each renewal form. This difference comes from the FAA's assumption that the percentage of owners making application on the Internet will increase in later years, lowering the processing time for renewals. Over 20 years, the time to process all the re-registration and the renewals forms equals 35,455.62 (35,455.62 = .185 × 191,652) hours and 136,300.98 (136,300.98 = .122 × 1,117,221) hours respectively, for a total burden of 171,756.60 hours, and an average annual burden of 8,587.83 hours.

B. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices.

ICAO Standards set forth a model registration certificate. The FAA's certificate of registration will exceed the standards in that model because it will include an expiration date.

C. Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Regulatory Flexibility Determination

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final

rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule. We suggest readers seeking greater detail read the full regulatory evaluation, a copy of which we have placed in the docket for this rulemaking.

In conducting these analyses, FAA has determined that this rule: (1) Has benefits that justify its costs, (2) is not an "economically significant regulatory action" but is a "significant regulatory action" for other reasons as defined in section 3(f) of Executive Order 12866, (3) is "significant" as defined in DOT's Regulatory Policies and Procedures; (4) will not have a significant economic impact on a substantial number of small entities; (5) will not create unnecessary obstacles to the foreign commerce of the United States; and (6) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

Summary

Total Costs and Benefits of this Rulemaking

SUMMARY OF COSTS AND BENEFITS IN MILLIONS OF 2007 DOLLARS

[Over 20 years]

	Cost	Present value of cost	Benefit
Re-registration and 3-Year Renewal (Triennial Eliminated)	$29.9	$16.3	Reduction in Error Rate by 31%.

This rule will mandate that all aircraft owners reregister their aircraft over a 3-year period, and then renew these registrations on a 3-year basis. Total estimated costs, over 20 years is $29.9 million ($16.3 million, present value). These costs include both the costs to aircraft owners as well as processing costs for the Civil Aircraft Registry and include costs savings from the elimination of the Triennial Program.

The primary benefit of this rulemaking will be the increased accuracy of the records within the Aircraft Registry. Currently, approximately one third of registered aircraft information is incorrect. The FAA has concluded that the level of accuracy in the system of records must be significantly improved in order to better serve the needs of the users of the system as well as support its own operations. Benefits will accrue from improving the database as well as improving the data collection process.

Who is potentially affected by this rulemaking?

Private Sector

There are currently about 357,000 registered aircraft, of which about 241,000 are active aircraft. The FAA expects about 245,000 aircraft to reregister and then, every 3 years, renew their certificate. The FAA also expects between an additional 3,424 new aircraft to register each year.

Government

This rule will increase the workload on the Civil Aviation Registry, which will have to process an additional 1.3 million renewal and registration certificates over a 20-year period. However, this additional work will be partially offset by the elimination of the Triennial Aircraft Registration Program.

Our Cost Assumptions and Sources of Information

- *Discount rate—7%;*
- *Period of analysis—2010 through 2029;*
- All monetary values are expressed in 2007 dollars;
- The FAA based projections on a 1.4% annual growth rate
- The FAA will use the following unit costs:

(a) $5—fee per aircraft for both re-registration and renewal

(b) $37.20—hourly rate of an aircraft owner's time

(c) $9.10—FAA processing costs for re-registration per applicant

(d) $5.82—FAA processing costs for renewal per applicant

(e) $1.63—FAA processing costs for the Triennial Program for each notice sent

(f) $16.80—FAA processing costs for the Triennial Program per reply

Benefits of This Rulemaking

The primary benefit of this rulemaking will be the increased accuracy of the records within the Aircraft Registry. Currently, over one third of registered aircraft information is incorrect. Inaccurate records have many negative consequences. For example, FAA uses aircraft records to identify owners of specific aircraft so that safety related information, such as airworthiness directives (ADs), can be delivered to those owners, but because of inaccuracies, many safety-related mailings are returned without delivery. Aircraft manufacturers also use aircraft records for the same reasons, to send out safety-related information. Law enforcement and security agencies rely upon FAA's aircraft records to identify and locate owners of aircraft.

The FAA has concluded that the level of accuracy in the system of records must be significantly improved in order to better serve the needs of the users of the system as well as support its own operations. Specifically, benefits will accrue from improving the database as well as improving the data collection process. The benefits from improving the Registry database include cost savings, better service for aircraft owners, and help with law enforcement. The benefits to be realized by improving the data collection process also include cost savings as well as a more accurate response rate.

Costs of This Rulemaking

This rulemaking requires that all aircraft owners will have to re-register their aircraft during a 3-year period, that all aircraft registrations will need to be renewed every 3 years, and that the present Triennial Program is eliminated in its entirety.

The FAA estimates that approximately 244,600 aircraft will each go through the re-registration process, and so will be issued a new registration certificate. Following re-registration aircraft will renew their registration every 3 years. In calculating the costs of the rule, the FAA counts the number of aircraft transactions that result from either re-registration or renewal. Moreover, FAA did not include the cost of normal course of business registrations and the $5 fee because the fee is an economic transfer. These costs are recognized in a separate section in the rule but are not included in the total cost of the rule.

The FAA estimates that over 20 years the Registry will process 1.3 million certificate actions, composed of re-registration and renewal. However, the Registry will achieve cost savings with the elimination of the Triennial Program. Over 20 years, the rule replaces the current system with a 3-year re-registration program, followed by a 3-year renewal cycle that is estimated to cost $29.9 million ($16.3 million, present value).

Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule will affect all aircraft owners, through part 47, as all aircraft owners will be required to reregister and then periodically renew their aircraft. There will be a substantial number of small entities. However, the cost to small entities will be negligible. The total cost per certificate to an aircraft owner is about $24, which includes the value of time to complete the form plus the $5 registration fee. An aircraft owner will renew his or her certificate, on average, six more times over a 20-year period for a total of seven certificate actions. Seven certificate actions will result in costs of $168 over 20 years for an average cost of $8 per year. In addition, the FAA did not receive comments on the regulatory flexibility analysis. Therefore, as Administrator of the FAA, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

International Trade Analysis

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will have only a domestic impact and therefore will not create unnecessary obstacles to the foreign commerce of the United States.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (the Act) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million.

This rule does not contain such a mandate. The requirements of Title II do not apply.

D. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The FAA has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

E. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312(d) and involves no extraordinary circumstances.

F. Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The FAA has determined that it is not a "significant regulatory action" under the executive order because, while a "significant regulatory action" under Executive Order 12866, and DOT's Regulatory Policies and Procedures, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

G. Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/;* or

3. Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

H. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. You can find out more about SBREFA on the Internet at *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects

14 CFR Part 13

Administrative practice and procedure, air transportation, Investigations, Law enforcement, Penalties.

14 CFR Part 47

Aircraft, Reporting and recordkeeping requirements.

14 CFR Part 91

Aircraft.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 1. The authority citation for part 13 continues to read as follows:

Authority: 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 106(g), 5121–5128, 40113–40114, 44103–44106, 44702–44703, 44709–44710, 44713, 46101–46111, 46301, 46302 (for a violation of 49 U.S.C. 46504), 46304–46316, 46318, 46501–46502, 46504–46507, 47106, 47107, 47111, 47122, 47306, 47531–47532; 49 CFR 1.47.

■ 2. Revise the fourth sentence of paragraph (b) of § 13.19 to read as follows:

§ 13.19 Certificate action.

* * * * *

(b) * * * If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration, the Administrator issues an order suspending or revoking that certificate. * * *

* * * * *

■ 3. Revise paragraph (a) of § 13.27 to read as follows:

§ 13.27 Final order of Hearing Officer in certificate of aircraft registration proceedings.

(a) If, in proceedings under section 501(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1401), the Hearing Officer determines that the aircraft is ineligible for a Certificate of Aircraft Registration, the Hearing Officer shall suspend or revoke the respondent's certificate, as proposed in the notice of proposed certificate action.

* * * * *

PART 47—AIRCRAFT REGISTRATION

■ 4. The authority citation for part 47 continues to read as follows:

Authority: 4 U.S.T. 1830; Pub. L. 108–297, 118 Stat. 1095 (49 U.S.C. 40101 note, 49 U.S.C. 44101 note); 49 U.S.C. 106(g), 40113–40114, 44101–44108, 44110–44113, 44703–44704, 44713, 45302, 46104, 46301.

Part 47—[Nomenclature change]

■ 5. Amend 14 CFR part 47 by removing the words "FAA Aircraft Registry" and "FAA Registry" wherever they appear and adding, in their place, the word "Registry".

§§ 47.5, 47.7, 47.9, 47.11, 47.35, and 47.37 [Amended]

■ 6. Amend 14 CFR part 47 by removing the words "Application for Aircraft Registration" and "application" and adding, in their place, the words "Aircraft Registration Application, AC Form 8050–1" in the following places:

■ a. § 47.5(a)
■ b. § 47.7(a)
■ c. § 47.9(a) introductory text
■ d. § 47.11 (introductory text)
■ e. § 47.35(a) introductory text
■ f. § 47.37(a)(2)

§§ 47.5, 47.7, and 47.11 [Amended]

■ 7. Amend 14 CFR part 47 by removing the words "Application for Aircraft Registration" and "application" and adding, in their place, the words "Aircraft Registration Application" in the following places:

■ a. § 47.5(c)
■ b. § 47.7(c)(2) introductory text
■ c. § 47.11(h)

§§ 47.5, 47.7, 47.8, 47.11, 47.31, and 47.43 [Amended]

■ 8. Amend 14 CFR part 47 by removing the words "Certificate of Aircraft Registration" and "registration certificate" and adding in their place, the words "Certificate of Aircraft Registration, AC Form 8050–3" in the following places:

■ a. § 47.5(c)
■ b. § 47.7(d) introductory text
■ c. § 47.8(c)
■ d. § 47.11(e)
■ e. § 47.31(a) introductory text
■ f. § 47.43 (b)

§§ 47.9, 47.33, and 47.35 [Amended]

■ 9. Amend 14 CFR part 47 by removing the word "Administrator" and adding, in its place, the word "FAA" in the following places:

■ a. § 47.9(e)
■ b. § 47.33(b) and 47.33(d)
■ c. § 47.35(b)

■ 10. Revise § 47.1 to read as follows:

§ 47.1 Applicability.

This part prescribes the requirements for registering aircraft under 49 U.S.C. 44101–44104. Subpart B applies to each applicant for, and holder of, a Certificate of Aircraft Registration, AC Form 8050–3. Subpart C applies to each applicant for, and holder of, a Dealer's Aircraft Registration Certificate, AC Form 8050–6.

■ 11. Amend § 47.2 by adding the definition of "Registry" in alphabetical order and by revising paragraphs (2) and (3) of the definition of "U.S. citizen" to read as follows:

§ 47.2 Definitions.

* * * * *

Registry means the FAA, Civil Aviation Registry, Aircraft Registration Branch.

* * * * *

U.S. citizen * * *

(2) A partnership each of whose partners is an individual who is a citizen of the United States.

(3) A corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

■ 12. Amend § 47.3 by:

■ a. Removing the citation "§ 47.31(b)" where it appears in paragraph (b)(2) and adding in its place the citation "§ 47.31(c)"; and

■ b. Revising paragraph (a) to read as follows:

§ 47.3 Registration required.

(a) An aircraft may be registered under 49 U.S.C. 44103 only when the aircraft is not registered under the laws of a foreign country and is—

(1) Owned by a citizen of the United States;

(2) Owned by an individual citizen of a foreign country lawfully admitted for

permanent residence in the United States;

(3) Owned by a corporation not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a State within the United States, and the aircraft is based and primarily used in the United States; or

(4) An aircraft of—

(i) The United States Government; or

(ii) A State, the District of Columbia, a territory or possession of the United States, or a political subdivision of a State, territory, or possession.

* * * * *

■ 13. Revise the first sentence of § 47.7(d) introductory text to read as follows:

§ 47.7 United States citizens and resident aliens.

* * * * *

(d) *Partnerships.* A partnership may apply for a Certificate of Aircraft Registration, AC Form 8050–3, under 49 U.S.C. 44102 only if each partner, whether a general or limited partner, is an individual who is a citizen of the United States. * * *

* * * * *

§ 47.8 [Amended]

■ 14. Amend § 47.8(c) by removing the citation "§ 47.41(a)(5)" and adding, in its place, the citation "§ 47.41(a)(3)".

§ 47.11 [Amended]

■ 15. Amend § 47.11(b)(1) by removing the words "certificate of repossession on FAA Form 8050–4" and adding, in its place, the words "Certificate of Repossession of Encumbered Aircraft, FAA Form 8050–4".

■ 16. Amend § 47.13 by revising paragraphs (a) through (f) to read as follows:

§ 47.13 Signatures and instruments made by representatives.

(a) Each person signing an Aircraft Registration Application, AC Form 8050–1, or a document submitted as supporting evidence under this part, must sign in ink or by other means acceptable to the FAA. If signed in ink, the Aircraft Registration Application must also have the typed or legibly printed name of each signer in the signature block.

(b) When one or more persons doing business under a trade name submits an Aircraft Registration Application, a document submitted as supporting evidence under this part, or a request for cancellation of a Certificate of Aircraft Registration, AC Form 8050–3, the application, document, or request must be signed by, or on behalf of, each person who shares title to the aircraft.

(c) When an agent submits an Aircraft Registration Application, a document submitted as supporting evidence under this part, or a request for cancellation of a Certificate of Aircraft Registration, on behalf of the owner, that agent must—

(1) State the name of the owner on the application, document, or request;

(2) Sign as agent or attorney-in-fact on the application, document, or request; and

(3) Submit a signed power of attorney, or a true copy thereof certified under § 49.21 of this chapter, with the application, document, or request.

(d) When a corporation submits an Aircraft Registration Application, a document submitted as supporting evidence under this part, or a request for cancellation of a Certificate of Aircraft Registration, it must—

(1) Have an authorized person sign, by means acceptable to the FAA, the application, document, or request;

(2) Show the title of the signer's office on the application, document, or request; and

(3) Submit a copy of the authorization from the board of directors to sign for the corporation, certified as true under § 49.21 of this chapter by a corporate officer or other person in a managerial position therein, with the application, document, or request, unless—

(i) The signer of the application, document, or request is a corporate officer or other person in a managerial position in the corporation and the title of his office is stated in connection with his signature; or

(ii) A valid authorization to sign is on file at the Registry.

(4) The provisions of paragraph (d)(3) of this section do not apply to an irrevocable deregistration and export request authorization when an irrevocable deregistration and export request authorization under the Cape Town Treaty is signed by a corporate officer and is filed with the Registry.

(e) When a partnership submits an Aircraft Registration Application, a document submitted as supporting evidence under this part, or a request for cancellation of a Certificate of Aircraft Registration, it must—

(1) State the full name of the partnership on the application, document, or request;

(2) State the name of each general partner on the application, document, or request; and

(3) Have a general partner sign the application, document, or request.

(f) When co-owners, who are not engaged in business as partners, submit an Aircraft Registration Application, a document submitted as supporting evidence under this part, or a request for cancellation of a Certificate of Aircraft Registration, each person who shares title to the aircraft under the arrangement must sign the application, document, or request.

* * * * *

■ 17. Amend § 47.15 by:

■ a. Removing the word "identification" wherever it appears, including the section heading, and adding, in its place the word "registration";

■ b. Revising paragraphs (a) introductory text, (a)(2), (c), the first sentence of paragraph (d), and (f);

■ c. Redesignating the undesignated paragraph following paragraph (a)(3) as (a)(4) and revising it; and

■ d. Adding paragraphs (i) and (j) to read as set forth below.

§ 47.15 Registration number.

(a) *Number required.* An applicant for aircraft registration must place a U.S. registration number (registration mark) on the Aircraft Registration Application, AC Form 8050–1, and on any evidence submitted with the application. There is no charge for the assignment of numbers provided in this paragraph. This paragraph does not apply to an aircraft manufacturer who applies for a group of U.S. registration numbers under paragraph (c) of this section; a person who applies for a special registration number under paragraphs (d) through (f) of this section; or a holder of a Dealer's Aircraft Registration Certificate, AC Form 8050–6, who applies for a temporary registration number under 47.16.

* * * * *

(2) *Aircraft last previously registered in the United States.* Unless the applicant applies for a different number under paragraphs (d) through (f) of this section, the applicant must place the U.S. registration number that is already assigned to the aircraft on the Aircraft Registration Application, and the supporting evidence. If there is no number assigned, the applicant must obtain a U.S. registration number from the Registry by making a written request that describes the aircraft by make, model, and serial number.

* * * * *

(4) *Duration of a U.S. registration number assignment.* Authority to use the registration number obtained under paragraph (a)(1), (2), or (3) of this section expires 90 days after the date it is issued unless the applicant submits an Aircraft Registration Application and complies with § 47.33 or § 47.37, as applicable, within that period of time. However, the applicant may obtain an extension of this 90-day period from the Registry if the applicant shows that the

delay in complying with that section is due to circumstances beyond the applicant's control.

* * * * *

(c) An aircraft manufacturer may apply to the Registry for enough U.S. registration numbers to supply estimated production for the next 18 months. There is no charge for this allocation of numbers.

(d) Any available, unassigned U.S. registration number may be assigned as a special registration number. * * *

* * * * *

(f) The Registry authorizes a special registration number change on the Assignment of Special Registration Numbers, AC Form 8050–64. The authorization expires one year from the date the Registry issues an Assignment of Special Registration Numbers unless the special registration number is permanently placed on the aircraft. Within five days after the special registration number is placed on the aircraft, the owner must complete and sign the Assignment of Special Registration Numbers, state the date the number was placed on the aircraft, and return the original form to the Registry. The duplicate of the Assignment of Special Registration Numbers and the present Certificate of Aircraft Registration, AC Form 8050–3, must be carried in the aircraft as temporary authority to operate it. This temporary authority is valid until the date the owner receives the revised Certificate of Aircraft Registration showing the new registration number, but in no case is it valid for more than 120 days from the date the number is placed on the aircraft.

* * * * *

(i) When aircraft registration has ended, as described in § 47.41(a), the assignment of a registration number to an aircraft is no longer authorized for use except as provided in § 47.31(c) and will be cancelled:

(1) Following the date established in § 47.40(a)(1) for any aircraft that has not been re-registered under § 47.40(a);

(2) Following the expiration date shown on the Certificate of Aircraft Registration for any aircraft whose registration has not been renewed under § 47.40(c);

(3) Following the expiration date shown on the Dealer's Aircraft Registration Certificate, AC Form 8050–6, for any aircraft registered under Subpart C of this part, when the certificate has not been renewed, and the owner has not applied for registration in accordance with § 47.31; or

(4) When ownership has transferred—

(i) Six months after first receipt of notice of aircraft sale or evidence of ownership from the last registered owner or successive owners, and an Aircraft Registration Application has not been received.

(ii) Six months after evidence of ownership authorized under § 47.67 has been submitted, and the applicant has not met the requirements of this part.

(iii) Twelve months after a new owner has submitted evidence of ownership and an Aircraft Registration Application under § 47.31, and the applicant or a successive applicant has not met the requirements of this part.

(j) At the time an assignment of registration number is cancelled, the number may be reserved for one year in the name of the last owner of record if a request has been submitted with the fee required by § 47.17. If the request for reservation and fee are not submitted prior to cancellation, the registration number is unavailable for assignment for a period of five years.

§ 47.16 [Amended]

■ 18. Amend § 47.16(a) by removing the words "Dealer's Aircraft Registration Certificates" and adding, in their place, the words "Dealer's Aircraft Registration Certificates, AC Form 8050–6,".

■ 19. Amend § 47.17 by revising paragraphs (a)(4), (a)(5), and (a)(6) and adding paragraph (a)(7) as set forth below:

§ 47.17 Fees.

(a) * * *

(4) Special registration number (each number)	10.00
(5) To change, reassign, or reserve a registration number	10.00
(6) Replacement Certificate of Aircraft Registration	2.00
(7) Re-registration or Renewal Certificate of Aircraft Registration	5.00

* * * * *

■ 20. Amend § 47.31 as follows:

■ a. Revise paragraph (a)(1) to read as set forth below;

■ b. Remove the words "Aircraft Bill of Sale, ACC Form 8050–2" where they appear in paragraph (a)(2), and add, in their place, the words "Aircraft Bill of Sale, AC Form 8050–2";

■ c. Revise paragraph (c) to read as set forth below; and

■ d. Remove paragraph (d).

The revisions read as follows:

§ 47.31 Application.

(a) * * *

(1) An Aircraft Registration Application, AC Form 8050–1, signed by the applicant in the manner prescribed by § 47.13;

* * * * *

(c) After compliance with paragraph (a) of this section, the applicant for registration of an aircraft last previously registered in the United States must carry the second copy of the Aircraft Registration Application in the aircraft as temporary authority to operate without registration.

(1) This temporary authority is valid for operation within the United States until the date the applicant receives the Certificate of Aircraft Registration or until the date the FAA denies the application, but in no case for more than 90 days after the date the applicant signs the application. If by 90 days after the date the applicant signs the Aircraft Registration Application, the FAA has neither issued the Certificate of Aircraft Registration nor denied the application, the Registry will issue a letter of extension that serves as authority to continue to operate the aircraft without registration while it is carried in the aircraft.

(2) This temporary authority is not available in connection with any Aircraft Registration Application received when 12 months have passed since the receipt of the first application following transfer of ownership by the last registered owner.

(3) If there is no registration number assigned at the time application for registration is made, the second copy of the Aircraft Registration Application may not be used as temporary authority to operate the aircraft.

■ 21. Amend § 47.33 by removing the word "identification" where it appears in paragraph (c), and adding, in its place, the word "registration"; and revising paragraph (a)(2) to read as follows:

§ 47.33 Aircraft not previously registered anywhere.

(a) * * *

(2) Submits with his Aircraft Registration Application, AC Form 8050–1, an Aircraft Bill of Sale, AC Form 8050–2, signed by the seller, an equivalent bill of sale, or other evidence of ownership authorized by § 47.11.

* * * * *

■ 22. Revise § 47.39 to read as follows:

§ 47.39 Effective date of registration.

An aircraft is registered on the date the Registry determines that the submissions meet the requirements of this part. The effective date of registration is shown by a date stamp on the Aircraft Registration Application, AC Form 8050–1, and as the date of issue on the Certificate of Aircraft Registration, AC Form 8050–3.

■ 23. Add § 47.40 to read as follows:

§ 47.40 Registration expiration and renewal.

(a) *Re-registration.* Each aircraft registered under this part before October 1, 2010, must be re-registered in accordance with this paragraph (a).

(1) A Certificate of Aircraft Registration issued before October 1, 2010, expires on the expiration date identified in the following schedule that corresponds with the month in which the certificate was issued.

If the certificate was issued in:	*The certificate expires on:*	*The owner must apply for re-registration between these dates—to allow delivery of the new certificate before expiration*
March of any year	March 31, 2011	November 1, 2010 and January 31, 2011.
April of any year	June 30, 2011	February 1, 2011 and April 30, 2011.
May of any year	September 30, 2011	May 1, 2011 and July 31, 2011.
June of any year	December 31, 2011	August 1, 2011 and October 31, 2011.
July of any year	March 31, 2012	November 1, 2011 and January 31, 2012.
August of any year	June 30, 2012	February 1, 2012 and April 30, 2012.
September of any year	September 30, 2012	May 1, 2012 and July 31, 2012.
October of any year	December 31, 2012	August 1, 2012 and October 31, 2012.
November of any year	March 31 2013	November 1, 2012 and January 31, 2013.
December of any year	June 30, 2013	February 1, 2013 and April 30, 2013.
January of any year	September 30, 2013	May 1, 2013 and July 31, 2013.
February of any year	December 31, 2013	August 1, 2013 and October 31, 2013.

(2) Each holder of a Certificate of Aircraft Registration, AC Form 8050–3, issued before October 1, 2010, must submit an Application for Aircraft Re-registration, AC Form 8050–1A, and the fee required by § 47.17, between October 1, 2010, and December 31, 2013, according to the schedule in paragraph (a)(1) of this section.

(3) A Certificate of Aircraft Registration issued under this paragraph expires three years after the last day of the month in which it is issued.

(b) *Initial Registration.* A Certificate of Aircraft Registration issued in accordance with § 47.31 expires three years after the last day of the month in which it is issued.

(c) *Renewal.* Each holder of a Certificate of Aircraft Registration, AC Form 8050–3, containing an expiration date may apply for renewal by submitting an Application for Aircraft Registration Renewal, AC Form 8050–1B, and the fee required by § 47.17 during the six months preceding the expiration date. A certificate issued under this paragraph expires three years from the expiration date of the previous certificate.

■ 24. Amend § 47.41 by—

■ a. Removing paragraphs (a)(2) and (a)(4);

■ b. Redesignating paragraph (a)(3) as (a)(2) and paragraphs (a)(5) through (a)(9) as paragraphs (a)(3) through (a)(7);

■ c. Removing the semi-colon at the end of paragraphs (a)(1) through (a)(4) and adding in their place a period, and removing the phrase "; or" at the end of newly redesignated paragraph (a)(5) and adding, in its place, a period; and

■ d. Revising the introductory text of paragraph (a), revising paragraph (b)(3), and adding paragraph (b)(4) to read as follows:

§ 47.41 Duration and return of Certificate.

(a) Each Certificate of Aircraft Registration, AC Form 8050–3, issued by the FAA under this subpart is effective, unless registration has ended by reason of having been revoked, canceled, expired, or the ownership is transferred, until the date upon which one of the following events occurs:

* * * * *

(b) * * *

(3) Within 21 days of the termination of the registration, by the holder of the Certificate of Aircraft Registration in all other cases mentioned in paragraph (a) of this section, except in the case of expired certificates, the holder must destroy the expired certificate.

(4) If the certificate is not available for return, as directed in paragraph (b) of this section, a statement describing the aircraft and stating the reason the certificate is not available must be submitted to the Registry within the time required by paragraph (b) of this section.

■ 25. Revise § 47.43(b) to read as follows:

§ 47.43 Invalid registration.

* * * * *

(b) If the registration of an aircraft is invalid under paragraph (a) of this section, the holder of the invalid Certificate of Aircraft Registration, AC Form 8050–3, must return it as soon as possible to the Registry.

■ 26. Revise § 47.45 to read as follows:

§ 47.45 Change of address.

Within 30 days after any change in a registered owner's mailing address, the registered owner must notify the Registry in writing of the change of address. If a post office box or mailing drop is used for mailing purposes, the registered owner also must provide that owner's physical address or location. Upon acceptance, the Registry will issue, without charge, a revised Certificate of Aircraft Registration, AC Form 8050–3, reflecting the new mailing address. When a post office box or mailing drop is used for mailing purposes, and the registered owner's physical address or location changes, the registered owner must notify the Registry in writing of the new address or location within 30 days.

■ 27. Amend § 47.47 by revising the introductory text of paragraph (a) and paragraph (a)(1) as follows:

§ 47.47 Cancellation of Certificate for export purpose.

(a) The holder of a Certificate of Aircraft Registration, AC Form 8050–3, or the holder of an irrevocable deregistration and export request authorization recognized under the Cape Town Treaty and filed with the FAA, who wishes to cancel the Certificate of Aircraft Registration for the purpose of export must submit to the Registry—

(1) A written request for cancellation of the Certificate of Aircraft Registration describing the aircraft by make, model, and serial number, and stating the U.S. registration number and the country to which the aircraft will be exported;

* * * * *

■ 28. Revise § 47.49 to read as follows:

§ 47.49 Replacement of Certificate.

(a) If the original Certificate of Aircraft Registration, AC Form 8050–3, is lost, stolen, or mutilated, the registered owner may submit to the Registry a written request that states the reason a replacement certificate is needed and the fee required by § 47.17. The Registry will send a replacement certificate to the registered owner's mailing address

or to another mailing address if requested in writing by the registered owner.

(b) The registered owner may request a temporary Certificate of Aircraft Registration pending receipt of a replacement certificate. The Registry issues a temporary Certificate of Aircraft Registration in the form of a fax that must be carried in the aircraft until receipt of the replacement certificate.

§ 47.51 [Removed and Reserved]

■ 29. Remove and reserve § 47.51.

■ 30. Amend § 47.61 by—

■ a. Revising the section heading:

■ b. Removing the word "Dealers'" from paragraph (b), and adding, in its place, the word "Dealer's"; and

■ c. Revising the introductory text of paragraph (a) and paragraph (a)(2) and adding paragraph (c) to read as follows:

§ 47.61 Dealer's Aircraft Registration Certificates.

(a) The FAA issues a Dealer's Aircraft Registration Certificate, AC Form 8050–6, to U.S. manufacturers and dealers to—

* * * * *

(2) Facilitate operating, demonstrating, and merchandising aircraft by the manufacturer or dealer without the burden of obtaining a Certificate of Aircraft Registration, AC Form 8050–3, for each aircraft with each transfer of ownership, under Subpart B of this part.

* * * * *

(c) If the Dealer's Aircraft Registration Certificate expires under § 47.71, and an aircraft is registered under this Subpart, application for registration must be made under § 47.31, or the assignment of registration number may be cancelled in accordance with § 47.15(i)(3).

§ 47.63 [Amended]

■ 31. Amend § 47.63(a) by removing the words "An Application for Dealers' Aircraft Registration Certificates" and adding, in their place, the words "A Dealer's Aircraft Registration Certificate Application".

■ 32. Revise § 47.65 to read as follows:

§ 47.65 Eligibility.

To be eligible for a Dealer's Aircraft Registration Certificate, AC Form 8050–6, the applicant must have an established place of business in the United States, must be substantially engaged in manufacturing or selling aircraft, and must be a citizen of the United States, as defined by 49 U.S.C. 40102 (a)(15).

■ 33. Revise § 47.67 to read as follows:

§ 47.67 Evidence of ownership.

Before using a Dealer's Aircraft Registration Certificate, AC Form 8050–6, for operating the aircraft, the holder of the certificate (other than a manufacturer) must send to the Registry evidence of ownership under § 47.11. An Aircraft Bill of Sale, AC Form 8050–2, or its equivalent, may be used as evidence of ownership. There is no recording fee.

§ 47.69 [Amended]

■ 34. Amend § 47.69 by removing the words "Dealer's Aircraft Registration Certificate" in the introductory text, and adding, in their place, the words "Dealer's Aircraft Registration Certificate, AC Form 8050–6".

■ 35. Amend § 47.71 by—

■ a. Removing the words "Dealer's Aircraft Registration Certificate" in paragraph (a), and adding, in their place, the words "Dealer's Aircraft Registration Certificate, AC Form 8050–6,"; and

■ b. Revising paragraph (b) to read as follows:

§ 47.71 Duration of Certificate; change of status.

* * * * *

(b) The holder of a Dealer's Aircraft Registration Certificate must immediately notify the Registry of any of the following—

(1) A change of name;

(2) A change of address;

(3) A change that affects status as a citizen of the United States; or

(4) The discontinuance of business.

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 36. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180).

■ 37. Amend § 91.203 by revising paragraph (a)(2) to read as follows:

§ 91.203 Civil aircraft: Certifications required.

(a) * * *

(2) An effective U.S. registration certificate issued to its owner or, for operation within the United States, the second copy of the Aircraft registration Application as provided for in § 47.31(c), or a registration certification issued under the laws of a foreign country.

* * * * *

Issued in Washington, DC, on July 9, 2010.

J. Randolph Babbitt,

Administrator.

[FR Doc. 2010–17572 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0406; Airspace Docket No. 10–ASW–8]

Establishment of Class D Airspace; San Marcos, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class D airspace for San Marcos Municipal Airport, San Marcos, TX. Establishment of an air traffic control tower has made this action necessary to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport. A minor change in the airport descriptor also has been made.

DATES: Effective date 0901 UTC, September 23, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On April 30, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class D airspace for San Marcos Municipal Airport, San Marcos, TX (75 FR 22712) Docket No. FAA–2010–0406. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class D airspace designations are published in paragraph 5000 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR part 71.1. The Class D airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class D airspace at San Marcos, TX. Establishment of an air traffic control tower at San Marcos Municipal Airport has made this action necessary for the safety and management of IFR operations at the airport. Also, a minor change has been made in the amendatory language for the airport descriptor, changing from San Marcos Municipal Airport, TX, to San Marcos, TX.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at San Marcos Municipal Airport, San Marcos, TX. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

* * * * *

Paragraph 5000 Class D Airspace.

* * * * *

ASW TX D San Marcos, TX [New]

San Marcos Municipal Airport, TX
(Lat. 29°53′34″ N., long. 97°51′47″ W.)

That airspace extending upward from the surface to and including 3,100 feet MSL within a 4.2-mile radius of San Marcos Municipal Airport, and within 1 mile each side of the 313° bearing from the airport extending from the 4.2-mile radius to 4.6 miles northwest of the airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

Issued in Fort Worth, Texas, on July 9, 2010.

Rick Kervin,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–17500 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0399; Airspace Docket No. 10–AGL–3]

Establishment of Class E Airspace; Paynesville, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace for Paynesville, MN, to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAPs) at Paynesville Municipal Airport. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: *Effective Date:* 0901 UTC, September 23, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On April 27, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class E airspace for Paynesville, MN, creating controlled airspace at Paynesville Municipal Airport (75 FR 22044) Docket No. FAA–2010–0399. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace extending upward from 700 feet above the surface to accommodate SIAPs at Paynesville Municipal Airport, Paynesville, MN. This action is necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial

number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Paynesville Municipal Airport, Paynesville, MN.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E. O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

AGL MN E5 Paynesville, MN [New]

Paynesville Municipal Airport, MN
(Lat. 45°22′19″ N., long. 94°44′41″ W.)

That airspace extending upward from 700 feet above the surface within a 7.2-mile radius of Paynesville Municipal Airport.

Issued in Fort Worth, Texas, on July 1, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–17503 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0400; Airspace Docket No. 10–ACE–3]

Establishment of Class E Airspace; Syracuse, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace for Syracuse, KS, to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAPs) at Syracuse-Hamilton County Municipal Airport. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: *Effective Date:* 0901 UTC, September 23, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On April 27, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class E airspace for Syracuse, KS, creating controlled airspace at Syracuse-Hamilton County Municipal Airport (75 FR 22045) Docket No. FAA–2010–0400. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9T signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace extending upward from 700 feet above the surface to accommodate SIAPs at Syracuse-Hamilton County Municipal Airport, Syracuse, KS. This action is necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Syracuse-Hamilton County Municipal Airport, Syracuse, KS.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E. O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

ACE KS E5 Syracuse, KS [New]

Syracuse-Hamilton County Municipal Airport, KS
(Lat. 37°59′30″ N., long. 101°44′47″ W.)

That airspace extending upward from 700 feet above the surface within a 7.3-mile radius of Syracuse-Hamilton County Municipal Airport.

Issued in Fort Worth, Texas, on July 1, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–17510 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2007–29015; Amdt. No. 91- 311]

RIN 2120–AJ10

Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft; Modifications to Rules for Sport Pilots and Flight Instructors With a Sport Pilot Rating; OMB Approval of Information Collection

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; OMB approval of information collection.

SUMMARY: This document announces the Office of Management and Budget's (OMB's) approval of the information collection requirement contained in the FAA's final rule, "Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft; Modifications to Rules for Sport Pilots and Flight Instructors With a Sport Pilot Rating," which was published on February 1, 2010.

DATES: The final rule published on February 1, 2010, became effective on April 2, 2010. However, because it contained information collection requirements, compliance with the provisions contained in § 91.417 (a) was not required until those collection requirements are approved. This document announces that OMB approval was received on July 7, 2010.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this document, contact Larry L. Buchanan, Light-Sport Aviation Branch, AFS–610, Regulatory Support Division, Flight Standards Service, Federal Aviation Administration, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; telephone (405) 954–6400. Mailing address: Light-Sport Aviation Branch, AFS–610; P.O. Box 25082; Oklahoma City, OK 73125.

For legal questions concerning this document, contact Paul G. Greer, Regulations Division, AGC–200, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–3073; e-mail *paul.g.greer@faa.gov.*

SUPPLEMENTARY INFORMATION: On February 1, 2010, the final rule, "Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft; Modifications to Rules for Sport Pilots and Flight Instructors With a Sport Pilot Rating" was published in the **Federal Register** (75 FR 5204). In that rule, the FAA amended its requirements for sport pilots and flight instructors with a sport pilot rating to address airman certification and operational issues that arose after regulations for the certification of aircraft and airmen for the operation of light-sport aircraft were implemented in 2004.

In the **DATES** section of the final rule, the FAA noted that affected parties were not required to comply with the new information collection requirements in § 91.417 (incorrectly referenced in the **DATES** section as § 91.419) until OMB approved the FAA's request to collect the information. Paragraph (a) of § 91.417 contained a new requirement for owners and operators of special light-sport aircraft (SLSA) to retain a record of the current status of applicable safety directives and transfer that information at the time of the sale of that aircraft. That information collection requirement had not been approved by OMB at the time of publication.

In accordance with the Paperwork Reduction Act, the FAA submitted a copy of the new information collection requirements to OMB for its review. OMB approved the collection on July 7, 2010, and assigned the information collection OMB Control Number 2120–0730, which expires on July 31, 2013.

This document is being published to inform affected parties of the approval, and to announce that the new information collection requirement of § 91.417 (a) became effective on July 7, 2010.

Issued in Washington, DC, on July 15, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. 2010–17627 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 814

[Docket No. FDA–2009–N–0458]

RIN 0910–AG29

Medical Devices; Pediatric Uses of Devices; Requirements for Submission of Information on Pediatric Subpopulations That Suffer From a Disease or Condition That a Device Is Intended to Treat, Diagnose, or Cure; Withdrawal

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule; withdrawal.

SUMMARY: The Food and Drug Administration (FDA) published in the **Federal Register** of April 1, 2010, a direct final rule that was intended to make noncontroversial amendments to existing regulations which would require the submission of readily available pediatric medical device information as a part of premarket approval applications, requests for humanitarian use device exemptions, and any product development protocols. The comment period closed on June 15, 2010. FDA is withdrawing the direct final rule because the agency received significant adverse comment.

DATES: The direct final rule published at 75 FR 16347, April 1, 2010, is withdrawn on July 19, 2010.

FOR FURTHER INFORMATION CONTACT: Robert Gatling, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1640, Silver Spring, MD 20993, 301–796–6560.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, the direct final rule published on April 1, 2010, at 75 FR 16347 is withdrawn.

Dated: July 9, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–17617 Filed 7–19–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0948]

RIN 1625–AB43

Inland Navigation Rules; Correction

ACTION: Final rule; correction.

SUMMARY: In the **Federal Register** published on April 15, 2010, the Coast Guard placed the Inland Navigation Rules into the Code of Federal Regulations. That publication contained an error in the "Discussion of the Rule" section. This error does not impact the regulations, but has caused confusion among some members of the public.

DATES: This correction is effective July 20, 2010.

FOR FURTHER INFORMATION CONTACT: For information about this correction, contact Kevin d'Eustachio, Office of Regulations and Administrative Law, telephone (202) 372–3854, e-mail kevin.m.deustachio@uscg.mil. For information about the original regulation, contact LT Scott Medeiros, Office of Vessel Activities (CG–54133), telephone (202) 372–1565 Scott.R.Medeiros@uscg.mil.

SUPPLEMENTARY INFORMATION: In FR doc 2010–8532 appearing on page 20294 in the issue of Thursday, April 15, 2010, the following corrections are made:

1. On page 19545, in the first column, in the three places that "§ 83.185" appears, remove the numbers "§ 83.185" and replace with "§ 83.38".

Dated: July 14, 2010.

Steve Venckus,

Office of Regulations and Administrative Law (CG–0943), U.S. Coast Guard.

[FR Doc. 2010–17663 Filed 7–19–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–1017]

RIN 1625–AA11

Regulated Navigation Areas; Bars Along the Coasts of Oregon and Washington; Amendment

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is making a change to the Regulated Navigation Area (RNA) covering the Umpqua River Bar in Oregon so that it does not include those waters between "Navigation Aid Number 8" and "Navigation Aid Number 6" on the Umpqua River. The change has been requested by a number of individuals and organizations that believe they are able to safely use those waters when the bar is restricted or closed.

DATES: This rule is effective August 19, 2010.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–1017 and are available online by going to *http://www.regulations.gov,* inserting USCG–2008–1017 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 LT Kion Evans, Thirteenth Coast Guard District Prevention Division; telephone 206–220–7232, e-mail *Kion.J.Evans@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 April 12, 2010, we published a notice of proposed rulemaking (NPRM) entitled "Regulated Navigation Areas; Bars Along the Coasts of Oregon and Washington; Amendment" in the **Federal Register** (75 FR 18449). We received one comment on the proposed rule. No public meeting was requested and none was held.

Basis and Purpose

On November 17, 2009, the Coast Guard published a Final Rule entitled "Regulated Navigation Areas; Bars Along the Coasts of Oregon and Washington" in the **Federal Register** (74 FR 59098), which established Regulated Navigation Areas (RNA) covering each of the coastal bars in Oregon and Washington. Following implementation of the rule, as codified at 33 CFR 165.1325, on December 17, 2009, the Coast Guard began receiving feedback from a number of individuals and organizations that use the waters near the Umpqua River Bar in Oregon indicating that the RNA covering that bar, as defined in 33 CFR 165.1325(a)(12), is too large in that they believe they are able to safely use the area between "Navigation Aid Number 8" and "Navigation Aid Number 6" in the Umpqua River when the bar is restricted or closed.

In light of the public desires expressed, the possible economic impact on the local community, and the Coast Guard's assessment that mariners are, in most circumstances, able to safely operate between "Navigation Aid Number 8" and "Navigation Aid Number 6" on the Umpqua River when the bar is restricted or closed, the Coast Guard is changing the Umpqua River Bar RNA as defined in 33 CFR 165.1325(a)(12) to allow such use without obtaining permission of the Captain of the Port or his/her designated representatives.

Discussion of Comments and Changes

The one comment received on the proposed rule expressed concern that the location of the RNA as described in the regulatory text did not align with the description given in the preamble, specifically with regards to "Navigation Aid Number 6." The rule was changed to correct that inconsistency.

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. The Coast Guard has made this determination based on the fact that this rule simply reduces the size of an established Regulated Navigation Area.

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 those small entities that use the waters near the Umpqua River Bar. The rule would not have a significant economic impact on a substantial number of small entities, however, because it simply reduces the size of an established Regulated Navigation Area.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM 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 (adjusted for inflation) 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 cause 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 that 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. This rule involves the reduction in size of a Regulated Navigation Area. Under figure 2–1, paragraph (34)(g), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend § 165.1325 by revising paragraph (a)(12) to read as follows:

§ 165.1325 Regulated Navigation Areas; Bars Along the Coasts of Oregon and Washington.

(a) * * *

(12) Umpqua River Bar, Oreg.: From a point on the shoreline at 43°41′20″ N., 124°11′58″ W. thence westward to 43°41′20″ N., 124°13′32″ W thence southward to 43°38′35″ N., 124°14′25″ W. thence eastward to a point on the shoreline at 43°38′35″ N., 124°12′35″ W. thence northward along the shoreline to the navigational light "6" located on the jetty at 43°40′11″ N., 124°11′56″ W. thence northward to a point on the north bank of the entrance channel at 43°40′33″ N., 124°11′56″ W. thence southwestward along the north bank of the entrance channel thence northward along the seaward shoreline to the beginning.

* * * * *

Dated: *July 7, 2010.*

G.T. Blore,

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

[FR Doc. 2010–17665 Filed 7–19–10; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 111

Content of Periodicals Mail

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 707.3, to update present "content requirements" on materials eligible for mailing at Periodicals prices with authorized Periodicals publications.

DATES: Effective September 7, 2010.

FOR FURTHER INFORMATION CONTACT: Jerry Lease, 202–268–7264.

SUPPLEMENTARY INFORMATION: After discussions with the Periodicals mailing industry, the Postal Service agreed to review the standards governing contents of Periodicals mail, and decided to update several standards. This rule removes the current advertising limitation on loose supplements, except for unwrapped copies of loose addressed supplements included in a mailing for an authorized Periodicals publication. The final rule also revises the regulations on pages, specifically multi-layer pages, giving publishers more latitude in page design. The provisions concerning the mailing of products and product samples have been updated and simplified. Finally, the standards governing protective covers and attachments have been updated for consistency with past rulings. This final rule contains only those DMM revisions that are consistent with the expressed wishes of numerous publishers and Periodicals association representatives.

Background

In the 1980s, and again in the 1990s, the Postal Service undertook extensive reviews of the standards governing what could be mailed as part of a periodical publication at Periodicals prices (formerly second-class rates). Advances in technology, and difficulty in applying the standards, were key underlying factors in those reviews. On March 27, 1995, the Postal Service published a final rule in the **Federal Register** (60 FR 10021–10029) revising the standards.

Since that time, the standards governing contents of a publication eligible for Periodicals prices have not changed, except for several minor modifications. There has been no discernable undesired movement of printed advertising materials, or other matter, from Standard Mail to Periodicals mail.

The changes to the standards reflected in this final rule concentrate on four areas of "content" provisions and mailpiece construction:

- DMM 707.3.3.1, *Pages.*
- DMM 707.3.3.5, *Supplements.*
- DMM 707.3.4.3, *Products.*
- DMM 707.3.5, *Mailpiece Construction.*
  - Specifically DMM 3.5.4, *Without Mailing Wrapper.*
  - and DMM 3.5.6, *Cover page and Protective Cover.*

Pages

A basic requirement for all Periodicals publications is that they be comprised of "printed sheets." In the March 27, 1995 rulemaking, however, the printed sheet requirement was relaxed to allow small amounts of "fastening" material, such as grommets, string, and rubber bands, used to assemble a page. The Postal Service concluded at that time allowing such materials was not a significant deviation from the "printed sheet" rule because the changes were consistent with the existing practice of allowing Periodicals publications to be bound with staples, saddle stitching, or spiral binding.

More recently, publishers have argued that the 1995 changes, although welcome, unduly limit creativity in designing publications that appeal to their readers and advertisers. These publishers also point out advances in technology that they are restricted from using such as the inclusion of sound devices and video as part of a printed page. Finally, they point out that private delivery companies do not impose similar restrictions on the delivery of their publications, nor are they prohibited from using such technologies in the newsstand editions of their publications.

Accordingly, DMM 707.3.3.1a is revised to replace "fastening" with "non-paper" in the first sentence to permit non-paper materials other than fastening materials in the construction of a multilayer page. This change would allow additional creativity in page design. The sentence "Not all elements that make up a multilayer page must be printed" is added to 3.3.1a, for additional transparency. That sentence is currently incorporated in Customer Support Ruling (CSR) PS–234, titled "Multilayer pages in Periodicals Publications." Finally, the sentence "In addition, multilayer pages may contain novel characteristics such as an LED display, a sound device, or battery operated movable parts" is added to 3.3.1a, to allow publishers to take advantage of current technologies, within the boundaries of mailable versus nonmailable matter as described in DMM 601.

In addition, it should be noted that publishers continue to be required to adhere to the mailing standards governing the Periodicals price category claimed.

Supplement

Many publishers have considered the 25 percent nonadvertising standard for loose supplements to be burdensome, and inappropriate as a means of limiting advertising in Periodicals mail. It is often viewed as an unnecessary restriction on a publisher's ability to choose whether to place advertising matter in the host publication or accompanying loose supplement.

Moreover, the existing standards are hard to apply. This problem exists for customers and postal personnel, as demonstrated by the numerous requests for guidance directed to the Pricing and Classification Service Center (PCSC) and headquarters Mailing Standards personnel concerning what is advertising or nonadvertising matter. Often, when supplements are produced by third parties, it becomes particularly difficult to make such judgments. Contracts must be reviewed to evaluate the relationship(s) between parties. Payment arrangements by outside parties for the advertising portion of supplements must be examined in determining whether the material qualifies as nonadvertising matter.

The Postal Service agrees with many publishers and their association representatives that the 25 percent nonadvertising requirement should be

eliminated except for separately addressed loose supplements mailed with the host publication outside a wrapper or polybag. The Postal Service is revising DMM 707.3.3.5 as follows:

- In the first sentence of 3.3.5a., the words "on the front cover/page" are added to ensure that the required "Supplement to * * *" endorsement is shown on the front of the supplement.
- The words "contain at least 25% nonadvertising material and" are deleted from the first sentence of 3.3.5a.
- The words "must contain at least 25% nonadvertising material" apply only to loose addressed supplements when a wrapper is not required.

Product Samples

Product samples in Periodicals are not new. However, no explicit DMM standard acknowledges product samples are mailable at Periodicals prices. Mailability at Periodicals prices of product samples is achieved by "altering" a product, such as by changing the ingredients in fragrance samples, limiting significantly the size of a cosmetics sample, and requiring a disclaimer that the sample "simulates" or is a "rendition" of an actual product. Preparation guidelines are contained in Customer Support Ruling (CSR) PS–273. However, the Postal Service finds these guidelines difficult to administer, with documentation and verification of compliance burdensome on publishers and postal personnel alike.

In earlier rulemakings, the Postal Service expressed the view that applying the general requirement that all Periodicals publications must be formed of printed sheets is a sufficient standard to limit the inappropriate mailing of products and products samples at Periodicals prices (see DMM 707.4.5). Changes to the standards described in this rule will continue to exclude products such as stationery, cassettes, floppy disks, DVDs, CDs, and similar media, since they are not printed sheets.

But specifically allowing de minimis product samples will reduce the burden of the current guidelines. Consequently, and consistent with requests by many Periodicals publishers and Periodicals association representatives, the Postal Service has adopted a new provision in the DMM allowing product samples in de minimis form to be included as part of a printed sheet. This change will enhance both the value of some advertisements to the reader, and the overall value of the publication to the reader. Although not explicitly required, including the name of the host publication and the issue or issue date on the sample, and relating the sample to advertising or nonadvertising within the content of the host publication, will provide further support that the piece is properly prepared as a printed page (or a portion of a multilayer page) in the publication.

Product samples may not be included in a Periodicals publication mailed at letter-sized prices. The combined weight of product samples in an issue of a Periodicals publication cannot exceed 3.3 ounces. Any product sample that is a "packet" is limited to a weight of no more than one ounce with a burst strength minimum of 3,000 pounds per square inch (PSI). Attachable product samples, including packets weighing no more than one ounce, may not be affixed to either the front or back cover page of a Periodicals publication, or permissible component of a Periodicals publication, even if the publication is enclosed in a wrapper. Placement of attachable product samples must conform to machinability and uniform thickness standards, and must be placed no closer than ¾ inch of any open edge of any interior page.

Publishers are aware that in an environment of ever-increasing automated processing by the Postal Service of all types of mail including letters, flats, and parcels, it is critical that Periodicals publications not impede postal processing or damage postal processing equipment. Accordingly, it is reemphasized that any mailpiece to which a product sample is added under this new provision must meet the standards for physical characteristics related to basic mailability and to the eligibility for the specific postage prices claimed. In addition, all of the mailability restrictions and prohibitions in DMM 601 apply. See specifically DMM 601.2.1, *Packaging,* and 601.10.5, *Mailer Responsibility for Mailing Hazardous Materials.*

Products

Under impermissible mailpiece components, "products" are redefined to update the examples of impermissible products in Periodicals.

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); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 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)

* * * * *

700 Special Standards

* * * * *

707 Periodicals

* * * * *

3.0 Physical Characteristics and Content Eligibility

* * * * *

3.3 Permissible Mailpiece Components

3.3.1 Pages

* * * Pages are also subject to these standards:

[Revise 3.3.1a. to replace "fastening" with "non-paper" materials in the first sentence and to include new language to further describe a multilayer page as follows:]

a. Multilayer pages (including pages formed by sheets glued together and pages that have unusual shapes, such as cutouts, movable flaps, or "pop-ups") may include small amounts of non-paper material such as grommets, string, or rubber bands as needed to assemble the page. Not all elements that make up a multilayer page must be printed. In addition, multilayer pages may contain novel characteristics such as an LED display, a sound device, or battery operated movable parts. Multilayer pages may also be formed as pouches or pockets, but may contain only permissible loose enclosures (*see* 3.3.4) or other securely affixed permissible components.

* * * * *

3.3.5 Supplement

* * * Supplements are also subject to these conditions as applicable:

[Revise 3.3.5a. to make clear that the required supplement endorsement must be shown on the front/cover page. In addition, the requirement that a supplement to a bound Periodicals publication contain at least 25% nonadvertising is eliminated except for unwrapped loose supplements.]

a. A loose supplement to a bound Periodicals publication must bear on the front/cover page the endorsement "Supplement to" followed by one of the following: the title of the publication, the name of the publisher, or "Periodicals Publication." A bound publication with one or more supplements must be enclosed in a wrapper. However, a wrapper is not required when a loose supplement is included within the same mailing as the host publication, bears a proper delivery address, contains at least 25% nonadvertising material, and includes on the front/cover page the endorsement "Periodicals Supplement to" followed by the exact title and issue date of the host publication. The external dimensions of such unwrapped supplements may exceed those of the host publication provided they are of the same processing category as the host publication. If a supplement to a bound publication is formed of more than one sheet, all sheets making up the supplement must be bound together.

* * * * *

[Renumber current 3.3.9 and 3.3.10 as 3.3.10 and 3.3.11 accordingly, and add new 3.3.9 to provide for "product samples" in Periodicals publications as follows:]

3.3.9 Product Samples

Subject to the requirements in 3.3.1 and 3.4.5, product samples: Related to print advertising in the issue and are not offered for sale within the meaning of 3.4.2a and 3.4.3 may be included in a Periodicals publication as a page, or part of a multilayer page. Examples include, but are not limited to, a swatch of cloth; a paper towel as part of a printed page, or printed paper towel; a band-aid; and fragrance, cosmetics, lotions, or eatables in packet form. The combined weight of product samples in an issue is limited to 3.3 ounces. Any product sample in the form of a packet is limited in total weight to no more than one ounce, but does not include the page weight upon which the packet is affixed. Packet product samples also must have a minimum burst strength of 3,000 pounds per square inch (psi). Travel size and similar small products in commercially available form or packaging do not qualify as permissible product samples, even if less than 3.3 ounces. In addition, CDs, DVDs, and similar media do not qualify as permissible product samples. Permissible product samples:

a. Are not eligible with letter-size pieces;

b. Must comply with hazmat standards (601.10.5);

c. Must comply with machinability standards, *e.g.* uniform thickness (301.1.4);

d. Must not be attached to the front or back cover page of the host Periodicals publication, or any other permissible component;

e. Must be secured in place (spine or tip-on interior page) to prevent shifting (601.2.1); and,

f. Must be placed at least ¾ inch from all non-bound edges of any interior page.

* * * * *

3.4 Impermissible Mailpiece Components

* * * * *

3.4.3 Products

[Revise 3.4.3 to update examples of impermissible "products" in Periodicals publications as follows:]

Except as provided for in 3.3.9, products may not be mailed at Periodicals prices. Examples include stationery (such as pads of paper or blank printed forms); cassettes; floppy disks; CDs; DVDs; merchandise, including travel-size merchandise in commercially available form or packaging; and wall, desk, and blank calendars. Printed pages, including oversized pages and calendars, are not considered products if they are not offered for sale.

* * * * *

3.5 Mailpiece Construction

* * * * *

3.5.4 Without Mailing Wrapper

[Revise the last sentence of 3.5.4 to allow for ¾ inch clearance of any open edge on attachments to a Periodicals publication as follows:]

When the mailpiece does not have a mailing wrapper, all the components of an unbound publication must be combined with and inserted inside the publication. Only enclosures mailable at Periodicals prices under 3.3.4 may be included loose inside a bound unwrapped publication. An enclosure under 3.3.3c, *Enclosures at First-Class Mail or Standard Mail Prices,* or 3.3.4, *Loose Enclosures at Periodicals Prices,* or a single sheet prepared as an attachment under 3.3.8c, may be securely attached along the bound edge on the outside of an unwrapped publication if it does not exceed any dimension of the cover of the publication and comes within ¾ inch of any open edge.

* * * * *

3.5.6 Cover Page and Protective Cover

[Revise the first sentence of 3.5.6 to allow for ¾ inch clearance of any open edge on a protective cover to a Periodicals publication as follows:]

If the piece is not completely enclosed in a mailing wrapper, then any protective cover or cover page must cover both the front and back of the host publication and extend to within at least ¾ inch of any open edge. Exception: Flat-size pieces may have short covers as provided in 301.3.5.2. If the host publication is bound, the protective cover must be permanently attached to the publication.

* * * * *

We will publish an appropriate amendment to 39 CFR Part 111 to reflect these changes.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. 2010–17459 Filed 7–19–10; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0080; FRL–9176–7]

RIN 2060–AQ26

Amendments to National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on three amendments to the regulatory text in the prepared feeds manufacturing area source rule. First, this action corrects the date for new sources to submit a Notification of Compliance Status (NOCS) form. Second, this action corrects information that needs to be included in the Notification of Compliance Report for those small facilities that are not required to install cyclones on their pelleting operations. Third, this action adds language to the regulatory text that was inadvertently left out of the final rule requiring submittal of the annual compliance certification report. These corrections and clarifications will not change the standards established by the rule and not result in the imposition of any costs beyond those included in the final rule.

DATES: This direct final rule is effective on November 2, 2010, without further

notice, unless EPA receives adverse comment by September 3, 2010. If we receive adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that some or all of the amendments in this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0080, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov:* Follow the instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/oar/docket.html.* Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web site.
- *E-mail: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2008–0080 in the subject line of the message.
- *Fax:* Send comments to (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2008–0080.
- *Mail:* Area Source NESHAP for Prepared Feeds Manufacturing Docket, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. 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–2008–0080. 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, any form of encryption, and be free of any defects or viruses.

Docket: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0080. All documents in the docket are listed in the Federal Docket Management System index at *http://www.regulations.gov.* 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 form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Public Reading Room, 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Jan King, Regulatory Development and Policy Analysis Group, Office of Air Quality Planning and Standards (C404–05), Environmental Protection Agency, Research Triangle Park, NC 27711. Telephone number: (919) 541–5665; fax number: (919) 541–0242; e-mail address: *king.jan@epa.gov.*

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

I. Why is EPA using a direct final rule?
II. Does this action apply to me?
III. Where can I get a copy of this document?
IV. What amendments are we making to this rule?
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. Why is EPA using a direct final rule?

We are publishing the rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comment. As explained below, this action amends the date for new sources to submit a Notification of Compliance Status (NOCS) form; corrects information that needs to be included in the Notification of Compliance Report for those small facilities that are not required to install cyclones on their pelleting operations; and adds language to the regulatory text that was inadvertently left out of the final rule requiring submittal of the annual compliance certification report.

Because this is an amendment of regulatory language through rulemaking, a redline version of the regulatory language has been created and has been placed in the docket (*http://www.regulations.gov,* see Docket No. EPA–HQ–OAR–2008–0080) to aid the public's ability to comment on the regulatory text.

If we receive relevant adverse comment on this direct final rule, we will publish a timely withdrawal in the **Federal Register** informing the public that some or all of the amendments in this rule will not take effect. Any parties interested in commenting must do so at this time.

II. Does this action apply to me?

Regulated Entities. The regulated categories and entities potentially affected by the final rule include:

Category	NAICS code [1]	Examples of regulated entities
Other Animal Foods Manufacturing	311119	Animal feeds, prepared (except dog and cat), manufacturing.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 63.11619, subpart DDDDDDD (NESHAP for Area Sources: Prepared Feeds Manufacturing). If you have any questions regarding the applicability of this action to a particular entity, consult either the state delegated authority or the EPA regional representative, as listed in 40 CFR 63.13 of subpart A (General Provisions).

III. Where can I get a copy of this document?

Electronic Access. In addition to being available in the docket, an electronic copy of this direct final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

IV. What amendments are we making to this rule?

On January 5, 2010 (75 FR 522), the EPA promulgated the national emission standards for hazardous air pollutants (NESHAP) for area source prepared feeds manufacturing facilities as subpart DDDDDDD in 40 CFR part 63. Today's action contains the following corrections and clarifications:

1. The date for new sources to submit the Notification of Compliance Form is corrected from "within 120 days of startup, or by May 4, 2012, whichever is later," to within 120 days of startup or October 18, 2010, whichever is later.

2. Small facilities that are not subject to the requirement to install and operate a cyclone to control emissions from pelleting operations must submit documentation of their initial average daily feed production level in their Notification of Compliance Status report. The final rule used the incorrect term "initial daily pelleting production level." This is being corrected to indicate that documentation of the "initial average daily feed production level" be submitted.

3. The requirement to submit the annual compliance certification report is added. This requirement was in the proposed rule but inadvertently deleted in the final rule.

The corrections will become effective on November 2, 2010, without further notice, unless EPA receives adverse comment by September 3, 2010. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that some or all of the amendments in this rule will take affect. Today's action notifies interested parties of the amendments.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The proposed amendments result in no changes to the information collection requirements of the existing standards of performance and will have little or no impact on the information collection estimate of projected cost and hour burden made and approved by the Office of Management and Budget (OMB) during the development of the existing standards of performance. Therefore, the information collection requests have not been amended. However, OMB has previously approved the information collection requirements contained in the existing regulations (subpart DDDDDDD, 40 CFR part 63) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0635 (ICR 2354.02). 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 generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations found at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this direct final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action does not impose any additional costs over those in the final rule published on January 5, 2010 (75 FR 522).

D. Unfunded Mandates Reform Act

This direct final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or to the private sector in any one year. This direct final rule is not expected to impact State, local, or Tribal governments. Thus, this rule would not be subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This final rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This direct final rule does not impose any requirements on State and local governments. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This direct final rule imposes no requirements on Tribal governments; thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

This direct final rule is not a "significant energy action" as defined in Executive Order 13211 (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.

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 (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.

These direct final rule amendments do not involve technical standards as defined in the NTTAA. Therefore, this direct final rule is not subject to NTTAA.

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

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

EPA has determined that this direct final rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA will submit a report containing these final rule amendments 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 final rule amendments in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This direct final rule will be effective on November 2, 2010.

List of Subjects for 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: July 14, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I, part 63, subpart DDDDDDD of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart DDDDDDD—[Amended]

■ 2. Section 63.11624 is amended as follows:

■ a. Revising the second sentence of paragraph (a)(2) introductory text;

■ b. Revising paragraph (a)(2)(iv); and

■ c. Revising paragraph (b) introductory text.

The revisions are to read as follows:

§ 63.11624 What are the notification, reporting, and recordkeeping requirements?

(a) * * *

(2) * * * If you are the owner or operator of a new affected source, you must submit a Notification of Compliance Status within 120 days of initial startup, or by October 18, 2010, whichever is later. * * *

* * * * *

(iv) If you own or operate an affected source that is not subject to the requirement in § 63.11621(e) to install and operate a cyclone to control emissions from pelleting operations because your initial average daily feed production level was 50 tpd or less, documentation of your initial average daily feed production level determination.

(b) *Annual compliance certification report.* You must, by March 1 of each year, prepare an annual compliance certification report for the previous calendar year containing the information specified in paragraphs (b)(1) through (b)(6) of this section. You must submit the report if you had any instance described by paragraph (b)(3) or (b)(4) of this section.

* * * * *

[FR Doc. 2010–17711 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 102–5

[FMR Amendment 2010–02; FMR Case 2010–102–4; Docket 2010–0013, Sequence 1]

RIN 3090–AJ05

Federal Management Regulation; Home-to-Work Transportation

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration is amending the Federal Management Regulation (FMR) to clarify existing Home-to-Work Transportation policy. This final rule updates and clarifies who is not covered by 41 CFR part 102–5.

DATES: *Effective Date:* This final rule is effective on July 20, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr.

James Vogelsinger, Office of Governmentwide Policy, Office of Travel, Transportation, and Asset Management (MT), (202) 501–1764 or e-mail at *james.vogelsinger@gsa.gov*. For information pertaining to status or publication schedules contact the Regulatory Secretariat, 1800 F Street, NW., Room 4041, Washington, DC 20405, (202) 501–4755. Please cite FMR case 2010–102–4.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Management Regulation (FMR) part 102–5 was published in the **Federal Register** on September 12, 2000 (65 FR 54966) to establish policy regarding home-to-work transportation. Section 102–5.20 defines who is not covered by the policy within part 102–5. This final rule clarifies who is not covered by the policy within part 102–5. This final rule also refers readers to section 102–34.210 which addresses when a Government motor vehicle can be used for transportation between places of employment and mass transit facilities.

B. Executive Order 12866

This final rule is excepted from the definition of "regulation" or "rule" under Section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993 and, therefore, was not subject to review under Section 6(b) of that Executive Order.

C. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for notice and comment as per the exemption specified in 5 U.S.C. 553 (a)(2); therefore, the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* does not apply. However, this final rule is being published to provide transparency in the promulgation of Federal policies.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FMR do not impose information collection requirements 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 exempt from Congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 102–5

Government property, Home-to-work transportation, Motor vehicles.

Dated: May 25, 2010.

Martha Johnson,

Administrator of General Services.

■ For the reasons set forth in the preamble, GSA amends 41 CFR part 102–5 as set forth below:

PART 102–5—HOME-TO-WORK TRANSPORTATION

■ 1. The authority citation for 41 CFR part 102–5 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 31 U.S.C. 1344(e)(1).

■ 2. Amend section § 102–5.20 by—

■ (a) Revising paragraph (a);

■ (b) Removing paragraph (b);

■ (c) Redesignating paragraph (c) as paragraph (b);

■ (d) Removing the period at the end of newly redesignated paragraph (b) and adding "; or" in its place; and

■ (e) Adding a new paragraph (c).

The revisions read as follows:

§ 102–5.20 Who is not covered by this part?

* * * * *

(a) Employees who use a passenger carrier in conjunction with official travel, including temporary duty (TDY) or relocation;

* * * * *

(c) Employees who use a passenger carrier for transportation between places of employment and mass transit facilities (*see, e.g.,* 41 CFR 102–34.210).

[FR Doc. 2010–17666 Filed 7–19–10; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648–XX26

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Closure.

SUMMARY: NMFS closes the northern area Angling category fishery for large medium and giant ("trophy") BFT for the remainder of 2010. Fishing for, retaining, possessing, or landing large medium and giant BFT (measuring 73 inches (185 cm) curved fork length or greater) north of 39° 18' N. lat. (off Great Egg Inlet, NJ) is prohibited effective at 11:59 p.m., July 18, 2010. This action is being taken to prevent overharvest of the 2010 Angling category quota northern area subquota for large medium and giant BFT.

DATES: Effective 11:59 p.m. on July 18, 2010, through December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Brad McHale, 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006).

NMFS is required, under § 635.28(a)(1), to file a closure notice with the Office of the Federal Register for publication when a BFT quota is reached or is projected to be reached. On and after the effective date and time of such notification, for the remainder of the fishing year, or for a specified period as indicated in the notification, fishing for, retaining, possessing, or landing BFT under that quota category is prohibited until the opening of the subsequent quota period or until such date as specified in the notice.

The 2010 BFT quota specifications established a quota of 5.2 mt of large medium and giant BFT (measuring 73 inches curved fork length or greater) to be harvested in the northern area, i.e., north of 39° 18' N. lat. (off Great Egg Inlet, NJ) by vessels permitted in the HMS Angling or Charter/Headboat category (while fishing recreationally) during 2010 (75 FR 30732, June 2, 2010). On June 14 (75 FR 33531), NMFS announced three Angling category BFT fishery inseason actions, effective June 12, 2010: a change to the daily retention limit, closure of the southern area trophy fishery, and a quota transfer of 1.7 mt from the Reserve to the northern area trophy fishery. The southern area trophy BFT closure was based on reported landings of trophy BFT via the North Carolina Tagging Program. NMFS

transferred quota from the Reserve to the Angling category so that 1.7 mt (the amount established in the 2010 BFT quota specifications) would be available for the landing of trophy BFT in the northern area. NMFS has determined that the northern area trophy BFT subquota has been reached. Therefore, through December 31, 2010, fishing for, retaining, possessing, or landing large medium or giant BFT north of 39° 18' N. lat. by persons aboard vessels permitted in the HMS Angling category and the HMS Charter/Headboat category (while fishing recreationally) must cease at 11:59 p.m. on July 18, 2010.

The intent of this closure is to prevent overharvest of the Angling category northern area trophy BFT subquota. Anglers are reminded that all non-tournament BFT landed under the Angling category quota must be reported within 24 hours of landing either online at www.hmspermits.gov or by calling (888) 872–8862. In Maryland and North Carolina, vessel owners must report their recreational tuna landings at state-operated reporting stations. For additional information on these programs, including reporting station locations, please call (410) 213–1351 (Maryland) or (800) 338–7804 (North Carolina).

Anglers may catch and release (or tag and release) BFT of all sizes, subject to the requirements of the catch-and-release and tag-and-release programs at § 635.26. Anglers are also reminded that all released BFT must be returned to the sea immediately with a minimum of injury and without removing the fish from the water, consistent with requirements at § 635.21(a)(1).

If needed, subsequent Angling category adjustments will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (888) 872–8862 or (978) 281–9260, or access *www.hmspermits.gov*, for updates.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the Consolidated HMS FMP provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. The closure of the northern area Angling category trophy fishery is necessary to prevent overharvest of the Angling category northern area trophy BFT subquota. NMFS provides notification of closures by publishing the notice in the **Federal Register**, e-mailing individuals who have subscribed to the Atlantic HMS News electronic newsletter, and updating the information posted on the Atlantic Tunas Information Line and on *www.hmspermits.gov*.

These fisheries are currently underway and delaying this action would be contrary to the public interest as it could result in excessive BFT landings that may result in future potential quota reductions for the Angling category. NMFS must close the northern area trophy BFT fishery before additional landings of these size BFT accumulate. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there is good cause under 5 U.S.C. 553(d) to waive the 30–day delay in effectiveness.

This action is being taken under 50 CFR 635.28(a)(1), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: July 15, 2010.

Galen Tromble,

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

[FR Doc. 2010–17695 Filed 7–15–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100427197–0207–01]

RIN 0648–AY86

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Pollock Catch Limit Revisions

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

ACTION: Emergency rule; request for comments.

SUMMARY: NMFS issues this final rule pursuant to its authority to issue emergency measures under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This emergency action implements new stock status determination criteria for pollock and associated increases in pollock catch limits under the Northeast (NE) Multispecies Fishery Management Plan (FMP), based on the most recent and best available scientific information. Specifically, this emergency action increases fishing year (FY) 2010 pollock catch levels specified by Framework Adjustment (FW) 44, including Overfishing Levels (OFLs), Acceptable Biological Catches (ABCs), Annual Catch Limits (ACLs), ACL components, incidental Total Allowable Catches (TACs) for special management programs, and sector Annual Catch Entitlements (ACEs). The ACL components include sub-ACLs for the common pool and sectors. This action is intended to provide additional fishing opportunities, consistent with the FMP and the Magnuson-Stevens Act.

DATES: Effective July 15, 2010, through January 11, 2011. Comments must be received by August 19, 2010.

FOR FURTHER INFORMATION CONTACT: Thomas A. Warren, Fishery Policy Analyst, (978) 281–9347, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

This final rule implements emergency measures, authorized by section 305(c) of the Magnuson-Stevens Act, to revise current pollock catch limits immediately. On May 1, 2010, NMFS implemented catch limits developed by the New England Fishery Management Council (Council) under FW 44 (75 FR 18356; April 9, 2010) for all groundfish stocks, including pollock, for FY 2010 through 2012. The catch levels specified by FW 44 included OFLs, ABCs, ACLs, ACL components, and incidental TACs for special management programs. The ACL components included sub-ACLs for the common pool and sectors. On May 26, 2010, NMFS published (75 FR 29459) adjusted ACL subcomponents and adjusted sector ACEs in order to reflect changes to the sector rosters just prior to the start of FY 2010.

The FW 44 catch levels for all stocks, including pollock, were based upon the most recent scientific information available at that time, i.e., the stock assessments conducted by the Groundfish Assessment Review Meeting (GARM III) in 2008, as well as subsequent pertinent information for pollock, as explained below. GARM III originally characterized pollock as overfished and subject to overfishing and, in accordance with required procedures, NMFS notified the Council of the status of the stock on September 2, 2008. Subsequent correspondence resulted in two modifications to the characterization of the status of the pollock biomass. A September 16, 2008,

letter from the Council to NMFS noted that these determinations regarding stock status were based upon erroneous methods. NMFS noted this error and subsequently made corrections[t3] to the methods and revised the characterization of the pollock stock status as approaching an overfished condition, but still likely subject to overfishing (October 3, 2008, NMFS letter to the Council). The stock status determination was revised a third time in order to incorporate the most recent scientific information (fall 2008 trawl survey data), which again characterized the pollock stock as overfished and subject to overfishing (February 6, 2009, NMFS letter to the Council).

Due to the high uncertainty of the determination of pollock stock status (as noted in the GARM III stock assessment conclusions), the NMFS Northeast Fisheries Science Center, in conjunction with the Northeast Region Coordinating Council, which provides advice on the scheduling and prioritization of stock assessments, agreed to schedule another pollock stock assessment in 2010. In addition, the Council's Scientific and Statistical Committee (SSC) recommended that pollock should be reassessed as soon as possible so that they may have a more reliable basis for any projections and catch advice. The 2010 pollock benchmark stock assessment was scheduled as soon as practicable, after considering the availability date of pertinent data, and other constraints.

The pollock peer reviewed benchmark stock assessment review (SAW 50) was completed during the first week of June 2010, and the final summary report was completed on July 14, 2010. The conclusions in this report indicate that overfishing is not occurring, the stock is not overfished, and the stock is rebuilt. Based on this information, the estimates for spawning stock biomass size and fishing mortality in 2009 are 196,000 mt (2.2 times B_{msy} proxy) and 0.07 (28 percent of F_{msy}), respectively.

NMFS policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone.

The new information from the pollock benchmark stock assessment considered to be a "recently discovered circumstance," which, in the context of the current FMP and low pollock catch limits specified for FY 2010, has been determined by NMFS to represent an emergency situation. This circumstance is the results of the recently conducted assessment of pollock, which significantly revises the status of this stock. Although the new assessment has been ongoing for a number of weeks, it was not possible to have predicted its final outcome; nor could the results have been expedited due to the need to convene the necessary scientists, several of whom are not affiliated with NOAA, to complete the assessment and its peer review.

The emergency presents serious conservation and management problems because the low catch limits for pollock could result in substantially reduced fishing effort and decreased catch and revenue especially in light of the multiple species included in the fishery. When the projected catch of the ACL for a single stock such as pollock triggers a reduction or cessation of fishing effort (as required by the FMP for common pool and sector vessels, respectively), numerous other stocks that are caught concurrently with pollock may also be reduced.

NMFS has determined that the current situation meets the criteria for emergency action. Because this is a Secretarial emergency action, not a Council action, the involvement of the SSC in the specification of ABC is not specifically required, although the emergency rule must still be consistent with the best scientific information available. Although NMFS could wait for the SSC to consider the new assessment, the time necessary to complete such a process would unduly delay the possibility of meeting the emergency exigencies of this matter. Due to the urgency of this issue, NMFS has relied upon the Amendment 16 control rule for ABC established by the SSC to ensure consistency with the SSC's most recent advice concerning the appropriate level of ABC. Specifically, the control rule states that for most stocks, including pollock, the ABC should be determined as the catch associated with 75 percent of F_{msy}, or the catch associated with fishing mortality that meets the rebuilding requirements (whichever is lower). The duration of this action is limited by the Magnuson-Stevens Act to 180 days, however NMFS will re-evaluate the status of the fishery at the end of the 180 days and may extend this action in order to make the catch limits effective for the duration of the fishing year (through April 30, 2011), consistent with the authority in the Magnuson-Stevens Act to extend emergency actions for up to an additional 186 days.

Based upon the stock assessment results, NMFS is revising the stock Status Determination Criteria for pollock. The revised biomass target parameter (B_{msy} proxy) is SSB msy (40 percent Maximum Spawning Potential (MSP)) (91,000 mt); and the maximum fishing mortality threshold is the Fmsy proxy (F 40 percent MSP) (0.25).

The revised pollock catch limits are contained in Tables 1 and 2 below. Consistent with the FMP, the incidental catch TAC is divided between the Regular B DAS Program (84 percent) and the Closed Area I Hook Gear Haddock Special Access Program (14 percent).

TABLE 1. REVISED POLLOCK CATCH LEVELS FOR FY 2010

Pollock Catch Limit	Current Specification (mt) FW 44 Adjustment	Revised Specification (mt)
OFL of Catch	5,084	25,200
ABC	3,293	19,800
State Waters ACL subcomponent	200	1,188
Other ACL sub-component	200	1,188
Groundfish sub-ACL	2,748	16,553
Sector sub-ACL	2,686	16,178
Common Pool sub-ACL	62	375
Incidental Catch TAC	1.24	7.5

TABLE 2. POLLOCK ACE BY SECTOR (MT)

Sector	Current ACE (mt) FW 44 Adjustment	Revised ACE (mt)
Fixed Gear	214	1,290

TABLE 2. POLLOCK ACE BY SECTOR (MT)—Continued

Sector	Current ACE (mt) FW 44 Adjustment	Revised ACE (mt)
NCCS	12	73
NEFS 2	338	2,034
NEFS 3	202	1,218
NEFS 4	155	934
NEFS 5	11	68
NEFS 6	88	529
NEFS 7	21	124
NEFS 8	18	106
NEFS 9	105	632
NEFS 10	40	239
NEFS 11	255	1, 533
NEFS 12	1	9
NEFS 13	61	364
Port Clyde Community	117	707
Sustainable Harvest	1,047	6,309
Tri-State	2	9
Total	2,686	16,178

All ACE values for sectors assume that each sector member has a valid permit for FY 2010.

NCCS: Northeast Coastal Communities Sector; NEFS: Northeast Fishery Sectors

An environmental assessment (EA) was prepared that analyzes the impact of the revised pollock catch limits for the duration of a year, and compares the impact to the current catch limits specified for FY 2010 (i.e., the No Action Alternative). The revised level of pollock catch is consistent with sustaining the pollock biomass over the long-term at the level associated with maximum sustainable yield (B_{msy}) and fishing at a sustainable level of mortality (F_{msy}). Both scientific and management uncertainty are accounted for in this catch level, so the risks of negative biological impacts have been minimized. The revision to the FY 2010 pollock catch limits contained in this rule may result in the catch of a substantially greater amount of pollock than under the No Action Alternative. The larger catch limit for pollock may result in greater fishing effort and greater catch of other stocks in addition to pollock, as compared to the current pollock catch limits, because it is not likely that pollock will serve as a constraining stock. The increased pollock catch limit is specified in the context of the FMP, which currently authorizes the NMFS NE Regional Administrator to adjust trip limits in-season to prevent the ACL from being exceeded or to facilitate additional catch.

Due to the increased amount of pollock catch allowed under this emergency action, the increased pollock ACL represents an increase of potential revenue of $15 million, assuming recent average prices for pollock, and assuming that the full ACL for pollock will be harvested. This estimate of pollock revenue is likely high, given the level of recent pollock landings. The primary economic benefit of the revised ACL is expected to be associated with reducing the likelihood that an accountability measure would be triggered for the common pool and for sectors. The triggering of accountability measures would have reduced or precluded access to other stocks and the associated revenue.

Even with a total increase in the revised sector specifications of 13,492 mt of pollock, two sectors, NEFS 2 and NEFS 11, will still be left with less pollock ACE than the amount landed by the collective sector membership during FY 2008. That is, even though the revised aggregate pollock ACE is higher than the FY 2008 landings, the ACE for these ectors is still lower than the sector members' FY 2008 combined pollock landings. However, the deficit for the NEFS 2 sector may be readily overcome, since the operations plan for NEFS 4, which would receive an ACE of over 2 million lb (934 mt), states that NEFS 4 will be a lease-only sector in order to provide additional ACE to NEFS 2 and NEFS 3. The regulations would also allow NEFS 11 to lease additional ACE. With[t9] respect to the impact of the revised pollock catch limit on individual members of sectors, approximately 16 percent of permits that joined a sector and that had a non-zero pollock Potential Sector Contribution, will still have less pollock than they landed during FY 2008.

The Council is considering revising pollock catch limits for FY 2011 and 2012 through a future rulemaking.

Classification

NMFS has determined that this rule is necessary to respond to an emergency situation and is consistent with the Magnuson-Stevens Act and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds it impracticable and contrary to the public interest to provide for prior notice and opportunity for the public to comment, or to delay for 30 days the effective date of this emergency regulation, under the provisions of section 553(b) and (d) of the Administrative Procedure Act. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment or a delay in effectiveness contrary to the public interest. This action would result in the benefit of the revenues associated with larger pollock catch limits. This action could not allow for prior public comment because the scientific review process and determination could not have been completed any earlier due to the inherent time constraints associated with such process.

If this rulemaking was delayed to allow for notice and comment and a 30-day delay in effectiveness, the current quota for some sectors could be exceeded, which could result in triggering restrictive and economically harmful management actions that otherwise could have been avoided. The time necessary to provide for prior notice, opportunity for public comment, and delayed effectiveness for this action may prevent some vessels from targeting pollock, or could severely curtail fishing operations if the current ACL is reached prior to implementation of the increased catch limit. In the interest of receiving public input on this action, the revised assessment upon which this action was based is made available to the public, and this action requests public comments on that document and the provisions in this rule.

This emergency rule has been determined to be not 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.

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

Dated: July 14, 2010

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 2010–17693 Filed 7–15–10; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910131362–0087–02]

RIN 0648–XX65

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch for Catcher Vessels Participating in the Rockfish Entry Level Trawl Fishery in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; modification of closure.

SUMMARY: NMFS is reopening directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to fully use the 2010 directed fishing allowance of Pacific ocean perch for trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 15, 2010, through 1200 hrs, A.l.t., July 17, 2010. Comments must be received at the following address no later than 4:30 p.m., A.l.t., July 30, 2010.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by 0648–XX65, by any one of the following methods:

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

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

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

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

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

NMFS closed the directed fishery for Pacific ocean perch allocated to trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area of the GOA under § 679.20(d)(1)(iii) on July 3, 2010 (75 FR 38396, July 7, 2010).

NMFS has determined that approximately 209 mt of Pacific ocean perch remain in the directed fishing allowance in the Central Regulatory Area of the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the allowance of the 2010 TAC of Pacific ocean perch in Statistical Area 630, NMFS is terminating the previous closure and is reopening directed fishing for Pacific ocean perch in the Central Regulatory Area of the GOA. This will enhance the socioeconomic well-being of harvesters dependent upon Pacific ocean perch in this area. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) The current catch of Pacific ocean perch by the Rockfish Pilot Program entry level trawl vessels and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels participating in this fishery.

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 48 hours. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch by entry level trawl vessels in the Central Regulatory Area of the GOA, effective 1200 hrs, A.l.t., July 17, 2010.

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) and 679.25(c)(1)(ii) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of Pacific ocean perch in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 9, 2010.

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

Without this inseason adjustment, NMFS could not allow the fishery for Pacific ocean perch by entry level trawl vessels in the Central Regulatory Area of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until July 30, 2010.

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

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

Dated: July 15, 2010.

Galen Tremble,

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

[FR Doc. 2010–17689 Filed 7–15–10; 4:15 pm]

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Proposed Rules

Federal Register

Vol. 75, No. 138

Tuesday, July 20, 2010

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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150–AI25

[NRC–2008–0619]

Requirements for Fingerprint-Based Criminal History Records Checks for Individuals Seeking Unescorted Access to Research or Test Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to require research and test reactor (RTR) licensees (also called nonpower reactor licensees) to obtain a fingerprint-based criminal history records check before granting any individual unescorted access to their facilities. This action is necessary to comply with the requirements of Section 652 of the Energy Policy Act of 2005 (EPAct), which amended Section 149 of the Atomic Energy Act of 1954, as amended (AEA), to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and a criminal history records check of any person who is permitted unescorted access to a utilization facility.

DATES: Submit comments on the rule by October 4, 2010. Submit comments on the information collection aspects of this rule by September 20, 2010. Comments received after the above dates will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after these dates.

ADDRESSES: Please include Docket ID NRC–2008–0619 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, *see* Section I, "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods.

Federal Rulemaking Web Site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2008–0619. Address questions about NRC dockets to Carol Gallagher, telephone 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

Hand Deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (Telephone 301–415–1677).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

You may submit comments on the information collections by the methods indicated in the Paperwork Reduction Act Statement in Section XI of this document.

FOR FURTHER INFORMATION CONTACT: Timothy A. Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1462, e-mail *Timothy.Reed@nrc.gov;* or S. Elizabeth Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–2130, e-mail *Elizabeth.Reed@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Submitting Comments and Accessing Information
II. Background
III. Public Comment on Advance Notice of Proposed Rulemaking and Public Workshop
IV. Discussion
V. Section-by-Section Analysis
VI. Request for Stakeholder Feedback on Additional Topics
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X. Finding of No Significant Environmental Impact: Availability
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XIV. Backfit Analysis

I. Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.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.

You can access publicly available documents related to this document, including the following documents, 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, Room O–1F21, 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, or 301–415–4737, or by e-mail to *PDR.Resource@nrc.gov*.

Federal Rulemaking Web Site: Public comments and supporting materials related to this proposed rule can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2008–0619.

Document	PDR	ADAMS	Web
EA–07–074, Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors, issued April 30, 2007 (72 FR 25337; May 4, 2007).	X	ML070750140	X
EA–07–098, Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics Research and Test Reactors, issued August 1, 2007 (72 FR 44590; August 8, 2007).	X	ML072050494	X
Advance Notice of Proposed Rulemaking, published on April 14, 2009 (74 FR 17115)	X	ML090920147	X
Regulatory Analysis	X	ML101670084	X
Regulatory Analysis Appendix		ML100610020	
Proposed Rule Information Collection Analysis	X	ML101670110	X

II. Background

Before the terrorist actions of September 11, 2001, NRC regulations in 10 CFR 73.60 and 10 CFR 73.67 imposed physical protection requirements on RTRs that included measures for storing and using special nuclear material in controlled access areas, monitoring the controlled access areas for unauthorized activities, and ensuring a response to all unauthorized activities to protect special nuclear material from theft or diversion. Additionally, 10 CFR 73.60(f) implemented the Commission's authority to impose alternative or additional security measures for the protection against radiological sabotage for RTRs licensed to operate at power levels at or above two megawatts thermal (MWt). Under this provision, several RTRs have implemented such additional measures. Subsequent to September 11, 2001, the NRC evaluated the adequacy of security at RTRs and considered whether additional actions should be taken to help ensure the trustworthiness and reliability of individuals with unescorted access. RTRs were advised to consider taking immediate additional precautions, including observation of activities within their facility. The NRC evaluated these additional measures at each facility during the remainder of 2001.

From 2002 through 2004, RTRs voluntarily implemented compensatory measures (CM) that included site-specific background investigations for individuals granted unescorted access. Depending on local restrictions, such as university rules, some of these background investigations included provisions for Federal Bureau of Investigation (FBI) fingerprint-based criminal history records checks, while checks at other RTRs include provisions for local or State law enforcement fingerprint-based criminal history records checks. Investigations at some RTRs did not include any fingerprinting. The NRC has also conducted security assessments at certain RTRs, which helped to identify risk-significant areas and materials.

Section 652 of the EPAct, enacted on August 8, 2005, amended Section 149 of the AEA to require fingerprinting and FBI identification and criminal history records checks for individuals requesting unescorted access to any utilization facility, including RTRs, or radioactive material or other property subject to regulation by the NRC that the NRC determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks. Although the NRC had previously taken several steps to provide additional regulatory oversight for unescorted access to RTRs, the EPAct granted the NRC additional authority to impose FBI identification and criminal history records checks based on fingerprints of any person permitted unescorted access to various NRC-regulated facilities, including RTRs.

In SECY–05–0201, "Implementation of the Energy Policy Act of 2005," dated October 31, 2005, the NRC staff informed the Commission of its plan for implementing the NRC's responsibilities under the EPAct and requested Commission approval of the staff's funding recommendation for fiscal year 2006. The Commission approved the staff's recommendations in Staff Requirements Memorandum (SRM) dated January 5, 2006, and directed the staff to recommend appropriate interim regulatory actions that the NRC should implement while it developed the generic requirements for granting unescorted access, including the provisions in Section 652 of the EPAct pertaining to fingerprinting.

In SECY–07–001, "Interim Implementation of Fingerprinting Requirements in section 652 of the Energy Policy Act of 2005," dated January 12, 2007, the NRC staff provided information and recommendations to the Commission on its EPAct interim implementation plan. In an SRM dated March 12, 2007, the Commission directed the NRC staff to issue orders to RTRs to require fingerprint-based criminal history records checks for individuals requesting unescorted access to these facilities. The NRC staff was directed to issue orders to RTR licensees to require fingerprinting only for individuals with unescorted access to risk-significant areas or materials within the facilities. The Commission also directed the NRC staff to proceed with a rulemaking to determine if fingerprint-based criminal history records checks should be required for additional personnel.

The security of RTRs is regulated through requirements located in Part 73 of the Commission's regulations. The specific security measures that are required vary depending on several factors, which include the quantity and type of special nuclear material possessed by the licensee, as well as the power level at which the licensee is authorized to operate. In response to the Commission's March 12, 2007, directive, the NRC imposed fingerprinting requirements for unescorted access to special nuclear material on the applicable RTR licensees by order (Order EA–07–074, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors," (72 FR 25337; May 4, 2007) and Order EA–07–098, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics' Research and Test Reactors" (72 FR 44590; August 8, 2007), ADAMS Accession Nos. ML070750140 and ML072050494, respectively). Specifically, the orders state that:

> An individual who is granted 'unescorted access' could exercise physical control over the special nuclear material possessed by the licensee, which would be of significance to the common defense and security or would adversely affect the health and safety of the public, such that the special nuclear material could be used or removed in an unauthorized manner without detection, assessment, or response by systems or persons designated to detect, assess or respond to such unauthorized use or removal.

In implementing the requirement of the EPAct on an interim basis, the

orders were issued requiring fingerprinting only for individuals with unescorted access to risk-significant materials (*i.e.,* fuel), within the research and test reactor facilities. Licensees were required to submit fingerprints of individuals who were seeking or currently had unescorted access. Individuals who had previously been subjected to fingerprinting that would satisfy the requirements for unescorted access (*e.g.,* access to Safeguards Information) did not need to be fingerprinted again. These orders required that a reviewing official consider the results of the FBI criminal history records check in conjunction with other applicable requirements to determine whether an individual may be granted or allowed continued unescorted access. The reviewing official was allowed to be the same official previously approved by NRC for the Safeguards Information (SGI) order (Order EA–06–203, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Access to Safeguards Information," dated September 29, 2006; ADAMS Accession No. ML061510049) that implemented the EPAct fingerprinting and criminal history records check requirements for individuals who seek access to SGI. The unescorted access order provided that an NRC-approved reviewing official was the only individual who could make the unescorted access determination.

Advance Notice of Proposed Rulemaking (ANPR)

On April 14, 2009 (74 FR 17115), the NRC published an ANPR to obtain stakeholder views on the issues associated with the proposal to require a fingerprint-based criminal history records check for individuals granted unescorted access to RTRs. The ANPR indicated that the NRC was beginning the process of establishing generic requirements for RTR licensees to obtain a fingerprint-based criminal history records check on any individual having unescorted access to their facilities. The ANPR was intended to inform external stakeholders of the options that the NRC is considering for implementing the fingerprinting requirements (as a rulemaking) for RTR licensees. The ANPR provided interested stakeholders an opportunity to comment on the options under consideration by the NRC. The NRC developed this proposed rulemaking based on the feedback received on the ANPR (discussed in Section III of this document).

III. Public Comment on Advance Notice of Proposed Rulemaking and Public Workshop

On June 4, 2009, the NRC held a public workshop to answer stakeholder questions about the ANPR and to obtain stakeholder input on the follow-on rulemaking to require fingerprinting for unescorted access at RTR facilities. In addition to the comments received during the public workshop, the NRC received seven comment letters from interested parties: Four from RTR licensees, one from the Nuclear Energy Institute, one from the National Organization of Test, Research and Training Reactors, and one from an individual.

A. General Comments

Comment: One commenter stated that he had no issue with the proposal and would not be affected. Five commenters and several of those participating in the public workshop expressed the view that the NRC should codify the NRC imposed unescorted access orders (EA–07–074 and EA–07–098) and not impose any additional requirements. Several commenters stated that the regulation should be identical to the orders and that expanding the requirement beyond the orders is neither justifiable nor effective, and that it would cause an undue burden on the affected licensees. One commenter indicated that any change in requirements beyond those in the orders should be based on solving specific problems to reduce burden on facilities, or solve implementation issues that allow a poor practice to exist.

NRC Response: The NRC understands the concerns of the stakeholders and recognizes its obligation under Section 104c of the AEA to impose only the minimum amount of regulation needed for RTR licensees. It is the NRC's intent in this proposed rulemaking to implement the statutory requirements in Section 149 of the AEA, which the NRC is required to implement, while at the same time complying with the constraints of Section 104c of the AEA. The NRC believes that the proposed rulemaking would provide the minimum fingerprint-based FBI criminal history records checks requirements mandated by Section 149 of the AEA for unescorted access at RTR facilities.

Comment: One commenter pointed out that in addition to NRC Order EA–07–074, the NRC issued NRC Order 06–023, which addresses fingerprint-based criminal history records checks for access to SGI at RTRs, and that the NRC should consider including access to SGI in this rulemaking.

NRC Response: The NRC notes that § 73.57 was amended October 24, 2008 (73 FR 63546) to require each licensee authorized to engage in an activity subject to regulation by the Commission, including RTR licensees, to comply with the requirements of § 73.57. Section 73.57 contains the fingerprinting requirements for access to SGI. As a result, the NRC's regulations in § 73.57 already address access to SGI for RTR licensees and, as such, inclusion of additional provisions for access to SGI in this rulemaking would be duplicative and are unnecessary.

Comment: One commenter stated that the NRC should consider how it can create a system that can address fingerprint-based criminal history records checks "for other sources" besides the reactor, such as NRC Agreement State licensed sources which would also require fingerprint-based criminal history records checks.

NRC Response. Although the commenter does not clarify the meaning of "other sources," the NRC interprets this comment to mean sources beyond SNM within a utilization facility. The NRC has decided to restrict the scope of this rulemaking to the implementation of only the requirements in Section 149 of the AEA for RTR licensees (fingerprint-based criminal history records check for unescorted access to RTR facilities), although the proposed rule does recognize that if the RTR licensee has conducted fingerprinting in accordance with the NRC's regulations for other access purposes (*e.g.,* access to SGI), the licensee would not be required to re-fingerprint. With regard to security requirements, including fingerprinting requirements, for other sources, the NRC has a rulemaking underway that would address the Agreement State licensed byproduct material sources (SECY–09–0181).

Comment: One commenter stated that wording suggested in the ANPR such as "specific procedures for the conduct of fingerprinting" codifies the need for multiple procedures that provide specific guidance to law enforcement or other agencies that perform fingerprinting that is "beyond our control." This commenter suggests that the codification should state that "the licensee shall have a program, process or procedure that provides guidance * * *"

NRC Response: As a general principal, the NRC prefers to construct performance-based regulation (rather than explicit, prescriptive regulation) where possible. Where practical and necessary, procedural implementation of proposed requirements is addressed in supporting guidance. In this

circumstance, the "procedures" that are referred to are in § 73.57 and generally address the requirements in that section for handling and processing of fingerprints. Section 73.57 contains specific fingerprinting requirements that ensure fingerprint submissions are handled in a manner consistent with other licensees and in accordance with AEA requirements to provide the fingerprints to FBI. As such, the NRC is proposing to add the RTR licensee fingerprint provisions to § 73.57, thereby ensuring that RTR licensee fingerprints are handled properly. With regard to the implementation of the fingerprint requirements in RTR licensee procedures and security plans, the NRC recognizes that flexibility should be provided. Each RTR licensee's security plan or procedures as applicable would include a description of how the RTR licensee intends to comply with the requirements pertaining to fingerprinting. If, as the comment implies, a third party (*i.e.,* law enforcement or other agency) might be employed to obtain the fingerprints of individuals seeking unescorted access to nonpower reactor facilities, then the process used to obtain those fingerprints from third parties would be described in the licensee's security plan or procedures, as applicable, documenting that the RTR licensee complies with the requirements of § 73.57.

Comment: One commenter stated that "identifying areas of significance" should not be adopted. The commenter indicated that the reason access to certain SNM was identified early on as the implementing criterion, and included in the unescorted access orders was that it was much easier and appropriate to identify who can get to the SNM. Because of the unique nature of these facilities, where in some cases the facility is buried inside an existing academic building, the commenter indicated that it is very difficult to identify unescorted access by area. The commenter stated that this is exclusively true only for working hours. After normal hours, the commenter believes it is appropriate to identify those areas that fall under the security system. A facility should fingerprint everyone who has the ability to deactivate the security system.

NRC Response: The NRC understands the concern, and recognizes that there may be challenges associated with these requirements. The NRC also recognizes that RTR licensees may have unique challenges due to the location of these RTR facilities within academic surroundings. The provisions in this proposed rule are constructed to provide flexibility, providing both an "area" criterion (unescorted access to vital areas) and a "material" criterion (unescorted access to SNM). The NRC recognizes that RTR licensees may need to be flexible in how they implement these proposed requirements, and this may, in some case, require RTR licensees to take simpler, more bounding approaches to implementation of the requirements (either restricting unescorted access, providing escorts, or fingerprinting more personnel) for more complex situations.

Comment: One commenter stated that there must be great care in defining SNM as used in the proposed rule. If small amounts of SNM under the reactor license or a source are relocated to a laboratory for an experiment, and do not present a hazard to the health or safety of the public, then the SNM should not cause a redefinition of a new "area of significance" and must remain exempt from the requirements of any proposed rule for control or direct supervision.

NRC Response: The NRC has developed the proposed rule provisions to be consistent with the requirements in the previously issued NRC orders and with the standard definition of SNM. Additionally, for the purposes of determining which individuals must be fingerprinted, an individual must (beyond simply seeking unescorted access) possess the capability and knowledge to make unauthorized use of the SNM in the nonpower reactor or to remove the SNM from the nonpower reactor facility without authorization or detection. This constraint in the proposed requirement may limit the requirement for application of fingerprint-based criminal history records checks. In some cases, more than simple physical access to SNM or specified areas is necessary to require licensees to obtain fingerprint-based criminal history records checks under the proposed provisions.

Comment: A workshop participant questioned if "monitoring" necessarily meant "visual options."

NRC Response: The NRC notes that "monitoring" is an element of physical security, and in the broader security sense monitoring can typically involve "visual options." More importantly the scope of this rulemaking is fingerprint-based criminal history records checks for individuals seeking unescorted access at nonpower reactor facilities. Therefore, questions pertaining to monitoring (from a general security standpoint) do not directly pertain to the proposed rulemaking.

Comment: Several workshop participants questioned the viability of the reciprocity of fingerprint information between facilities. They stated that some facilities have students go through LiveScan FBI checks, and that it would be less burdensome if fingerprints could be transmitted electronically.

NRC Response: The NRC understands these concerns. The proposed provisions would provide some RTR licensees with the flexibility for using reciprocity by incorporating RTR licensees into the provisions of § 73.57(b)(5). The proposed revision to § 73.57(b)(5) would permit RTR licensees some discretion in determining whether to fingerprint an individual that is employed by, and has been granted access to, a nuclear power facility or a nonpower reactor facility or access to SGI by another licensee. The NRC recognizes that individual circumstances would determine whether this flexibility can be used. The NRC will accept electronic fingerprint submissions via LiveScan, however such electronic submission must come from the RTR licensee and not from a third party.

Comment: To reduce the burden on some of the small facilities, a workshop participant questioned whether it is appropriate to have an exemption in the regulation to waive the fee for fingerprint checks. The exemption would be based on the same reasoning as to why universities don't pay the annual licensing fees.

NRC Response: The NRC understands the concern. However, the requirements of Section 149 of the AEA explicitly require that the costs of an identification or records check be paid by the individual or entity required to conduct the fingerprinting. Therefore, the NRC does not have the authority to waive the fee.

B. Comments Responding to NRC Posed Questions

Question 1: Which of the definitions of areas of significance should be adopted by the NRC?

(1) Controlled access areas (CAAs) as defined in 10 CFR 73.2;

(2) Areas of the facility determined in each licensee's security assessment;

(3) Prescriptive locations such as the reactor (regardless of type), spent fuel storage areas, fresh fuel storage areas, *etc.,* or;

(4) Others?

Comment: Three written comments addressed this question. One commenter stated that identifying "areas of significance" should not be adopted because the unique nature of RTR facilities makes it difficult to grant unescorted access by area. Another commenter stated that only option (2) would be reasonable because "areas of

significance" are specific to the facility and may "flex" as the facility is changed or materials are relocated for research purposes. Two commenters noted that identifying "areas of significance" based on security reviews (option (2)) would not present a major imposition, but recognized that it would be problematic and would require some flexibility for some research reactors with less well defined areas of demarcation. The current criteria focusing on individuals who have access to SNM or who could control SNM, appear to be a better generic approach. Finally, a participant at NRC's public workshop stated that the original focus of the NRC orders had been on the individual rather than a defined area and sought the rationale for departing from that philosophy.

NRC Response: The NRC appreciates the stakeholder feedback and agrees with the need (implied by stakeholder comments) for requirements that are sufficiently flexible to address the range of situations that can exist at RTR facilities. Accordingly, the proposed provisions in this document use two criteria for unescorted access; the first pertains to an "area" and the second pertains to the "material." With regard to the "area" criterion, the proposed rule would use the term "vital area." Vital area is defined in § 73.2 as "any area which contains vital equipment," and vital equipment is in turn defined in § 73.2 as "any equipment, system, device, or material, the failure, destruction, or release of which could directly or indirectly endanger the public health and safety by exposure to radiation. Equipment or systems which would be required to protect public health and safety following such failure, destruction, or releases are also considered to be vital." These definitions apply to all the provisions within 10 CFR Part 73, and accordingly apply to RTR licensees whose security requirements are governed by 10 CFR Part 73. The equipment, systems, devices, and material that fall within the § 73.2 vital equipment definition meet the utilization facility definition in Section 11.cc of the AEA. Hence fingerprinting individuals who wish to have unescorted access to vital areas (which contain vital equipment) is ensuring that individuals permitted access to the "utilization facility" as defined in the AEA, is properly implemented in the NRC's regulations. Additionally, the proposed rule would incorporate a "material" criterion (*i.e.,* special nuclear material) which the NRC recognizes is a more useful criterion for many RTR situations, and which is consistent with the unescorted access orders.

Question 2: What would be the approximate number of additional personnel that must be fingerprinted for unescorted access based on the "areas of significance" as defined in Question 1, and are there categories of persons that should be exempted?

Comment: One university commenter stated that no additional individuals would require fingerprinting if the "area of significance" is defined as the vital area defined in its Physical Security Plan. The commenter also stated that if the area of significance is expanded beyond the vital area, an additional 200 students and faculty would require fingerprint-based criminal history records checks, with an additional 25 to 50 individuals each academic term. Two university representatives indicated that they expected no increase in the number of persons to be fingerprinted; one stated that an unspecified number of additional escorts would be required. With respect to categories of persons to be exempted, one commenter agreed that exemptions should be granted for unusual instances such as known foreign nationals or gifted students.

NRC Response: The NRC agrees with this commenter and the observation of other commenters making similar remarks that the size of the area defined by the rule directly impacts the number of individuals requiring fingerprint-based criminal history records checks for unescorted access. The proposed rule would use "vital area," which falls within the AEA definition of "utilization facility" as discussed above in response to the Question 1 comment. The NRC expects that these proposed revisions would result in a similar group of people requiring fingerprinting when compared to the NRC orders previously issued to RTR licensees. The NRC believes that the proposed rule would properly implement Section 149 of the AEA, and reflect the minimum requirements necessary for RTR licensees.

Question 3: What is the estimated cost or impact of performing security plan or procedure revisions, and of providing the necessary administrative controls and training to implement fingerprint requirements for individuals permitted unescorted access to "areas of significance" such as those described in Question 1?

Comment: One commenter stated that the cost of fingerprinting individuals outside the vital area would be a significant burden. In addition to the $37 for the cost of the actual fingerprint processing, the time and effort necessary to obtain the fingerprinting would require his university to hire an employee to only process fingerprinting and background check information. While one commenter estimated that implementing increased fingerprinting or escorts would result in a productivity loss of approximately 0.25 persons or $25,000, two commenters stated that any change to the language in the security orders would place an undue burden on licensees to make revisions to their security plans. One university representative estimated that the additional time required to administer this requirement would cost approximately $10,000 because that institution had already expanded the definition of individuals requiring fingerprinting beyond the requirement in the security orders.

NRC Response: The NRC appreciates the information provided and will give it consideration when estimating the costs associated with implementing the fingerprinting requirements of Section 149 of the AEA. The NRC is required to implement the provisions of the AEA so this burden cannot be eliminated in its entirety, but if more efficient and less-burdensome approaches are identified, the agency will attempt to construct requirements that impose the least burden while complying with Section 149 of the AEA.

Question 4: Is the proposed definition of "individuals with unescorted access" reasonable and sufficient? If not, why? For example, should persons granted unescorted access to "areas of significance" be permitted access to the facility when no supervision or oversight is present (*e.g.,* evenings or weekends)? Should the NRC require access controls such as maintaining records of the time and duration of persons accessing an "area of significance" without escorts?

Comment: One commenter stated that unescorted access should permit individuals access to areas and equipment without supervision. Another commenter stated that the ANPR's definition of "unescorted access" as "any individual who has the ability to access licensee-designated 'areas of significance' without continuous direct supervision or monitoring by an authorized individual," is not workable. This commenter states that inherent in the current definition is the concept of an individual with capability and knowledge to exercise control over or remove SNM without detection and/or response by the protection system. According to this commenter maintenance employees are given training and access to areas of significance during normal working

hours, but do not have the knowledge or capability to exercise control over the SNM without detection. This commenter's facility limits the capability and knowledge to control or move the strategic nuclear material to a very small group of individuals who have authority to access "areas of significance" during non-business hours, and even these individuals cannot access the system without the knowledge of the security forces. Another commenter's facility defines persons authorized "unescorted containment access" and those authorized "unescorted laboratory access." The second definition would need to be changed if unescorted access is to refer to persons having access to "areas of significance."

With respect to the question regarding permitting access to the facility when there is no supervision or oversight, one commenter stated that if the new definition of unescorted access is to be used (*i.e.,* access to areas of significance) his university may define a new class of individuals with "limited unescorted access" to encompass workers who are allowed in to do limited duties, but would not allow this class of individuals access after hours because those areas would be such that informed individuals could exercise control over procedures or damage equipment and/or materials.

With respect to the proposal to require records of times and areas that persons have had access to "areas of significance," one commenter opposed this requirement. These records may be part of the security layer at some facilities, however they do not deter an insider with access and intent to remove or damage equipment.

NRC Response: The NRC understands the concerns expressed by the commenters. The proposed rule language does not include the term "areas of significance." To ensure compliance with Section 149 of the AEA (to fingerprint any individual permitted access to a utilization facility), the proposed rule does include a criterion to require fingerprinting for individuals who wish to have access to a "vital area." As discussed in a previous response, the NRC concludes that vital equipment as defined in § 73.2 falls within the AEA definition of utilization facility and so it is appropriate to fingerprint individuals who wish to have access to vital areas (containing vital equipment). Additionally, the proposed rule would incorporate language denying unescorted access to individuals, who possess the capability and knowledge to make unauthorized use of, or remove, SNM until they have submitted fingerprints for an FBI criminal history records check. These provisions are both consistent with the previous orders on unescorted access and provide an appropriate level of flexibility.

Question 5: What has worked well, what has not, and why?

Comment: Some commenters stated that an early concern had been the additional amount of time required for the fingerprinting, but the actual processing time has been short and that the orders appear to be working effectively. One commenter stated that repeated and excessive fingerprinting has been burdensome and expressed frustration because of a lack of a clear method to share clearance information between facilities and government agencies. This commenter did not explain why fingerprinting needed to be repeated in some circumstances. Another commenter suggested that the NRC permit the licensee to work directly with the FBI without having to process the fingerprints through the NRC.

NRC Response: The NRC agrees with the commenter regarding the lack of a clear method to share clearance information between facilities and government agencies. The proposed rule would incorporate RTR licensees into § 73.57(b)(5), which provides RTR licensees the flexibility of using reciprocity. The NRC does not have the authority to allow RTR licensees to submit fingerprints directly to the FBI instead of submitting them through the NRC. Section 149 of the AEA states that, "all fingerprints obtained by an individual or entity as required [in this section] be submitted to the Attorney General of the United States *through the Commission* for identification and a criminal history records check." The FBI has strictly interpreted this provision and will not accept fingerprints except through the NRC.

Question 6: What requirements were found to be the most burdensome? Are there less burdensome alternatives that would accomplish the same level of protection?

Comment: Several commenters stated that the fingerprinting requirement has not been particularly burdensome because the number of individuals affected is manageable. The continual use of paper and ink required to maintain paper copies of fingerprints was cited by three commenters as being burdensome. The industry-wide and Federal use of "LiveScan" fingerprinting was cited as being less burdensome and having the benefit of enhancing the industry's and NRC's ability to share information.

NRC Response: The NRC agrees with the commenters. The NRC has developed the proposed rule to contain generically-applicable requirements that implement Section 149 of the AEA, are consistent with previous requirements in NRC issued orders, and reflect the minimum requirements necessary for RTR licensees consistent with Section 104c of the AEA. The proposed provisions in this document use two criteria for unescorted access; the first pertains to an "area" and the second pertains to the "material." With regard to the "area" criterion, the proposed rule would use the term "vital area" (as defined in Part 73), which the NRC concludes (as discussed above in previous responses) falls within the AEA definition of "utilization facility." Additionally, the proposed rule would incorporate a "material" criterion (*i.e.,* special nuclear material), which the NRC recognizes is a more useful criterion for many RTR situations. The proposed rule would incorporate RTR licensees into § 73.57 and thereby afford RTR licensees the flexibility provided to other licensees such as the use of reciprocity.

Question 7: Are there requirements in the orders that appear to contribute little to the security of the facility? Could the same resources be used more effectively in other ways?

Comment: None of the comments received addressed this question.

NRC Response: None

Question 8: Are there other enhancements that could be made?

Comment: None of the comments identified other enhancements that could be made.

NRC Response: None.

Question 9: Has the implementation of the orders identified any new issues that should be addressed through rulemaking?

Comment: None of the comments received identified addressed this question.

NRC Response: None.

Question 10: Regarding alternatives to fingerprinting foreign nationals and/or minors in connection with a trustworthiness and reliability determination.

(1) Do foreign nationals and/or minors require unescorted access to "areas of significance?"

(2) Are there alternative methods to obtain information upon which a licensee could base a trustworthiness and reliability determination for these individuals?

Comment: One commenter stated that criminal history records checks for minors should be considered valid even though the opportunity for criminal

behavior has been limited. However, foreign nationals should be vetted through other Federal agencies because fingerprint checks would not be as effective for these individuals. One commenter stated that neither foreign nationals nor minors would be permitted access without escorts. Another commenter stated that any proposed rule should provide a mechanism for exempting individuals based on "unusual instances," such as exempting foreign national researchers or students, or gifted minors. Such an exemption should include a temporary waiver to allow work while the process is in progress based on an evaluation by management. Another commenter stated that foreign nationals require unescorted access to "areas of significance" but minors do not, and that there are alternative ways to obtain information upon which to base a trustworthiness and reliability determination but the validity of information from some sources could be problematic. Another individual commented that both foreign nationals and minors require unescorted access to "areas of significance."

NRC Response: The NRC agrees with the commenters that fingerprints may not be as effective in determining the trustworthiness and reliability of a foreign national or of a minor, and agrees that there may be alternative ways to obtain information upon which to base a trustworthiness and/or reliability determination. The scope of this proposed rulemaking is fingerprint-based FBI criminal history records checks. However, the NRC is considering whether other background investigation elements should also be required for the purpose of a trustworthiness and reliability determination. These requirements would be addressed in a follow-on rulemaking should the Commission decide that the requirements are necessary.

Question 11: Is there any additional information that the NRC should consider in preparing the proposed rule?

Comment: None of the comments received specifically addressed this question.

NRC Response: None.

IV. Discussion

The proposed amendments would establish, for RTR licensees, generically applicable fingerprinting requirements similar to those previously imposed by the Commission's orders pertaining to the granting of unescorted access. The proposed amendments would implement the requirement in Section 149(a)(1)(B)(i) of the AEA that the Commission require to be fingerprinted any individual who is permitted unescorted access to a utilization facility.

As previously noted, Section 149 of the AEA grants the NRC the authority to impose FBI fingerprint-based identification and criminal history records checks for individuals seeking unescorted access at a broader range of NRC licensees and regulated facilities. Before the EPAct amended Section 149, the NRC required fingerprinting for unescorted access to facilities licensed under Sections 103 and 104b of the AEA. Because the amendment, which eliminated the references to Section 103 and 104b, utilization facilities licensed under Section 104c (as discussed in more detail below) of the AEA, which were not previously subject to these requirements, are now subject to these fingerprint requirements, and it is this specific expansion that is the subject of this proposed rule (*i.e.,* extension of these fingerprint-based FBI criminal history records check requirements to nonpower reactors including RTR licensees).

Section 149 now requires fingerprinting for individuals seeking unescorted access to a "utilization facility." Utilization facility is a term that is defined in Section 11.cc. of the AEA as:

> (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

The AEA definition provides discretion to the Commission with regard to how this term might be implemented. In this regard the Commission defined "utilization facility" in 10 CFR 50.2 as any nuclear reactor other than one designed or used primarily for the formation of plutonium or U–233.

In developing these proposed provisions, the NRC recognized that when constructing requirements for RTR licensees, it should be cognizant of the direction in Section 104c of the AEA which states, in part that:

> The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under the Act to promote common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

The proposed revisions discussed in this document are constructed in accordance with the requirements of Section 149 of the AEA and within the constraints of 104c of the AEA. The NRC recognizes that there may be future nonpower utilization facilities (none of which are currently licensed) that could be licensed under Section 103 of the AEA (*e.g.,* medical isotope production facilities are one possible facility). The NRC concludes that the proposed provisions would establish adequate minimum fingerprinting requirements for unescorted access at these Class 103 nonpower reactor facilities. If the NRC determines that these fingerprinting requirements need to be supplemented in the future, the NRC intends to supplement these minimum requirements as necessary during the licensing process using license conditions.

V. Section-by-Section Analysis

A. Section 73.57(a) General

Paragraphs (a)(1) and (a)(2) would be simplified because the first portion of the current rule language, which includes current power reactors licensed under Part 50 and applicants for power reactor licenses, is encompassed by the second portion of the rule provision that requires licensees that engage, or intend to engage in any regulated activity to be subject to the provisions of § 73.57.

Paragraph (a)(3) would be revised to add nonpower reactors (which includes RTR licensees) into the scope of licensees subject to § 73.57 fingerprint provisions. Nonpower reactor licensees would be added to § 73.57 to make use of the current fingerprint requirement provisions that are being successfully used for other licensees subject to FBI fingerprint-based criminal history records checks. This would ensure that RTR licensee fingerprints are handled in a manner that is both consistent with the process used for other licensees, and that ensures NRC meets it obligations under the AEA for the handling and processing of fingerprints with the FBI.

B. Section 73.57(b) General Performance Objective and Requirements

Paragraph (b)(1) would be revised to include nonpower reactor licensees in the scope of the general performance and objective requirements of § 73.57. The paragraph would point to new paragraph (g) where the specific

unescorted access provisions for RTR licensees would be described.

Paragraph (b)(2)(i) would be revised to add nonpower reactor facilities, relieving RTR licensees from being required to fingerprint the designated entities, consistent with the exceptions allowed for other licensees. Paragraph (b)(2)(i) would be further revised to list "offsite response organizations responding to a nonpower reactor facility" as one of the categories that would not require fingerprinting under the revised § 73.57 provisions. To implement this proposed requirement, RTR licensees would need to develop or revise predetermined actions that accommodate offsite response organizations during emergency conditions. These actions may involve the use of a liaison with the various offsite response organizations.

Paragraph (b)(2)(v) would be added to enable individuals who have a valid unescorted access authorization to a nonpower reactor facility on the effective date of the rule (granted in response to NRC Orders EA–07–074 and EA–07–098) to retain their access authorization and not be required to have a new fingerprint-based FBI criminal history records check under proposed § 73.57(g) until such time that the individual's existing authorization either expires, is terminated, or is otherwise required to be renewed.

Paragraph (b)(4) would be revised to relieve RTR licensees from being required to fingerprint an individual if the licensee is reinstating the unescorted access to a granted individual when that individual returns to the same reactor facility and the unescorted access has not been interrupted for a continuous period of more than 365 days.

Paragraph (b)(5) would be revised to provide nonpower reactor licensees the discretion not to fingerprint individuals for which a fingerprint-based criminal history records check has been conducted, and for which the criminal history records check can be transferred to the gaining licensee in accordance with § 73.57(f)(3). This revision allows for reciprocity of fingerprint-based criminal history records checks and grants RTR licensees the same discretion that is currently granted to power reactor licensees.

Paragraph (b)(8) would be revised to include RTR licensees to ensure that RTR licensees use the information obtained as part of the criminal history records check solely for the purpose of determining an individual's suitability for unescorted access.

C. Section 73.57(c) Prohibitions

Paragraph (c)(1) would be revised to include RTR licensees so that the associated prohibitions are provided to individuals seeking unescorted access at nonpower reactors.

D. Section 73.57(d) Procedures for Processing of Fingerprint Checks

Paragraph (d)(1) would be revised to include nonpower reactor facilities so that the established fingerprint provisions and forms that NRC currently uses for other licensees can be used by RTR licensees.

Paragraph (d)(3)(ii) would be revised to apply the application fee provisions to all licensees (including RTR licensees) subject to the section 73.57 fingerprinting requirements.

E. Section 73.57(f) Protection Information

Paragraph (f)(2) would be revised to add nonpower reactor licensees to ensure that the personal information disclosure restrictions are applied to RTR licensees.

Paragraph (f)(5) would be revised to add nonpower reactors and thereby provide records retention requirements for the fingerprints and criminal history records checks generated through compliance with proposed § 73.57.

F. Section 73.57(g) Fingerprinting Requirements for Nonpower Reactor Licensees

This paragraph would be added to provide the new proposed fingerprint-based criminal history records checks requirements required by Section 149 of the AEA. The scope of the proposed requirements is consistent with orders on unescorted access issued by the NRC on April 30, 2007 and August 1, 2007 (EA–07–074 and EA–07–098 respectively). These orders require RTR licensees to conduct FBI identification and fingerprint-based criminal history records checks based on fingerprints for individuals granted unescorted access to SNM at these facilities (*i.e.,* individuals having the knowledge and capability to remove the SNM and use it in a way inimical to the public health and safety or common defense and security). The orders were issued as interim measures until the NRC could formulate generically applicable requirements for incorporation into the NRC's regulations.

Section 73.57(g)(1) would establish requirements that prohibit any person from having unescorted access to a nonpower reactor facility unless that person has been determined by the licensee to be trustworthy and reliable based on a fingerprint-based FBI criminal history records check. This determination would be made by an NRC-approved reviewing official. The reviewing official is required to have unescorted access in accordance with the requirements of proposed § 73.57, or access to SGI. The licensee's NRC-approved reviewing official would evaluate the criminal history records check information to determine whether the individual has a record of criminal activity that indicates that the individual should be denied unescorted access. For each determination of unescorted access, which would include a review of criminal history information, the NRC would expect RTR licensees to document the basis for the decision. When negative information is discovered that was not provided by the individual, or which is different in any material respect from the information provided by the individual, this information would be considered, and actions would be taken based on these findings. The NRC would expect these findings to be documented. A criminal history record containing a pattern of behaviors which could be expected to recur or continue, or recent behaviors which cast questions on whether an individual should have unescorted access in accordance with proposed § 73.57(g) would be carefully evaluated before unescorted access is granted to the individual.

Section 73.57(g)(2)(i) would establish requirements for RTR licensees to obtain fingerprints for criminal history records checks for each individual who is seeking or permitted unescorted access to vital areas of the nonpower reactor facility. Vital area is defined in § 73.2 as "any area which contains vital equipment," and vital equipment is in turn defined in § 73.2 as "any equipment, system, device, or material, the failure, destruction, or release of which could directly or indirectly endanger the public health and safety by exposure to radiation. Equipment or systems which would be required to protect public health and safety following such failure, destruction, or releases are also considered to be vital." These definitions apply to all the provisions within 10 CFR Part 73, and accordingly apply to RTR licensees whose security requirements are governed by 10 CFR Part 73. The equipment, systems, devices, and material that fall within the § 73.2 vital equipment definition meet the utilization facility definition in Section 11.cc of the AEA. Hence fingerprinting individuals who wish to have unescorted access to vital areas is ensuring that individuals permitted

access to the "utilization facility," as defined in the AEA, is properly implemented in the NRC's regulations.

At higher powered RTRs, the vital area criterion may increase the scope of personnel required to obtain fingerprinting beyond the SNM criterion proposed in § 73.57(g)(2)(ii), in order to accommodate individuals wishing to have access to equipment that can mitigate the impact of sabotage. The NRC notes that RTR licensees have associated "vital area" with the storage of unirradiated highly enriched uranium, as the historic principal security concern for most RTR facilities has been theft and diversion of highly enriched uranium. However, as discussed above, the NRC would be using "vital area" in this proposed provision as defined in § 73.2. A vital area at a particular RTR will vary as a function of the facility design. Security assessments have been performed for a number of licensees that can provide the licensees insight into what constitutes a vital area. Given that implementation of this proposed revision may involve a significant amount of interpretation on the part of RTR licensees, the NRC expects that RTR licensees would have clear documentation to support their decisions.

Paragraph (g)(2)(ii) would establish requirements for RTR licensees to obtain fingerprints for a criminal history records check for each individual who is seeking or granted unescorted access to SNM in the nonpower reactor facility. This provision is consistent with the criteria used in the unescorted access order. The Commission notes that there may be significant overlap between the two criteria (*i.e.,* SNM and vital area) of proposed § 73.57(g)(2). As an example, SNM can be considered to be "vital equipment" under the material portion of the § 73.2 vital equipment definition. The NRC expects that the SNM criterion would, in most situations, determine whether an individual is required to be fingerprinted in accordance with the proposed provisions.

For both proposed § 73.57(g)(2)(i) and (ii), for the purposes of determining which individuals must be fingerprinted, an individual must additionally (beyond simply seeking unescorted access) possess the capability and knowledge to make unauthorized use of the special nuclear material in the nonpower reactor. This constraint in the proposed requirement may limit the requirement for application of fingerprint-based criminal history records checks. In some cases, more than simple physical access to special nuclear material or specified areas is necessary to require licensees to obtain fingerprint-based criminal history records checks under § 73.57(g)(2)(i) and (ii). To determine which individuals should be fingerprinted for unescorted access, RTR licensees would need to evaluate their current security plans and procedures considering the definition of vital area (in 10 CFR Part 73) and the requirements of § 73.57(g)(2)(i) and (ii), as well as any other security assessment information that might be available. For example, an RTR licensee may decide for practical reasons to fingerprint individuals who wish to have unescorted access within the controlled access area.

In most cases, the provisions of § 73.57(g) would use an RTR licensee's procedures similar to those used to implement the previous unescorted access and SGI access fingerprinting orders, and more importantly, it would follow the regulatory processing and handling requirements already incorporated into § 73.57.

When a licensee submits fingerprints to the NRC under the proposed provisions, the licensee would receive a criminal history review, provided in Federal records, since the individual's eighteenth birthday. The licensee's reviewing official would evaluate the criminal history records information pertaining to the individual as required by proposed § 73.57(g). The criminal history records check would be used in the determination of whether the individual has a record of criminal activity that indicates that the individual should not have unescorted access at the nonpower reactor facility. Each determination of unescorted access would include a review of the fingerprint-based criminal history information and should include the licensee's documentation of the basis for the decision.

1. When negative information is discovered that was not provided by the individual, or that is different in any material respect from the information provided by the individual, this information should be considered, and actions taken based on these findings should be documented.

2. A record containing a pattern of behaviors that indicates that the behaviors could be expected to recur or continue, or recent behaviors that cast questions on whether an individual should have unescorted access in accordance with the proposed provisions, should be carefully evaluated prior to any authorization of unescorted access.

VI. Request for Stakeholder Feedback on Additional Topics

A. Implementation

The NRC is proposing to make the final § 73.57 fingerprinting provisions effective 120 days following the date the final rule is published in the **Federal Register**. The NRC believes that this is sufficient time to allow RTR licensees to develop or revise procedures and programs associated with the granting of unescorted access at their facilities because the majority of procedure and plan changes should be in place as a result of the previously issued unescorted access order. Additionally, the NRC believes this provides sufficient time for additional individuals to be fingerprinted and approved by the reviewing official.

1. Is 120 days sufficient time to implement the new provisions, including revising or developing fingerprinting programs or procedures?

2. Are there any other newly issued NRC requirements or impositions (aggregate impacts) that you expect could adversely impact your ability to implement the proposed provisions?

3. If there are other potential aggregate impacts, is there a time when you expect that these impacts will become insignificant in terms of your capability to implement the new proposed revisions?

B. Background Investigation Requirements

The NRC is interested in obtaining stakeholder feedback on additional background investigation requirements. These additional elements are not part of the proposed provisions in § 73.57 that implement the mandated AEA Section 149 fingerprinting requirements for RTR licensees. However, during the development of these proposed fingerprinting provisions, the NRC concluded that soliciting stakeholder feedback on additional background investigation requirements would be worthwhile to gain stakeholders views on whether these requirements would provide greater confidence and validity to the unescorted access determinations. The NRC recognizes its obligation under Section 104c of the AEA to put in place the minimum requirements for RTR licensees and accordingly has not incorporated proposed rule language in this document for these additional background investigation provisions. However, with the stakeholder input, the NRC may elect to further revise the unescorted access requirements for RTR licensees in a future rulemaking.

1. The newly revised Safeguards Information requirements in §§ 73.21,

73.22, and 73.23 (issued in October 2008 and effective February 2009) are supported by background checks, which require the reviewing official to determine trustworthiness and reliability. Specifically, § 73.22 (b)(2) requires that a person to be granted access to SGI must be trustworthy and reliable based on a background check or other means approved by the Commission. Background check is a term defined in § 73.2 to include FBI fingerprint-based criminal history records checks; employment history; education; and personal references.

For RTR licensees, should the NRC require that background checks for unescorted access and SGI access be consistent, and address the same elements that are identified in the § 73.2 definition beyond the FBI fingerprint-based criminal history records check?

2. While an FBI fingerprint-based criminal history records check will identify criminal activity for individuals over 18 that have a criminal history in the United States, would this information be sufficient for RTR licensees to make a meaningful trustworthiness and reliability determination for unescorted access? If more is needed, what could be added to increase the validity of these determinations?

3. Assuming that a background check (containing the additional requirements identified in § 73.2) were to be conducted, what time period should the investigation cover (*i.e.,* 5 years, 10 years *etc.*)?

4. Are RTR licensees aware of any conflicting Federal and State requirements concerning the privacy of students and staff? If so, what is the nature of the conflict?

5. Do RTR licensees know the number of people that seek unescorted access and already have been granted access to SGI (*i.e.,* these individuals would already have been fingerprinted and subjected to background checks to receive SGI access)?

To provide stakeholders with a better idea of the type of rule language that might be considered for a future rulemaking, and thereby support more informed feedback on the above questions, the NRC is providing the following example of potential requirements that could be considered.

Before granting an individual unescorted access, licensees shall complete a background investigation of the individual seeking unescorted access authorization. The scope of the investigation must encompass at least the past [x] years. The background investigation must include at a minimum:

• *Verification of true identity.* Licensees shall verify the true identity of an individual who is applying for unescorted access authorization to ensure that the applicant is who they claim to be. A licensee shall review official identification documents (*e.g.,* driver's license, passport, government identification, State, province, or country of birth issued certificate of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information. Licensees shall document the type, expiration, and identification number of the identification, or maintain a photocopy of identifying documents on file. Licensees shall certify and affirm in writing that the identification was properly reviewed and maintain the certification and all related documents for review upon inspection.

• *Employment history evaluation.* Licensees shall complete an employment history evaluation. Licensees shall verify the individual's employment with each previous employer for the most recent [x] years before the date of application.

• *Verification of education.* Licensees shall verify that the individual participated in the education process during the claimed period.

• *Criminal history review.* Reviewing officials shall obtain from local criminal justice resources the criminal history records of an individual who is applying for unescorted access authorization and evaluate the information to determine whether the individual has a record of local criminal activity that may adversely impact his or her trustworthiness and reliability. The scope of the applicant's local criminal history review must cover all residences of record for the [x] year period preceding the date of the application for unescorted access authorization.

• *Character and reputation determination.* Licensees shall complete reference checks to determine the character and reputation of an individual who has applied for unescorted access authorization. Reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to, the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks under this subpart must be limited to whether the individual has been and continues to be trustworthy and reliable.

• The licensee shall also, to the extent possible, obtain independent information to corroborate the information provided by the individual (*e.g.,* seek references not supplied by the individual).

• If a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee but at least [x] business days of the request, the licensee shall:

—Document the refusal, unwillingness, or inability in the record of investigation; and

—Obtain a confirmation of employment, educational enrollment and attendance, or other form of engagement claimed by the individual from at least one alternate source that has not been previously used.

VII. Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement States Programs," approved by the Commission on June 20, 1997, and published in the **Federal Register** (62 FR 46517; September 3, 1997), this rule is classified as compatibility "NRC." Compatibility is not required for Category "NRC" regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the "EA or the provisions of this chapter. Although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements by a mechanism that is consistent with the particular State's administrative procedure laws. Category "NRC" regulations do not confer regulatory authority on the State.

VIII. Plain Language

The Presidential memorandum "Plain Language in Government Writing" published on June 10, 1998 (63 FR 31883), directed that the Government's documents be in clear and accessible language. The NRC requests comments on the proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the **ADDRESSES** heading of this document.

IX. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. The NRC is not aware of

any voluntary consensus standard that could be used instead of the proposed Government-unique standards. The NRC will consider using a voluntary consensus standard if an appropriate standard is identified.

X. Finding of No Significant Environmental Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A, "National Environmental Policy Act; Regulations Implementing Section 102(2)," of 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required.

The determination of this environmental assessment is that there will be no significant offsite impact to the public from this action. However, the general public should note that the NRC is seeking public participation on this environmental assessment. Comments on this environmental assessment may be submitted to the NRC as indicated under the **ADDRESSES** heading of this document.

The NRC has sent a copy of this environmental assessment and this proposed rule to every State Liaison Officer and requested their comments on the environmental assessment.

XI. Paperwork Reduction Act Statement

This proposed rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq*). This rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

Type of submission, new or revision: Revision.

The title of the information collection: 10 CFR Part 73, "Fingerprint Based Criminal History Records Checks for Unescorted Access to Research or Test Reactors (RTR)."

The form number if applicable: Form FD–258.

How often the collection is required: As needed, due to staff turnover.

Who will be required or asked to report: RTR licensees.

An estimate of the number of annual responses: 132 (100 responses plus 32 recordkeepers).

The estimated number of annual respondents: 32.

An estimate of the total number of hours needed annually to complete the requirement or request: 690 hours (450 reporting plus 240 recordkeeping). However, NRC has previously accounted for the hours for these requirements, issued under Orders, using the Agency's clearance for 10 CFR part 73. Therefore, the hours do not represent additional burden to licensees.

Abstract: The NRC is proposing to amend its regulations to require fingerprint-based criminal history records checks for RTR licensees to grant individuals unescorted access to their facilities. This action is necessary to comply with the requirements of Section 652 of the EPAct of 2005, which amended Section 149 of the AEA, to require fingerprinting and an FBI identification and criminal history records check of any person who is permitted unescorted access to a utilization facility. As a result of this action, RTR licensees would be subject to the fingerprinting and criminal history records check requirements specified in the NRC's regulations instead of NRC issued Orders EA–07–074 and EA–07–098 pertaining to this matter.

The NRC is seeking public comment on the potential impact of the information collections contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Estimate of burden?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

A copy of the OMB clearance package may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1F21, Rockville, MD 20852. Availability of the OMB clearance package is indicated in Section I of this document. The OMB clearance package and rule are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html* for 60 days after the signature date of this notice.

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden and on the above issues, by September 20, 2010 to the Information Services Branch (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by e-mail to *INFOCOLLECTS.RESOURCE@NRC.GOV* and to the Desk Officer, Ms. Christine Kymn, Office of Information and Regulatory Affairs, NEOB–10202 (3150–0011), Office of Management and Budget, Washington, DC 20503. Comments on the proposed information collections may also be submitted via the Federal eRulemaking Portal *http://www.regulations.gov,* Docket # NRC–2008–0619. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. You may also e-mail comments to *Christine.Kymn@omb.eop.gov* or comment by telephone at (202) 395–4638.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

XII. Regulatory Analysis: Availability

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The Commission requests public comments on the draft regulatory analysis. Availability of the regulatory analysis is indicated in Section I of this document. Comments on the draft analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading.

XIII. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of non-power reactors. Only one of the companies and universities that own and operate these facilities falls within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810), and the economic impact on this entity is judged to be small.

XIV. Backfit Analysis

The NRC's backfit provisions are found in the regulations at §§ 50.109, 70.76, 72.62, 76.76, and in 10 CFR Part 52. Under § 50.2, nonpower reactors are

research or test reactors licensed in accordance with Sections 103 or 104c of the AEA and §§ 50.21(c) or 50.22 for research and development. The NRC has determined that the backfit provision in § 50.109 does not apply to test, research, or training reactors. The NRC has further determined that the amendments to § 73.57 contained in this proposed rule do not involve any provisions that would impose backfits on nuclear power plant licensees or on licensees for special nuclear material, independent spent fuel storage installations or gaseous diffusion plants as defined in 10 CFR chapter I. Therefore, a backfit analysis was not prepared for this proposed rule.

List of Subjects in 10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 73.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

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

Authority: Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 594 (2005).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C, 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169).

2. In § 73.57, the heading and paragraphs (a), (b)(1), and (b)(2)(i) are revised; paragraph (b)(2)(v) is added; the introductory text of paragraph (b)(4), paragraphs (b)(4)(i), (b)(5), (b)(8), the introductory text of paragraph (c)(1), paragraphs (d)(1), (d)(3)(ii), (f)(2) and (f)(5) are revised; and paragraph (g) is added to read as follows:

§ 73.57 Requirements for criminal history records checks of individuals granted unescorted access to a nuclear power facility, a non-power reactor, or access to Safeguards Information

(a) *General.* (1) Each licensee who is authorized to engage in an activity subject to regulation by the Commission shall comply with the requirements of this section.

(2) Each applicant for a license to engage in an activity subject to regulation by the Commission, as well as each entity who has provided written notice to the Commission of intent to file an application for licensing, certification, permitting, or approval of a product subject to regulation by the Commission shall submit fingerprints for those individuals who will have access to Safeguards Information.

(3) Before receiving its operating license under 10 CFR part 50 or before the Commission makes its finding under § 52.103(g), each applicant for a license to operate a nuclear power reactor (including an applicant for a combined license) or a nonpower reactor may submit fingerprints for those individuals who will require unescorted access to the nuclear power facility or nonpower reactor facility.

(b) * * *

(1) Except those listed in paragraph (b)(2) of this section, each licensee subject to the provisions of this section shall fingerprint each individual who is permitted unescorted access to the nuclear power facility, the nonpower reactor facility in accordance with paragraph (g) of this section, or access to Safeguards Information. The licensee will then review and use the information received from the Federal Bureau of Investigation (FBI), and based on the provisions contained in this section, determine either to continue to grant or to deny further unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information for that individual. Individuals who do not have unescorted access or access to Safeguards Information shall be fingerprinted by the licensee and the results of the criminal history records check shall be used before making a determination for granting unescorted access to the nuclear power facility, nonpower reactor facility, or to Safeguards Information.

(2) * * *

(i) For unescorted access to the nuclear power facility or the nonpower reactor facility (but must adhere to provisions contained in §§ 73.21 and 73.22): NRC employees and NRC contractors on official agency business; individuals responding to a site emergency in accordance with the provisions of § 73.55(a); offsite emergency response personnel who are responding to an emergency at a nonpower reactor facility; a representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement at designated facilities who has been certified by the NRC; law enforcement personnel acting in an official capacity; State or local government employees who have had equivalent reviews of FBI criminal history data; and individuals employed at a facility who possess "Q" or "L" clearances or possess another active government granted security clearance (*i.e.,* Top Secret, Secret, or Confidential);

* * * * *

(v) Individuals who have a valid unescorted access authorization to a nonpower reactor facility on [effective date of the rule] are not required to undergo a new fingerprint-based criminal history records check pursuant to paragraph (g) of this section, until such time that the existing authorization expires, is terminated, or is otherwise to be renewed.

* * * * *

(4) Fingerprinting is not required if the licensee is reinstating the unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information granted an individual if:

(i) The individual returns to the same nuclear power utility or nonpower reactor facility that granted access and such access has not been interrupted for a continuous period of more than 365 days; and

* * * * *

(5) Fingerprints need not be taken, in the discretion of the licensee, if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to a nuclear power facility, a nonpower reactor facility, or to Safeguards Information by another licensee, based in part on a criminal history records check under this section. The criminal history records check file may be transferred to the gaining licensee in accordance with the provisions of paragraph (f)(3) of this section.

* * * * *

(8) A licensee shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access to the nuclear power facility, the

nonpower reactor facility, or access to Safeguards Information.

(c) * * *

(1) A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information solely on the basis of information received from the FBI involving:

* * * * *

(d) * * *

(1) For the purpose of complying with this section, licensees shall, using an appropriate method listed in § 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual requiring unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information, to the Director of the NRC's Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling 301- 415–7232, or by e-mail to *FORMS.Resource@nrc.gov.* Guidance on what alternative formats might be practicable is referenced in § 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

* * * * *

(3) * * *

(ii) The application fee is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an administrative processing fee assessed by the NRC. The NRC processing fee covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission publishes the amount of the fingerprint records check application fee on the NRC public Web site. (To find the current fee amount, go to the Electronic Submittals page at *http://www.nrc.gov/site-help/e-submittals.html* and select the link for the Criminal History Program.) The Commission will directly notify licensees who are subject to this regulation of any fee changes.

* * * * *

(f) * * *

(2) The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to the nuclear power facility, the nonpower reactor or access to Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need to know.

* * * * *

(5) The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, on an individual (including data indicating no record) for one year after termination or denial of unescorted access to the nuclear power facility, the nonpower reactor, or access to Safeguards Information.

* * * * *

(g) *Fingerprinting Requirements for Unescorted Access for Nonpower Reactor Licensees.* (1) No person shall be permitted unescorted access to a nonpower reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on the results of an FBI fingerprint-based criminal history records check obtained in accordance with this paragraph. The reviewing official is required to have unescorted access in accordance with this section or access to Safeguards Information.

(2) Each nonpower reactor licensee subject to the requirements of this section shall obtain the fingerprints for a criminal history records check for each individual who is seeking or permitted:

(i) Unescorted access to vital areas of the nonpower reactor facility; or

(ii) Unescorted access to special nuclear material in the nonpower reactor facility provided the individual who is seeking or permitted unescorted access possesses the capability and knowledge to make unauthorized use of the special nuclear material in the nonpower reactor facility or to remove the special nuclear material from the nonpower reactor in an unauthorized manner.

Dated at Rockville, Maryland this 14th day of July, 2010.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–17635 Filed 7–19–10; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0616; Airspace Docket No. 10–ANM–6]

Proposed Amendment of Class E Airspace; Pendleton, OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace at Pendleton, OR. Decommissioning of the Foris Non-Directional Radio Beacon (NDB) at Eastern Oregon Regional Airport at Pendleton has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also would reflect the new name of the airport.

DATES: Comments must be received on or before September 3, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2010–0616; Airspace Docket No. 10–ANM–6, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2010–0616 and Airspace Docket No. 10–ANM–6) and be submitted in triplicate

to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2010–0616 and Airspace Docket No. 10–ANM–6". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace extending upward from 700 feet and 1,200 feet above the surface at Eastern Oregon Regional Airport at Pendleton, Pendleton, OR. The airspace would be reconfigured due to the decommissioning of the Foris NDB, and cancellation of the NDB approach. This action would enhance the safety and management of IFR operations at the airport. This also would reflect a change in the airport name, from Pendleton Municipal Airport to Eastern Oregon Regional Airport at Pendleton.

Class E airspace designations are published in paragraph 6005, of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Eastern Oregon Regional Airport at Pendleton, Pendleton, OR.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR Part 71.1 of the FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM OR E5 Pendleton, OR [Modified]

Eastern Oregon Regional Airport at Pendleton, OR
(Lat. 45°41′42″ N., long. 118°50′29″ W.)
Pendleton VORTAC
(Lat. 45°41′54″ N., long. 118°56′19″ W.)
Hermiston, Hermiston Municipal Airport
(Lat. 45°49′42″ N., long. 119°15′33″ W.)

That airspace extending upward from 700 feet above the surface within a 10.5-mile radius of lat. 45°41′30″ N., long. 118°47′24″ W., and within 4 miles each side of the Pendleton VORTAC 254° radial extending from the 10.5-mile radius to 10.9 miles west of the VORTAC, and within 8.3 miles north and 4.3 miles south of the Pendleton 090° bearing from the Eastern Oregon Regional Airport at Pendleton extending from the 10.5-mile radius to 20.7 miles east of the Eastern Oregon Regional Airport at Pendleton, and within a 4.3-mile radius of the Hermiston Municipal Airport, and within 2.2 miles each side of the Pendleton VORTAC 300° radial extending from the 4.3-mile radius to the Pendleton VORTAC; that airspace extending upward from 1,200 feet above the surface within 9.6 miles northeast and 6.1 miles southwest of the Pendleton VORTAC 137° radial extending from the 10.5-mile radius to 43.5 miles southeast of the VORTAC, and within 8.7 miles south and 6.1 miles north of the Pendleton 254° radial extending from the 10.5-mile radius to 28.8 miles west of the VORTAC, and within 8.3 miles north and 4.3 miles south of the Pendleton 273° radial extending from the 10.5-mile radius to 16.1 miles west of the VORTAC, and within 5.3 miles southwest and 7.9 miles northeast of the Pendleton 310° radial extending from the 10.5-mile radius to 26.1 miles northwest of the VORTAC, and within 4.3 miles northwest of the 025° radial and 4.3 miles southeast of the 049° radial extending from the 10.5-mile radius to the 30.5-mile radius of the

Pendleton VORTAC, and that airspace within the 27.9-mile radius of the Pendleton VORTAC extending clockwise from the southeast edge of V–536 to the northeast edge of V–298.

Issued in Seattle, Washington, on July 1, 2010.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2010–17624 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0619; Airspace Docket No. 10–AWP–11]

Proposed Amendment of Class E Airspace; San Clemente, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace at San Clemente, CA. Decommissioning of the San Clemente Island Non-Directional Radio Beacon (NDB) at San Clemente Island NALF (Frederick Sherman Field) has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also makes a minor adjustment to the geographic coordinates of the airport.

DATES: Comments must be received on or before September 3, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2010–0619; Airspace Docket No. 10–AWP–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2010–0619 and Airspace Docket No. 10–AWP–11) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2010–0619 and Airspace Docket No. 10–AWP–11". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace designated as an extension to a Class D surface area, at San Clemente Island NALF (Fredrick Sherman Field), San Clemente CA. The airspace would be reconfigured due to the decommissioning of the San Clemente Island NDB, and cancellation of the NDB approach. This will also update the geographic coordinates of the airport. This action would enhance the safety and management of IFR operations at the airport.

Class E airspace designations are published in paragraph 6004, of FAA Order 7400.9T, signed August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use

of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies controlled airspace at the airport.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR Part 71.1 of the FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009 is amended as follows:

Paragraph 6004 Class E airspace Designated as an Extension to a Class D Surface Area.

* * * * *

AWP CA E4 San Clemente, CA [Modified]

San Clemente Island NALF (Fredrick Sherman Field), CA
(Lat. 33°01′22″ N., long. 118°35′19″ W.)
San Clemente Island TACAN
(Lat. 33°01′37″ N., long. 118°34′46″ W.)

That airspace extending upward from the surface within 2.6 miles each side of the San Clemente Island TACAN 334° radial extending from the 4.3-mile radius of San Clemente Island NALF (Fredrick Sherman Field) to Control 1177L, and within 1.8 miles each side of the 064° bearing from the San Clemente Island NALF (Fredrick Sherman Field) Airport, extending from the 4.3-mile radius to 9 miles northeast. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Issued in Seattle, Washington, on July 1, 2010.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2010–17625 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA–2010–0289; SFAR No. 110]

RIN 2120–AJ69

Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan; Supplemental Regulatory Flexibility Analysis

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; Notice of availability and request for comments.

SUMMARY: This document announces the availability of and request for comments on the Supplemental Regulatory Flexibility Analysis for the previously published proposed rule entitled, Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan.

DATES: Comments must be received on or before August 4, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–0289 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations 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.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

For more information on the rulemaking process, see the Additional Information section of this document.

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 the docket Web site, anyone can find and read the electronic form of all 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) or you may visit *http://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time and follow the online instructions for accessing the docket or Docket Operations 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: Michael Lukacs, APO–300, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone number: (202) 267–9641.

SUPPLEMENTARY INFORMATION: Later in this preamble under the Additional Information section, we discuss how you can comment on this action and how we will handle your comments. Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. We also discuss how you can get a copy of related rulemaking documents.

Background

On May 26, 2010, the FAA published in the **Federal Register** the Notice of Proposed Rulemaking (NPRM) entitled Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan.[1] The comment period for the NPRM closed on June 10, 2010. The FAA received several comments about the agency's economic assessment of the proposed rule. Specifically, some commenters did not agree with the FAA's determination that the NPRM would not have a significant economic impact on a substantial number of small entities. To address these concerns, the FAA is publishing the below Supplemental Regulatory Flexibility Analysis for comment.

Supplemental Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals

[1] Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan: 75 FR 29466; May 26, 2010.

and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

Based on the comments received following publication of the NPRM, we have re-evaluated our certification under the RFA that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Based on our re-evaluation, we have determined that the proposed rule will, if promulgated, have a significant economic impact on a substantial number of small entities. Consequently, we have completed a Supplemental Regulatory Flexibility Analysis and request comments from affected small entities. The purpose of this analysis is to identify the number of small entities affected, assess the economic impact of the proposed regulation on them, and consider less burdensome alternatives and still meet the agency's statutory objectives. Under Section 603(b) and 603(c) of the RFA, the analysis must address:

1. A description of the reasons why the action by the agency is being considered.

2. A succinct statement of the objectives of, and legal basis for, the proposed rule.

3. A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.

4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.

5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

6. Significant alternatives.

1. Description of the reasons why the action by the agency is being considered.

This action would permit certain U.S. civil flight operations below flight level (FL) 160 within the territory and airspace of Afghanistan, when approved by the FAA or when authorized by exemption by the FAA. Otherwise, flight operations below FL 160 within the territory and airspace of Afghanistan would be prohibited for all U.S. air carriers; U.S. commercial operators; persons exercising the privileges of a U.S. airman certificate, except when that person is operating a U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered aircraft, except when such operators are foreign air carriers.

The FAA is considering this action because insurgent activity in Afghanistan has increased and threatens the safety of U.S. civil aircraft and operators operating within Afghan airspace and overflying the territory of Afghanistan. This insurgent activity has adversely affected the safety of airfield operations for these flights. The Afghan insurgents, armed with various weapons, pose a serious threat to U.S. civil aircraft and operators at local airports and to these aircraft on approach to and departing from these airports. Insurgents with small arms fire capabilities have been targeting airfields with rockets and have fired on aircraft at these airfields. While U.S. civil aircraft have not yet specifically been targeted, there have been several reported events of these aircraft being hit by small arms fire. Also, foreign civil aircraft that support the North Atlantic Treaty Organization (NATO) have been shot down by small arms and rocket-propelled grenade fire.

2. Objectives and legal basis for the proposed rule.

The FAA is responsible for the safety of flight in the United States and for the safety of U.S.-registered aircraft and U.S. operators throughout the world. Also, the FAA is responsible for issuing rules affecting the safety of air commerce and national security. The FAA's authority to issue the rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106(g), describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise his authority consistently with the obligations of the United States Government under international agreements. Further, the FAA has broad authority under section 44701(a)(5) to prescribe regulations governing the practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security.

The FAA finds the proposed rule necessary to prevent a potential hazard to persons and aircraft engaged in Afghanistan flight operations. The nature of the hazard that the FAA seeks to address is described in the preceding section, "Description of the reasons why the action by the agency is being considered."

3. Description and Estimate of small entities.

There are currently no operational restrictions in Afghanistan. The proposed rule would affect U.S. operators, operators of U.S.-registered aircraft (except foreign air carriers), and U.S-certificated airmen (except those U.S. certificated airmen engaged in the operation of U.S.-registered aircraft for foreign air carriers) who operate in Afghanistan below FL 160.

In view of the threat escalation in the territory and airspace of Afghanistan, and in furtherance of the FAA Administrator's responsibilities to promote the safe flight of U.S. civil aircraft in air commerce and to issue aviation rules in the interest of national security of the United States, the Administrator has determined that the potential hazard to U.S-registered aircraft and U.S.-certificated airmen must be mitigated. Therefore, the FAA proposes to issue an SFAR to restrict flight below FL 160 within the airspace and territory of Afghanistan, except in compliance with the procedures set forth in the proposed rule.

We expect as many as 25 small entities would seek authorization from the FAA to operate in Afghanistan under this proposed rule. Depending on the characteristics of the existing flight operations, the number of flights could be affected. The operators currently operating are all-cargo, and all have less than 1,500 employees. Generally, these operators provide niche market services and have available capacity to provide military support. We are unable from the comments we received to the NPRM to determine the magnitude of the economic impact of the proposed rule on these operators. Separately, we are also unable to document and publish the revenue and number of operations per operator.

4. Compliance requirements.

The proposed rule would allow flights below FL 160 in the territory or airspace of Afghanistan only with the approval of the FAA or by an exemption issued by the FAA. The required documentation for the affected entities to be in compliance with this proposed rule would take each operator one hour to

fill out, endorse and file the required paperwork. As such, the cost for a one-year period would be $94 (1 hour × $94 per hour).

In addition to the paperwork that would be required as a result of this proposal, it is expected that some flight operations would not be authorized. Without authorization from the FAA to conduct these flights, the operator's inability to conduct such operations would result in a significant economic impact.

The FAA has used Department of Transportation Form 41 data for the total operating revenue per flight for international cargo operations of U.S. Operators. In 2009, the reported median revenue estimate was approximately $70,000 per flight, although the profit would be substantially less. As the number of flights currently operating would continue for the foreseeable future, operators who eliminate flights as a result of the proposed rule would incur a significant economic loss. The proposal would affect "more than just a few" operators who fly in Afghanistan. As such, we believe flights would be eliminated for a substantial number of operators.

The requirements of this proposal would have a significant economic impact on a substantial number of small entities.

5. Relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

The FAA is unaware that the rule would overlap, duplicate, or conflict with existing federal rules.

6. Significant Alternatives Considered.

Maintain the status quo: Continue to allow all flights to occur without requiring steps to manage the risks to these operations from insurgent activity or an approval or exemption from the FAA.

The FAA is responsible for both the safety of flight in the United States and for the safety of U.S.-registered aircraft and U.S. operators throughout the world. The FAA rejected this alternative and has not identified any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

The FAA has determined that the proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, we have prepared the above Supplemental Regulatory Flexibility Analysis. We solicit comments on this determination. We also solicit comments on the analysis of the number of small entities that would be affected, the economic impact of the proposed regulation on these small entities, and whether there are any less burdensome alternatives that still meet the agency's statutory objectives.

Additional Information

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments will reference a specific portion of the Supplemental Regulatory Flexibility Analysis or related rulemaking document, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please submit a single copy of your written or electronic comments only one time.

All comments we receive will be filed in the docket, as well as a report summarizing each substantive public contact with FAA personnel concerning the proposed rulemaking. Before acting on the proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may make changes to the proposal in light of the comments we receive.

Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD–ROM, mark the outside of the disk or CD–ROM and also identify electronically within the disk or CD–ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and we place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visiting the FAA's Regulations and Policies web page at *http://www.faa.gov/regulations_policies*; or
3. Accessing the Government Printing Office's web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket or SFAR number of this rulemaking.

You may access all documents the FAA considered in developing the proposed rule, including economic analyses and technical reports, from the internet through the Federal eRulemaking Portal referenced in paragraph (1).

Issued in Washington, DC, on July 15, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. 2010–17762 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1218

RIN 3041–AC81

Safety Standard for Bassinets and Cradles

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of reopening of comment period.

SUMMARY: The Consumer Product Safety Commission ("CPSC" or "Commission") is reopening the comment period for its proposed rule on the Safety Standard for Bassinets and Cradles. The reopened comment period will expire on September 10, 2010.

DATES: Written comments in response to this document must be received by the Commission no later than September 10, 2010.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2010–0028, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way: *Federal eRulemaking*

Portal: http://www.regulations.gov. Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through *http://www.regulations.gov.*

Written Submissions

Submit written submissions in the following way:

Mail/Hand delivery/Courier (for paper (preferably in five copies), disk, or CD–ROM submissions), to: Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically; if furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background comments or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For information about submitting comments, call or write to Rockelle Hammond, Office of the Secretary, Consumer Product Safety Commission, Bethesda, MD 20814; telephone (301) 504–6833.

SUPPLEMENTARY INFORMATION: On April 28, 2010, the Commission published a notice of proposed rulemaking ("NPR") in the **Federal Register** titled, "Safety Standard for Bassinets and Cradles" (75 FR 22303). The Commission issued the NPR pursuant to section 104(b) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") which requires the Commission to promulgate consumer product safety standards for durable infant or toddler products. These standards are to be "substantially the same as" applicable voluntary standards or more stringent than the voluntary standard if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product. The NPR proposed a more stringent safety standard for bassinets and cradles that will further reduce the risk of injury associated with these products. The NPR provided a 75-day public comment period which ended on July 12, 2010.

Although the NPR was posted on the CPSC's Web site at the same time it was published in the **Federal Register**, the NPR was not posted on the regulations.gov Web site until June 23, 2010. Additionally, after publication of the NPR, Commission staff met with various parties concerning test methods described in the NPR. The Commission is placing summaries of those meetings into the administrative record. To ensure that all interested parties have adequate notice of this NPR and the meeting summaries and the ability to comment on them, the Commission is reopening the docket to continue to receive public comments until September 10, 2010.

Dated: July 14, 2010.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2010–17596 Filed 7–19–10; 8:45 am]

BILLING CODE 6355–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2010–0477; FRL–9176–4]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Michigan; Redesignation of the Allegan County Area to Attainment for Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve Michigan's request to redesignate the Allegan County, Michigan 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone standard, because the request meets the statutory requirements for redesignation under the Clean Air Act (CAA). The Michigan Department of Natural Resources and Environment (MDNRE) submitted this request on May 24, 2010 and supplemented it on June 16, 2010.

This proposed approval involves several related actions. EPA is proposing to determine that the Allegan County area has attained the 8-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based on three years of complete, quality-assured ambient air quality monitoring data for the 2007–2009 ozone seasons that demonstrate that the 8-hour ozone NAAQS has been attained in the area. Preliminary data available for 2010 is consistent with continued attainment. EPA is also proposing to approve, as a revision to the Michigan State Implementation Plan (SIP), the State's plan for maintaining the 8-hour ozone NAAQS through 2021 in the area.

EPA is proposing to approve the 2005 emissions inventory submitted with the redesignation request as meeting the comprehensive emissions inventory requirement of the CAA for the Allegan County area. Finally, EPA is proposing to find adequate and approve the State's 2021 Motor Vehicle Emission Budgets (MVEBs) for the Allegan County area.

DATES: Comments must be received on or before August 19, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0477, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: bortzer.jay@epa.gov.*
3. *Fax:* (312) 692–2054.
4. *Mail:* Jay Bortzer, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand delivery:* Jay Bortzer, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0477. 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, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I of this document, "What Should I Consider as I Prepare My Comments for EPA?"

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 Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

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I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What actions is EPA proposing to take?

EPA is proposing to take several related actions. EPA is proposing to determine that the Allegan County nonattainment area has attained the 1997 8-hour ozone standard and that the area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve the request from MDNRE to change the legal designation of the Allegan County area from nonattainment to attainment for the 8-hour ozone NAAQS. EPA is also proposing to approve, as a revision to the Michigan SIP, the State's maintenance plan (such approval being one of the CAA criteria for redesignation to attainment status). The maintenance plan is designed to keep the Allegan County area in attainment of the ozone NAAQS through 2021. EPA is proposing to approve the 2005 emissions inventory for the Allegan County area as meeting the comprehensive inventory requirements of section 172(c)(3) of the CAA. If EPA's determination of attainment is finalized, under the provisions of 40 CFR 51.918, the requirement to submit certain planning SIPs related to attainment (the Reasonably Available Control Measure (RACM) requirement of section 172(c)(1) of the CAA, the Reasonable Further Progress (RFP) and attainment demonstration requirements of sections 172(c)(2) and (6) of the CAA, and the requirement for contingency measures of section 172(c)(9) of the CAA) are not applicable to the area as long as it continues to attain the NAAQS and would cease to be applicable upon redesignation. In addition, as set forth in more detail below, in the context of redesignations, EPA has interpreted requirements related to attainment as not applicable for purposes of redesignation. Finally, EPA is proposing to find adequate and approve the newly-established 2021 MVEBs for the Allegan County area. The adequacy comment period for the MVEBs began on June 17, 2010, with EPA's posting of the availability of the submittal on EPA's Adequacy Web site (at *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm*). The adequacy comment period for these MVEBs ends on July 19, 2010. Please *see* section VI. B. of this rulemaking, "Adequacy of the MVEBs," for further explanation of this process. We are proposing to find adequate and approve the State's 2021 MVEBs for transportation conformity purposes.

III. What is the background for these actions?

A. What is the general background information?

Ground-level ozone is not emitted directly by sources. Rather, emissions of nitrogen oxides (NO_X) and volatile organic compounds (VOCs) react in the presence of sunlight to form ground-level ozone. NO_X and VOCs are referred to as precursors of ozone.

The CAA establishes a process for air quality management through the NAAQS. Before promulgation of the 8-hour standard, the ozone NAAQS was based on a 1-hour standard. EPA originally designated the Allegan County area as an ozone nonattainment area under section 107 of the 1977 CAA on March 3, 1978 (43 FR 8962). EPA revisited this original designation in 1991 to reflect new designation requirements contained in the 1990 CAA. On November 6, 1991 (56 FR 56694), EPA retained the original

nonattainment designation for Allegan. At the time of the 1991 designations, current monitoring data were not available for this area, nor had the State completed a redesignation request showing that it complied with the requirements of section 107(d)(3)(E) of the CAA. Therefore, EPA designated the area as nonattainment, but did not establish a nonattainment classification, establishing the area as an incomplete data ozone nonattainment area. EPA subsequently redesignated the Allegan County area to attainment of the 1-hour standard effective January, 16 2001. (*See* 65 FR 70490 (November 24, 2000)). This attainment designation was thus in effect at the time EPA revoked the 1-hour ozone NAAQS, on June 15, 2005.

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million parts (ppm). On April 30, 2004 (69 FR 23857), EPA published a final rule designating and classifying areas under the 8-hour ozone NAAQS. These designations and classifications became effective June 15, 2004. EPA designated as nonattainment any area that was violating the 8-hour ozone NAAQS based on the three most recent years of air quality data, 2001–2003.

The CAA contains two sets of provisions, subpart 1 and subpart 2, that address planning and control requirements for nonattainment areas. (Both are found in Title I, part D, of the CAA, 42 U.S.C. 7501–7509a and 7511–7511f, respectively.) Subpart 1 contains general requirements for nonattainment areas for any pollutant, including ozone, governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment areas.

Under EPA's implementation rule for the 1997 8-hour ozone standard (69 FR 23951 (April 30, 2004)), an area was classified under subpart 2 based on its 8-hour ozone design value (*i.e.* the three-year average annual fourth-highest daily maximum 8-hour average ozone concentration), if it had a 1-hour design value at the time of designation at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2) (69 FR 23954). All other areas were covered under subpart 1, based upon their 8-hour design values (69 FR 23958). The Allegan County area was designated as a subpart 1, 8-hour ozone nonattainment area by EPA on April 30, 2004 (69 FR 23857 and 23910), based on air quality monitoring data from 2001–2003 (69 FR 23860).

40 CFR 50.10 and 40 CFR part 50, Appendix I provide that the 1997 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, when rounded. The data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness. *See* 40 CFR part 50, Appendix I, section 2.3(d).

The MDNRE submitted a request to redesignate the Allegan County area to attainment for the 1997 8-hour ozone standard on May 12, 2010 and supplemented the submittal on June 16, 2010. The redesignation request includes three years of complete, quality-assured data for the period of 2007 through 2009, indicating the 8-hour NAAQS for ozone, as promulgated in 1997, had been attained for the Allegan County area. Under the CAA, nonattainment areas may be redesignated to attainment if sufficient complete, quality-assured data are available for the Administrator to determine that the area has attained the standard, and the area meets the other redesignation requirements in section 107(d)(3)(E) of the CAA.

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. In May 2008, States, environmental groups, and industry groups filed petitions with the DC Circuit Court of Appeals for review of the 2008 ozone standards. In March 2009, the court granted EPA's request to stay the litigation so EPA could review the standards and determine whether they should be reconsidered. On September 16, 2009, EPA announced reconsideration of our 2008 decision setting national standards for ground-level ozone. The designation process for that standard has been stayed. On January 6, 2010, EPA proposed to set the level of the primary 8-hour ozone standard within the range of 0.060 to 0.070 ppm, rather than at 0.075 ppm. We expect by September 2010 to have completed our reconsideration of the standard and also expect that thereafter we will proceed with designations. Therefore, the actions addressed in today's proposed rulemaking relate only to the 1997 8-hour ozone standard.

B. What are the impacts of the December 22, 2006, and June 8, 2007, United States Court of Appeals Decisions Regarding EPA's Phase 1 Implementation Rule?

1. Summary of Court Decision

On December 22, 2006, in *South Coast Air Quality Management Dist.* v. *EPA (South Coast),* the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard (69 FR 23951 (April 30, 2004)). 472 F.3d 882 (DC Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the DC Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. *Id.,* Docket No. 04 1201. Therefore, several provisions of the Phase 1 Rule remain effective: provisions related to classifications for areas currently classified under subpart 2 of Title I, part D, of the CAA as 8-hour nonattainment areas; the 8-hour attainment dates; and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS. The June 8, 2007, decision also left intact the court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8, 2007, decision reaffirmed the December 22, 2006, decision that EPA had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain transportation conformity requirements for certain types of Federal actions. The June 8, 2007, decision clarified that the court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

This section sets forth EPA's views on the potential effect of the court's rulings on this proposed redesignation action. For the reasons set forth below, EPA does not believe that the court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation or prevent EPA from proposing or ultimately finalizing this redesignation. EPA believes that the court's December 22, 2006, and June 8, 2007, decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in

light of the court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

2. Requirements Under the 1997 8-Hour Standard

With respect to the 1997 8-hour standard, the court's ruling rejected EPA's reasons for classifying areas under subpart 1 for the 8-hour standard, and remanded that matter to the Agency. In its January 16, 2009, proposed rulemaking in response to the *South Coast* decision, EPA has proposed to classify Allegan County under subpart 2 as a moderate area. 74 FR 2936, 2944. If EPA finalizes this rulemaking, the requirements under subpart 2 will become applicable when they are due, a deadline that EPA has proposed to be one year after the effective date of a final rulemaking classifying areas as moderate or marginal. 74 FR 2940–2941. Although a future final decision by EPA to classify this area under subpart 2 would trigger additional future requirements for the area, EPA believes that this does not mean that redesignation cannot now go forward. This belief is based upon: (1) EPA's longstanding policy of evaluating requirements in accordance with the requirements due at the time the request is submitted; and, (2) consideration of the inequity of applying retroactively any requirements that might be applied in the future.

First, at the time the redesignation request was submitted, the Allegan County area was not classified under subpart 2, nor were there any subpart 2 requirements yet due for this area. Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, States requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. *See* September 4, 1992, Calcagni memorandum ("Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division). *See also* Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465–66 (March 7, 1995) (Redesignation of Detroit-Ann Arbor). *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004), which upheld EPA's redesignation rulemaking applying this interpretation. *See also* 68 FR 25418, 25424, 25427 (May 12, 2003) (Redesignation of St. Louis).

Moreover, it would be inequitable to retroactively apply any new SIP requirements that were not applicable at the time the request was submitted. The DC Circuit has recognized the inequity in such retroactive rulemaking. In *Sierra Club* v. *Whitman,* 285 F.3d 63 (DC Cir. 2002), the DC Circuit upheld a district court's ruling refusing to make retroactive an EPA determination of nonattainment that was past the statutory due date. Such a determination would have resulted in the imposition of additional requirements on the area. The court stated: "Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time." *Id.* at 68. Similarly here it would be unfair to penalize the area by applying to it, for purposes of redesignation, additional SIP requirements under subpart 2 that were not in effect or yet due at the time it submitted its redesignation request.

3. Requirements Under the 1-Hour Standard

With respect to the 1-hour standard requirements, the Allegan County area was an attainment area subject to a CAA section 175A maintenance plan under the 1-hour standard at the time that the 1-hour standard was revoked. Therefore, the DC Circuit's decisions with respect to 1-hour nonattainment anti-backsliding requirements do not impact redesignation requests for these types of areas, except to the extent that the court in its June 8, 2007, decision clarified that for those areas with 1-hour motor vehicle emissions budgets in their maintenance plans, anti-backsliding requires that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93.

With respect to the three other anti-backsliding provisions for the 1-hour standard that the court found were not properly retained, the Allegan County area is an attainment area subject to a maintenance plan for the 1-hour standard, and the NSR, contingency measure (pursuant to section 172(c)(9) or 182(c)(9)), and fee provision requirements no longer apply to an area that has been redesignated to attainment of the 1-hour standard.

Thus, the decision in *South Coast Air Quality Management Dist.* would not preclude EPA from finalizing the redesignation of this area.

IV. What are the criteria for redesignation?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) allows for redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and, (5) the State containing such area has met all requirements applicable to the area under section 110 and part D.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990 on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

"Ozone and Carbon Monoxide Design Value Calculations," Memorandum from William G. Laxton, Director, Technical Support Division, June 18, 1990;

"Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;

"Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;

"Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992;

"State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (ACT) Deadlines," Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;

"Technical Support Documents (TSDs) for Redesignation Ozone and Carbon Monoxide (CO) Nonattainment Areas," Memorandum from G. T. Helms,

Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;

"State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992," Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;

"Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas," Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, to Air Division Directors, Regions 1–10, November 30, 1993;

"Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment," Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994; and

"Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

V. What is the effect of these actions?

Approval of the redesignation request would change the official designation of the Allegan County area for the 1997 8-hour ozone NAAQS found at 40 CFR part 81. It would also incorporate into the Michigan SIP a plan for maintaining the 8-hour ozone NAAQS through 2021. The maintenance plan includes contingency measures as required under CAA section 175A to remedy future violations of the 8-hour NAAQS. It also establishes MVEBs for the Allegan County area of 3.93 tons per day (tpd) VOC and 6.92 tpd NO_X for 2021.

VI. What is EPA's analysis of the request?

A. Attainment Determination and Redesignation

EPA is proposing to determine that the Allegan County area has attained the 1997 8-hour ozone standard and that the area has met all other applicable redesignation criteria under CAA section 107(d)(3)(E). The basis for EPA's proposed approvals of the redesignation requests is as follows:

1. The Area Has Attained the 8-Hour Ozone NAAQS (Section 107(d)(3)(E)(i))

EPA is proposing to make a determination that the Allegan County area has attained the 1997 8-hour ozone NAAQS. Whether an area is considered to be attaining the 8-hour ozone NAAQS is determined in accordance with 40 CFR 50.10 and part 50, Appendix I, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain the standard, the three-year average of the fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year must not exceed 0.08 ppm. Based on the rounding convention described in 40 CFR part 50, Appendix I, the standard is attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the EPA's Air Quality System (AQS). The monitors generally should have remained at the same location for the duration of the monitoring period required for determining attainment.

Michigan included in its redesignation request certified ozone monitoring data for the 2007 to 2009 ozone seasons. Michigan has quality-assured all of the ambient monitoring data in accordance with 40 CFR 58.10, and has recorded it in the AQS database. The data meet the completeness criteria in 40 CFR 50, Appendix I, which requires a minimum completeness of 75% annually and 90% over each three-year period. Monitoring data are presented in Table 1 below.

TABLE 1—ANNUAL 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATION AND THREE-YEAR AVERAGES OF 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS

County	Monitor	2007 4th high (ppm)	2008 4th high (ppm)	2009 4th high (ppm)	2007–2009 average (ppm)
Allegan	26–005–0003	0.094	0.073	0.076	0.081

Preliminary data available for 2010 are consistent with continued attainment.

In addition, as discussed below with respect to the maintenance plan, MDNRE has committed to continue to operate an EPA-approved monitoring network as necessary to show ongoing compliance with the NAAQS. MDNRE remains obligated to continue to quality-assure monitoring data in accordance with 40 CFR part 58 and to enter all data into AQS in accordance with Federal guidelines. In summary, EPA believes that the data show that the Allegan County area has attained the 1997 8-hour ozone NAAQS.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We have determined that Michigan has met all currently applicable SIP requirements for purposes of redesignation for the Allegan County area under section 110 of the CAA (general SIP requirements). We are also proposing to determine that the Michigan SIP meets all SIP requirements currently applicable for purposes of redesignation under part D of Title I of the CAA (requirements specific to subpart 1 nonattainment areas), in accordance with section 107(d)(3)(E)(v). In addition, with the exception of the emissions inventory under section 172(3), we have approved all applicable requirements of the Michigan SIP for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). As discussed below, in this action EPA is proposing to approve Michigan's 2005 emissions inventory as meeting the section 172(c)(3) comprehensive emissions inventory requirement.

In proposing these determinations, we have ascertained which SIP requirements are applicable to the area for purposes of redesignation, and have determined that there are SIP measures meeting those requirements and that they are fully approved under section 110(k) of the CAA. As discussed more fully below, for purposes of evaluating a redesignation request, SIPs must be fully approved only with respect to requirements that became due prior to

the submission of the redesignation request.

The September 4, 1992, Calcagni memorandum (*see* "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) describes EPA's interpretation of section 107(d)(3)(E) of the CAA. Under this interpretation, a State and the area it wishes to redesignate must meet the relevant CAA requirements that are due prior to the State's submittal of a complete redesignation request for the area. *See also* the September 17, 1993, Michael Shapiro memorandum and 60 FR 12459, 12465–12466 (March 7, 1995) (Redesignation of Detroit-Ann Arbor). Applicable requirements of the CAA that come due subsequent to the State's submittal of a complete request remain applicable until a redesignation to attainment is approved, but are not required as a prerequisite to redesignation. *See* section 175A(c) of the CAA; *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). *See also* 68 FR 25424, 25427 (May 12, 2003) (Redesignation of St. Louis).

If EPA's proposal to determine that the Allegan County area has attained the 1997 8-hour ozone standard is finalized, pursuant to 40 CFR 51.918, the requirements to submit certain planning SIPs related to attainment, including attainment demonstration requirements (the RACM requirement of section 172(c)(1) of the CAA, the RFP and attainment demonstration requirements of sections 172(c)(2) and (c)(6) of the CAA, and the requirement for contingency measures of section 172(c)(9) of the CAA), will not be applicable to the area as long as it continues to attain the NAAQS and would cease to apply upon redesignation. In addition, in the context of redesignations, EPA has interpreted requirements related to attainment as not applicable for purposes of redesignation. For example, in the General Preamble, EPA stated that:

> [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans * * * provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas.

"General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990," (General Preamble) 57 FR 13498, 13564 (April 16, 1992).

See also Calcagni memorandum at 6 ("The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.")

a. The Allegan County Area Has Met All Applicable Requirements for Purposes of Redesignation Under Section 110 and Part D of the CAA

i. Section 110 General SIP Requirements

Section 110(a) of Title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a State must have been adopted by the State after reasonable public notice and hearing, and, among other things, must: Include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; provide for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; include provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, NSR permit programs; include criteria for stationary source emission control measures, monitoring, and reporting; include provisions for air quality modeling; and provide for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a State from significantly contributing to air quality problems in another State. To implement this provision, EPA has required certain States to establish programs to address transport of air pollutants (NO_X SIP Call [1] and Clean Air Interstate Rule (CAIR) (70 FR 25162, May 12, 2005)). However, the section 110(a)(2)(D) requirements for a State are not linked with a particular nonattainment area's designation and classification. EPA believes that the requirements linked with a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a State regardless of the designation of any one particular area in the State. Thus, we believe that these requirements should not be construed to be applicable requirements for purposes of redesignation.

Further, we believe that the other section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A State remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements that are linked with a particular area's designation and classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176 (October 10, 1996)) and (62 FR 24826 (May 7, 1997)); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458 (May 7, 1996)); and Tampa, Florida, final rulemaking (60 FR 62748 (December 7, 1995)). *See also* the discussion on this issue in the Cincinnati, Ohio 1-hour ozone redesignation (65 FR 37890 (June 19, 2000)), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399 (October 19, 2001)).

We have reviewed Michigan's SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of the Michigan SIP addressing section 110 elements under the 1-hour ozone standard (40 CFR 52.1170). Further, in submittals dated December 6, 2007, and September 19, 2008, Michigan confirmed that the State continues to meet the section 110 requirements for the 8-hour ozone standard. EPA has not yet taken rulemaking action on these submittals; however, such approval is not necessary for redesignation.

[1] On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. In compliance with EPA's NO_X SIP Call, MDNRE has developed rules governing the control of NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, major cement kilns, and internal combustion engines. EPA approved Michigan's rules as fulfilling Phase I of the NO_X SIP Call on May 4, 2005 (70 FR 23029) and as meeting Phase II of the NO_X SIP Call on January 29, 2008 (73 FR 5101).

ii. Part D Requirements

EPA has determined that, if EPA finalizes the approval of the emissions inventories discussed in section VI.C. of this rulemaking, the Michigan SIP will meet the applicable SIP requirements for the Allegan County area applicable for purposes of redesignation under part D of the CAA. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Subpart 2 of part D, which includes section 182 of the CAA, establishes additional specific requirements depending on the area's nonattainment classification.

Since the Allegan County area was not classified under subpart 2, of Part D at the time its redesignation request was submitted, the subpart 2 requirements do not apply for purposes of evaluating the State's redesignation request. The applicable subpart 1 requirements are contained in sections 172(c)(1)–(9) and in section 176.

Subpart 1 Section 172 Requirements.

For purposes of evaluating this redesignation request, the applicable section 172 SIP requirements for the Allegan County area are contained in sections 172(c)(1)-(9). A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of Title I (57 FR 13498 (April 16, 1992)).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all RACM as expeditiously as practicable and to provide for attainment of the primary NAAQS. EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Because attainment has been reached, no additional measures are needed to provide for attainment, and section 172(c)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard until redesignation. 40 CFR 51.918.

The RFP requirement under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of redesignation because the Allegan County area has monitored attainment of the ozone NAAQS. (General Preamble, 57 FR 13564). *See also* 40 CFR 51.918. In addition, because the Allegan County area has attained the ozone NAAQS and is no longer subject to an RFP requirement, the requirement to submit the section 172(c)(9) contingency measures is not applicable for purposes of redesignation. *Id.*

Section 172(c)(3) requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. As part of Michigan's redesignation request for the Allegan County area, the State submitted a 2005 emissions inventory. As discussed below in section VI.C., EPA is proposing to approve the 2005 inventory, submitted by Michigan along with the redesignation request, as meeting the section 172(c)(3) emissions inventory requirement.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) requires permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a nonattainment NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." Michigan has demonstrated that the Allegan County area will be able to maintain the standard without part D NSR in effect; therefore, the State need not have a fully approved part D NSR program prior to approval of the redesignation request. The State's PSD program will become effective in the Allegan County area upon redesignation to attainment. *See* rulemakings for Detroit, Michigan (60 FR 12467–12468 (March 7, 1995)); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470 (May 7, 1996)); Louisville, Kentucky (66 FR 53665 (October 23, 2001)); and Grand Rapids, Michigan (61 FR 31834–31837 (June 21, 1996)).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we believe the Michigan SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

Subpart 1 Section 176 Conformity Requirements.

Section 176(c) of the CAA requires States to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under Title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability, which EPA promulgated pursuant to CAA requirements.

EPA believes that it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons. First, the requirement to submit SIP revisions to comply with the conformity provisions of the CAA continues to apply to areas after redesignation to attainment, since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved State rules. Therefore, because areas are subject to the conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if State rules are not yet approved, EPA believes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. *See also* 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

EPA approved Michigan's general and transportation conformity SIPs on December 18, 1996 (61 FR 66607 and 61 FR 66609, respectively). Section 176(c) of the CAA was amended by provisions contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEALU), which was signed into law on August 10, 2005 (Pub. L. 109–59). Among the changes Congress made to this section of the CAA were streamlined requirements for State conformity SIPs. Michigan is in the process of updating its transportation conformity SIP to meet these new requirements. Michigan

has submitted onroad motor vehicle budgets for the Allegan County area of 3.93 tpd VOC and 6.92 tpd NO_X for 2021. The area must use the MVEBs from the maintenance plan in any conformity determination that is effective on or after the effective date of the maintenance plan approval.

b. The Allegan County Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

If EPA issues a final approval of the emissions inventory under section 172(c)(3), EPA will have fully approved the Michigan SIP for the Allegan County area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request (*See* page 3 of the September 4, 1992, John Calcagni memorandum; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)) plus any additional measures it may approve in conjunction with a redesignation action. *See* 68 FR 25413, 25426 (May 12, 2003). Since the passage of the CAA of 1970, Michigan has adopted and submitted, and EPA has fully approved, provisions addressing various required SIP elements under the 1-hour ozone standard. In this action, EPA is proposing to approve Michigan's 2005 emissions inventory for the Allegan County area as meeting the requirement of section 172(c)(3) of the CAA. No Allegan County area SIP provisions are currently disapproved, conditionally approved, or partially approved.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions (Section 107(d)(3)(E)(iii))

EPA finds that Michigan has demonstrated that the observed air quality improvement in the Allegan County area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other State-adopted measures.

In making this demonstration, MDNRE has calculated the change in emissions between 2005 and 2008. Michigan is using the 2005 emissions inventory developed in conjunction with the Lake Michigan Air Directors Consortium (LADCO) as the nonattainment inventory. The State developed an attainment inventory for 2008, one of the years the Allegan County area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that Allegan County and upwind areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

i. Stationary Source NO_X Rules

Michigan has developed rules governing the control of NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, major cement kilns, and internal combustion engines. EPA approved Michigan's rules as fulfilling Phase I of the NO_X SIP Call on May 4, 2005 (70 FR 23029) and as meeting Phase II of the NO_X SIP Call on January 29, 2008 (73 FR 5101). Michigan began complying with Phase I of this rule in 2004. Compliance with Phase II of the SIP Call, which requires the control NO_X emissions from large internal combustion engines, began in 2007.

ii. Federal Emission Control Measures

Reductions in VOC and NO_X emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following.

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. These emission control requirements result in lower VOC and NO_X emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. The EPA has estimated that, by the end of the phase-in period, the following vehicle NO_X emission reductions will occur nationwide: passenger cars (light duty vehicles) (77%); light duty trucks, minivans, and sports utility vehicles (86%); and, larger sports utility vehicles, vans, and heavier trucks (69 to 95%). VOC emission reductions are expected to range from 12 to 18%, depending on vehicle class, over the same period. Some of these emission reductions had occurred by the 2006–2008 period used to demonstrate attainment, and additional emission reductions will occur during the maintenance period.

Heavy-Duty Diesel Engine Rule. EPA issued this rule in July 2000. This rule, which went into effect in 2004, includes standards that limit the sulfur content of diesel fuel. A second phase, which took effect in 2007, further reduced the highway diesel fuel sulfur content to 15 parts per million, leading to additional reductions in combustion NO_X and VOC emissions. EPA expects this rule to achieve a 95% reduction in NO_X emissions from diesel trucks and busses.

Non-Road Diesel Rule. EPA promulgated this rule in 2004. This rule applies to diesel engines used in industries, such as construction, agriculture, and mining. EPA estimates that compliance with this rule will cut NO_X emissions from non-road diesel engines by up to 90%. This rule is currently achieving emission reductions, but will not be fully implemented until 2010.

iii. Control Measures in Upwind Areas

On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 States to reduce emissions of NO_X. Affected States were required to comply with Phase I of the SIP Call beginning in 2004, and with Phase II beginning in 2007. The reduction in NO_X emissions has resulted in lower concentrations of transported ozone entering the Allegan County area. Between 2005 and 2008, units subject to Phase I of the NO_X SIP Call have reduced ozone season emissions by 68,000 tons. In addition, under Phase II of the NO_X SIP Call, EPA estimates that emissions from cement kilns have been reduced by 30% and emissions from internal combustion engines have been reduced by 80–91%. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

b. Emission Reductions

For the point, area and nonroad sectors, Michigan is using the 2005 emissions inventory developed in conjunction with LADCO (Base M Round 5) as the nonattainment inventory. The main purpose of LADCO is to provide technical assessments for and assistance to its member States on problems of air quality. LADCO's primary geographic focus is the area encompassed by its member States (Illinois, Indiana, Michigan, Ohio, and Wisconsin) and any areas which affect air quality in its member States. In developing the 2005 nonattainment year inventory, MDNRE provided point and area source inventories to LADCO. LADCO processed these inventories through the Emission Modeling System to generate summer weekday emissions for VOC and NO_X. The point source data provided to LADCO is a combination of

EPA's EGU inventory and source specific data reported to MDNRE for non-EGU sources. Area source emissions were estimated by MDNRE using published Emission Inventory Improvement Program methodologies or methodologies shared by other States. The methodology used for each area source category was documented. Nonroad mobile emissions were generated for LADCO using EPA's National Mobile Inventory Model (NMIM), with the following exceptions: recreational motorboat populations and spatial surrogates were updated and emissions estimates were developed for commercial marine vessels, aircraft, and railroads (MAR), three nonroad categories not included in NMIM. Onroad mobile emissions were prepared by the Michigan Department of Transportation (MDOT) using the MOBILE6.2 emissions model.

Michigan is using 2008 for the attainment year inventory. Michigan used linear regression analysis to extrapolate area source emissions estimates. Nonroad emissions were calcualted using NMIM, as described above, except that the MAR portion of the nonroad sector was interpolated from LADCO 2005, 2009, and 2018 MAR emissions estimates. Point source emissions were calculated by MDNRE using the 2008 Michigan Air Emissions Reporting System point source inventory. Onroad mobile emissions were prepared by MDOT using the MOBILE6.2 emissions model.

Using the inventories described above Michigan has documented changes in VOC and NO_X emissions from 2005 to 2008 for the Allegan County area. Emissions data are shown in Table 2, below.

TABLE 2—COMPARISON OF 2005 AND 2008 VOC AND NO_X EMISSIONS FOR THE ALLEGAN COUNTY AREA (TPD)

	VOC			NO_X		
	2005	2008	Net change (2005–2008)	2005	2008	Net change (2005–2008)
Point	2.02	1.52	−0.50	2.33	3.45	1.12
Area	10.00	9.33	−0.67	1.00	1.02	0.02
Onroad	4.70	3.93	−0.77	8.43	6.92	−1.51
Nonroad	6.16	4.59	−1.57	4.44	4.55	0.11
Total	22.88	19.37	−3.51	16.20	15.94	−0.26

Table 2 shows that the Allegan County area reduced VOC emissions by 3.51 tpd and NO_X emissions by 0.26 tpd between 2005 and 2008. Based on the information summarized above, Michigan has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))

In conjunction with its request to redesignate the Allegan County nonattainment area to attainment status, Michigan submitted a SIP revision to provide for the maintenance of the 8-hour ozone NAAQS in the area through 2021.

a. Maintenance Plan Requirements

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future 8-hour ozone violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum clarifies that an ozone maintenance plan should address the following items: The attainment VOC and NO_X emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

The MDNRE developed an emissions inventory for 2008, one of the years used to demonstrate monitored attainment of the 8-hour NAAQS, as described above. The attainment level of emissions is summarized in Table 2, above.

c. Demonstration of Maintenance

Along with the redesignation request, MDNRE submitted revisions to the Michigan 8-hour ozone SIP to include a maintenance plan for the Allegan County area, in compliance with section 175A of the CAA. The demonstration shows maintenance of the 8-hour ozone standard through 2021 by showing that current and future emissions of VOC and NO_X for the Allegan County area remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). *See also* 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003).

Michigan is using emissions inventory projections for the years 2018 and 2021 to demonstrate maintenance. MDOT calculated onroad emissions for 2018 and 2021 using the MOBILE6.2 emissions model. MDEQ used the 2018 Base M, Round 5 emissions inventory developed by LADCO for the remaining source categories for 2018. For 2021, MDNRE estimated emissions for the remaining source categories using linear regression analysis. NO_X reductions from CAIR are not included in the 2018 and 2021 emissions estimates.

TABLE 3—COMPARISON OF 2008, 2018, AND 2021 VOC AND NO_X EMISSIONS FOR THE ALLEGAN COUNTY AREA (TPD)

	VOC					NO_X				
	2008	2018	2021	Net change (2008–2018)	Net change (2008–2021)	2008	2018	2021	Net change (2008–2018)	Net change (2008–2021)
Point	1.52	2.79	2.91	1.27	1.39	4.45	2.10	2.13	−2.35	−2.32
Area	9.33	8.61	8.16	−0.72	−1.17	1.02	1.09	1.11	0.07	0.09
Onroad	3.93	2.53	2.28	−1.40	−1.65	6.92	3.10	2.71	−3.82	−4.21
Nonroad	4.59	3.88	2.20	−0.71	−2.39	4.55	2.04	2.11	−2.51	−2.44
Total	19.37	17.81	15.55	−1.56	−3.82	16.94	8.33	8.06	−8.61	−8.88

The emission projections show that Michigan does not expect emissions in the Allegan County area to exceed the level of the 2008 attainment year inventory during the maintenance period, even without implementation of CAIR. (*See also* discussion below). As shown in Table 3, VOC and NO_X emissions in the Allegan County area are projected to decrease by 3.82 tpd and 8.88 tpd, respectively, between 2008 and 2021.

In addition, LADCO performed a regional modeling analysis to address the effect of the recent court decision vacating CAIR. This analysis is documented in LADCO's "Regional Air Quality Analyses for Ozone, PM2.5, and Regional Haze: Final Technical Support Document (Supplement), September 12, 2008." LADCO produced a base year inventory for 2005 and future year inventories for 2009, 2012, and 2018. To estimate future EGU NO_X emissions without implementation of CAIR, LADCO projected 2007 EGU NO_X emissions for all States in the modeling domain based on Energy Information Administration growth rates by State and fuel type for the years 2009, 2012, and 2018. The assumed 2007–2018 growth rates were 8.8% for Illinois, Iowa, Missouri, and Wisconsin; 13.5% for Indiana, Kentucky, Michigan, and Ohio; and 15.1% for Minnesota. Emissions were adjusted by applying legally enforceable controls (*e.g.,* consent decree or rule requirements). EGU NO_X emissions projections for the States of Illinois, Indiana, Michigan, Ohio, and Wisconsin are shown below in Table 4. The emission projections used for the modeling analysis do not account for certain relevant factors such as allowance trading and potential changes in operation of existing control devices. The NO_X projections indicate that, due to the NO_X SIP Call, certain State rules, consent decrees resulting from enforcement cases, and ongoing implementation of a number of mobile source rules, EGU NO_X is not expected to increase in Michigan, or any of the States in the immediate region, and overall NO_X emissions in Michigan and the nearby region are expected to decrease substantially between 2005 and 2020.[2] Total NO_X emissions projections are shown in Table 5, below.

TABLE 4—EGU NO_X EMISSIONS FOR THE STATES OF ILLINOIS, INDIANA, MICHIGAN, OHIO, AND WISCONSIN (TPD) FOR 2007, 2009, 2012, AND 2018

	2007	2009	2012	2018
EGU	1,582	1,552	1,516	1,524

TABLE 5—TOTAL NO_X EMISSIONS FOR THE STATES OF ILLINOIS, INDIANA, MICHIGAN, OHIO, AND WISCONSIN (TPD) FOR THE YEARS 2005, 2009, 2012, AND 2018

	2005	2009	2012	2018
Total NO_X	8,260	6,778	6,076	4,759

Given that 2007 is one of the years Michigan used to demonstrate monitored attainment of the 8-hour NAAQS, Table 4 shows that EGU NO_X emissions will remain below attainment levels through 2018. If the rate of emissions increase between 2012 and 2018 continues through 2021, EGU NO_X emissions would still remain below attainment levels in 2020. Furthermore, as shown in Table 5, total NO_X emissions clearly continue to decrease substantially throughout the maintenance period.

Ozone modeling performed by LADCO supports the conclusion that the Allegan County area will maintain the 8-hour ozone standard throughout the maintenance period. Peak modeled ozone levels in the area for 2012 and 2018 are 0.083 ppm and 0.078 ppm, respectively. These projected ozone levels were modeled applying only legally enforceable controls; *e.g.,* consent decrees, rules, the NO_X SIP Call, Federal motor vehicle control programs, *etc.* Because these programs will remain in place, emission levels, and therefore ozone levels, would not be expected to increase significantly between 2018 and 2021. Given that projected emissions and modeled ozone levels continue to decrease substantially through 2018, it is reasonable to infer that a 2021 modeling run would also show levels well below the 1997 8-hour ozone standard.

EPA has considered the relationship of the maintenance plans to the reductions required pursuant to CAIR. This rule was remanded to EPA, and the process of developing a replacement rule is ongoing. However, the remand of CAIR does not alter the requirements of

[2] There is more uncertainty about the use of SO_2 allowances and future projections for SO_2 emissions; thus, further review and discussion will be needed regarding the appropriateness of using these emission projections for future $PM_{2.5}$ SIP approvals and redesignation requests.

the NO_X SIP Call, and Michigan has demonstrated maintenance without any additional CAIR requirements (beyond those required by the NO_X SIP Call). Therefore, EPA believes that Michigan's demonstration of maintenance under sections 175A and 107(d)(3)(E) is valid.

The NO_X SIP Call requires States to make significant, specific emissions reductions. It also provided a mechanism, the NO_X Budget Trading Program, which States could use to achieve those reductions. When EPA promulgated CAIR, it discontinued (starting in 2009) the NO_X Budget Trading Program, 40 CFR 51.121(r), but created another mechanism, the CAIR ozone season trading program, which States could use to meet their SIP Call obligations (70 FR 25289–90). EPA notes that a number of States, when submitting SIP revisions to require sources to participate in the CAIR ozone season trading program, removed the SIP provisions that required sources to participate in the NO_X Budget Trading Program. In addition, because the provisions of CAIR, including the ozone season NO_X trading program, remain in place during the remand, EPA is not currently administering the NO_X Budget Trading Program. Nonetheless, all States, regardless of the current status of their regulations that previously required participation in the NO_X Budget Trading Program, will remain subject to all of the requirements in the NO_X SIP Call even if the existing CAIR ozone season trading program is withdrawn or altered. In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO_X SIP Call, including the statewide NO_X emission budgets, continue to apply after revocation of the 1-hour standard.

All NO_X SIP Call States have SIPs that currently satisfy their obligations under the SIP Call, the SIP Call reduction requirements are being met, and EPA will continue to enforce the requirements of the NO_X SIP Call even after any response to the CAIR remand. For these reasons, EPA believes that regardless of the status of the CAIR program, the NO_X SIP Call requirements can be relied upon in demonstrating maintenance. Here, Michigan has demonstrated maintenance based in part on those requirements.

As part of its maintenance plan, the State elected to include a "safety margin" for the area. A "safety margin" is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan which continues to demonstrate attainment of the standard. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. The Allegan County area attained the 8-hour ozone NAAQS during the 2007–2009 time period. Michigan used 2008 as the attainment level of emissions for the area. For the Allegan County area, the emissions from point, area, nonroad, and mobile sources in 2008 equaled 19.37 tpd of VOC. In the maintenance plan, MDNRE projected emission levels for 2021 to be 15.55 tpd of VOC. The SIP submissions demonstrate that the Allegan County area will continue to maintain the standard with emissions at this level. The safety margin for VOC is calculated to be the difference between these amounts or, in this case, 3.82 tpd of VOC for 2021. By this same method, 8.88 tpd (*i.e.,* 16.94 tpd less 8.06 tpd) is the safety margin for NO_X for 2021. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained.

d. Monitoring Network

Michigan currently operates one ozone monitor in Allegan County. In its redesignation request, MDNRE has committed to continue to operate an EPA-approved monitoring network as necessary to demonstrate ongoing compliance with the NAAQS. Michigan remains obligated to continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into the AQS in accordance with Federal guidelines.

e. Verification of Continued Attainment

Continued attainment of the ozone NAAQS in the Allegan County area depends, in part, on the State's efforts toward tracking indicators of continued attainment during the maintenance period. Michigan's plan for verifying continued attainment of the 8-hour standard in the Allegan County area consists of a plan to continue ambient ozone monitoring in accordance with the requirements of 40 CFR part 58. MDNRE will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002) to track future levels of emissions.

f. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the State will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the State. The State should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the State will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. *See* section 175A(d) of the CAA.

As required by section 175A of the CAA, Michigan has adopted a contingency plan for the Allegan County area to address possible future ozone air quality problems. The contingency plan adopted by Michigan has two levels of response, an action level response and a contingency measure response.

An action level response will be triggered when the two-year average of the annual fourth-highest daily peak 8-hour ozone concentration is 0.085 ppm or higher within the maintenance area. An action level response will consist of Michigan performing a review of the circumstances leading to the high monitored values. MDNRE will conduct this review within six months following the close of the ozone season. If MDNRE determines that contingency measure implementation is necessary to prevent a future violation of the NAAQS, MDNRE will select and implement a measure that can be implemented promptly.

A contingency measure response will be triggered by a violation of the 1997 8-hour ozone standard (a three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration of 0.085 ppm or greater). When a contingency measure response is triggered, Michigan will select one or more control measures for implementation. The timing for implementation of a contingency measure is dependent on the process needed for legal adoption and source compliance, which varies for each measure. MDNRE will expedite the process of adopting and implementing the selected measures, with a goal of having measures in place as expeditiously as practicable and within 18 months after State certification of the violation. The State has confirmed EPA's interpretation that this commitment means that the measure

will be adopted and implemented within 18 months of being triggered.

MDNRE included the following list of potential contingency measures in the maintenance plan:

i. Reduced VOC content in architectural, industrial, and maintenance coating rule;

ii. Auto body refinisher self-certification audit program;

iii. Reduced VOC degreasing/solvent cleaning rule;

iv. Diesel retrofit program;

v. Reduced idling program;

vi. Portable fuel container replacement rule;

vii. Food preparation flame broiler control rule; and

viii. Lower Reid vapor pressure gasoline program.

g. Provisions for Future Updates of the Ozone Maintenance Plan

As required by section 175A(b) of the CAA, MDNRE commits to submit to the EPA an updated ozone maintenance plan eight years after redesignation of the Allegan County area to cover an additional ten-year period beyond the initial ten-year maintenance period. As required by section 175A of the CAA, Michigan has committed to retain the VOC and NO_X control measures contained in the SIP prior to redesignation.

EPA has concluded that the maintenance plan for Allegan County adequately addresses the five basic components of a maintenance plan: attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan. Thus EPA proposes to find that the maintenance plan SIP revision submitted by Michigan for the Allegan County area meets the requirements of section 175A of the CAA.

B. Adequacy of the MVEBs

1. How are MVEBs developed and what are the MVEBs for the Allegan County area?

Under the CAA, States are required to submit, at various times, control strategy SIP revisions and ozone maintenance plans for ozone nonattainment areas and for areas seeking redesignations to attainment of the ozone standard. These emission control strategy SIP revisions (*e.g.,* RFP and attainment demonstration SIP revisions) and ozone maintenance plans may include MVEBs based on onroad mobile source emissions for criteria pollutants and/or their precursors to address pollution from cars and trucks. The MVEBs are the portions of the total allowable emissions that are allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment or maintenance, as applicable.

Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188).

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must "conform" to (*i.e.,* be consistent with) the SIP. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS. If a transportation plan does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively approve or find that the MVEBs are "adequate" for use in determining transportation conformity. Once EPA affirmatively approves or finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs must be used by State and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA's finding of adequacy. The process of determining the adequacy of submitted SIP MVEBs is codified at 40 CFR 93.118.

The maintenance plan submitted by Michigan for the Allegan County area contains new VOC and NO_X MVEBs for 2021. The availability of the SIP submission with these 2021 MVEBs was announced for public comment on EPA's Adequacy Web site on June 17, 2010, at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.* The EPA public comment period on adequacy of the 2021 MVEBs for the Allegan County area closes on July 19, 2010.

EPA, through this rulemaking, is proposing to approve the MVEBs for use to determine transportation conformity in the Allegan County area because the MVEBs submitted by MDNRE meet the adequacy requirements contained in EPA's conformity rule (40 CFR 93.118(e)(4)), and EPA has determined that the area can maintain attainment of the 8-hour ozone NAAQS for the relevant maintenance period with mobile source emissions at the levels of the MVEBs. MDNRE has determined the 2021 MVEBs for the Allegan County area to be 3.93 tpd for VOC and 6.92 tpd for NO_X. These MVEBs exceed the onroad mobile source VOC and NO_X emissions projected by MDNRE for 2021, as summarized in Table 3 above ("onroad" source sector). MDNRE decided to include safety margins (described further below) of 1.65 tpd for VOC and 3.58 tpd for NO_X in the MVEBs to provide for mobile source growth. Michigan has demonstrated that the Allegan County area can maintain the 8-hour ozone NAAQS with mobile source emissions of 3.93 tpd for VOC and 6.92 tpd for NO_X, including the allocated safety margins, since total emissions will still remain under attainment year emission levels.

2. What is a safety margin?

A "safety margin" is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. As noted in Table 3, the emissions in the Allegan County area are projected to have safety margins of 3.82 tpd for VOC and 8.88 tpd for NO_X in 2021 (the difference between the attainment year, 2008, emissions and the projected 2021 emissions for all sources in the Allegan County area). Even if emissions reached the full level of the safety margin, the counties would still demonstrate maintenance since emission levels would equal those in the attainment year.

The MVEBs requested by MDNRE contain safety margins for mobile sources smaller than the allowable safety margins reflected in the total emissions for the Allegan County area. The State is not requesting allocation to the MVEBs of the entire available safety margins reflected in the demonstration of maintenance. Therefore, even though the State is requesting MVEBs that exceed the projected onroad mobile source emissions for 2021 contained in the demonstration of maintenance, the

increase in onroad mobile source emissions that can be considered for transportation conformity purposes is well within the safety margins of the ozone maintenance demonstration. Further, once allocated to mobile sources, these safety margins will not be available for use by other sources.

C. 2005 Comprehensive Emissions Inventory

As discussed above, section 172(c)(3) of the CAA requires nonattainment areas to submit a comprehensive, accurate and current inventory of actual emissions. As part of Michigan's redesignation request for the Allegan County area, the State submitted a 2005 emissions inventory. This inventory is discussed above in section VI.A.3.b. and summarized in Table 2. EPA is proposing to approve this 2005 inventory as meeting the section 172(c)(3) emissions inventory requirement.

VII. What actions is EPA taking?

EPA is proposing to determine that the Allegan County, Michigan area has attained the 1997 8-hour ozone NAAQS. EPA is proposing to approve the redesignation of the Allegan County area from nonattainment to attainment for the 1997 8-hour ozone NAAQS. After evaluating the redesignation request submitted by Michigan, EPA believes that the request meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. The final approval of this redesignation request would change the official designation for the Allegan County area from nonattainment to attainment for the 1997 8-hour ozone standard. EPA is also proposing to approve the maintenance plan SIP revision for the Allegan County area. EPA's proposed approval of the maintenance plan is based on the State's demonstration that the plan meets the requirements of section 175A of the CAA, as described more fully above. EPA is proposing to approve MDNRE's 2005 emissions inventory for the Allegan County area as meeting the requirements of section 172(c)(3) of the CAA. Finally, EPA finds adequate and is proposing to approve the State's 2021 MVEBs for the Allegan County area.

VIII. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, these actions merely do not impose additional requirements beyond those imposed by State law and the Clean Air Act. For that reason, these actions:

- Are not "significant regulatory actions" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are 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);
- Are not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Do 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 redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on Tribes, impact any existing sources of air pollution on Tribal lands, nor impair the maintenance of ozone national ambient air quality standards in Tribal lands. However, because there are Tribal lands located in Allegan County, we provided the affected Tribe with the opportunity to consult with EPA on the redesignation. The affected Tribe raised no concerns with the proposed rule.

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: July 8, 2010.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2010–17680 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0080; FRL–9176–6]

RIN 2060–AQ26

Amendments to National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing three amendments to the regulatory text in the prepared feeds manufacturing area source rule. First, this action would correct the date for new sources to submit a Notification of Compliance Status (NOCS) form. Second, this action would correct information that needs to be included in the Notification of Compliance Report for those small facilities that are not required to install cyclones on their pelleting operations. Third, this action would add language to the regulatory text requiring submittal of the annual compliance certification report that was inadvertently left out of the final rule. These corrections and clarifications would not change the

standards established by the rule. These corrections and clarifications also would not result in the imposition of any costs beyond those included in the final rule.

DATES: Written comments must be received on or before September 3, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0080, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov:* Follow the instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/oar/docket.html.* Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web site.
- *E-mail: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2008–0080 in the subject line of the message.
- *Fax:* Send comments to (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2008–0080.
- *Mail:* Area Source NESHAP for Prepared Feeds Manufacturing Docket, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. 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–2008–0080. 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, any form of encryption, and be free of any defects or viruses.

Docket: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0080. All documents in the docket are listed in the Federal Docket Management System index at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available (*e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Public Reading Room, 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Jan King, Regulatory Development and Policy Analysis Group, Office of Air Quality Planning and Standards (C404–05), Environmental Protection Agency, Research Triangle Park, NC 27711. Telephone number: (919) 541–5665; fax number: (919) 541–0242; e-mail address: *king.jan@epa.gov.*

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

I. Why is EPA issuing this proposed rule?
II. Does this action apply to me?
III. Where can I get a copy of this document?
IV. What amendments are we making to the rule?
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. Why is EPA issuing this proposed rule?

This document proposes to take action on three amendments to the regulatory text in the prepared feeds manufacturing area source rule. We have published a direct final rule amending the regulatory text in the prepared feeds manufacturing area source rule in the "Rules and Regulations" section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment by September 3, 2010, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the amendments in the direct final rule or certain amendments in the direct final rule and those amendments will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

In the "Rules and Regulations" section of this **Federal Register**, we are amending the regulatory text in the prepared feeds manufacturing area source rule as a direct final rule without a prior proposal. If we receive no adverse comment on that direct final rule, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the amendments in the direct final rule or certain amendments in the direct final rule and those amendments will not take effect. The regulatory text for this proposal is identical to that for the direct final rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information proved in the **ADDRESSES** section of this document.

II. Does this action apply to me?

Regulated Entities. Categories and entities potentially regulated by the proposed rule include:

Category entities	NAICS code [1]	Examples of regulated entities
Other Animal Foods Manufacturing	311119	Animal feeds, prepared (except dog and cat), manufacturing.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 63.11619, subpart DDDDDDD (NESHAP for Area Sources: Prepared Feeds Manufacturing). If you have any questions regarding the applicability of this action to a particular entity, consult either the State delegated authority or the EPA regional representative, as listed in 40 CFR 63.13 of subpart A (General Provisions).

III. Where can I get a copy of this document?

Electronic Access. In addition to being available in the docket, an electronic copy of this proposed action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/.* The TTN provides information and technology exchange in various areas of air pollution control.

IV. What amendments are we making to this rule?

On January 5, 2010 (75 FR 522), the EPA promulgated the national emission standards for hazardous air pollutants (NESHAP) for area source prepared feeds manufacturing facilities as subpart DDDDDDD in 40 CFR part 63. Today's action proposes the following corrections and clarifications:

1. The date for new sources to submit the Notification of Compliance Form is corrected from "within 120 days of startup, or by May 4, 2012, whichever is later," to within 120 days of startup or October 18, 2010, whichever is later.

2. Small facilities that are not subject to the requirement to install and operate a cyclone to control emissions from pelleting operations must submit documentation of their initial average daily feed production level in their Notification of Compliance Status report. The final rule used the incorrect term "initial daily pelleting production level." This is being corrected to indicate that documentation of the "initial average daily feed production level" be submitted.

3. The requirement to submit the annual compliance certification report under certain circumstances is added. This requirement was in the proposed rule but inadvertently deleted in the final rule.

These changes provide corrections and clarifications that are referenced in the final rule published on January 5, 2010. Today's action notifies interested parties of the proposed amendments.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This proposed action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The proposed amendments result in no changes to the information collection requirements of the existing standards of performance and will have little or no impact on the information collection estimate of projected cost and hour burden made and approved by the Office of Management and Budget (OMB) during the development of the existing standards of performance. Therefore, the information collection requests have not been amended. However, OMB has previously approved the information collection requirements contained in the existing regulations (subpart DDDDDDD, 40 CFR part 63) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0635 (ICR 2354.02). 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 generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations found at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. This action does not impose any additional costs over those in the final rule published on January 5, 2010 (75 FR 522). We continue to be interested in the potential impacts of this proposed amendment on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or to the private sector in any one year. This proposed rule is not expected to impact State, local, or Tribal governments. Thus, this rule would not be subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This proposed rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule does not impose any requirements on State and local governments. Thus,

Executive Order 13132 does not apply to this proposed rule.

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

This proposed action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule imposes no requirements on Tribal governments; thus, Executive Order 13175 does not apply to this proposed action. EPA specifically solicits additional comment on this proposed action from Tribal officials.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

This proposed rule is not a "significant energy action" as defined in Executive Order 13211 (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.

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 (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.

These proposed rule amendments do not involve technical standards as defined in the NTTAA. Therefore, this proposed rule is not subject to NTTAA.

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

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

EPA has determined that this proposed rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

List of Subjects for 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: July 14, 2010.

Lisa P. Jackson,

Administrator.

[FR Doc. 2010–17710 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2010–0047]
[MO 92210–0–0008]

Endangered and Threatened Wildlife and Plants; 90–Day Finding on a Petition to List *Pinus albicaulis* (Whitebark Pine) as Endangered or Threatened with Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to list *Pinus albicaulis* (whitebark pine) as endangered or threatened under the Endangered Species Act of 1973, as amended and to designate critical habitat. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing *P. albicaulis* may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing *P. albicaulis* is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12–month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before September 20, 2010. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

After September 20, 2010, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we may not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. In the box that reads "Enter Keyword or ID," enter the docket number for this finding, which is FWS–R6–ES–2010–0047. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.

• *U.S. mail or hand-delivery*: Public Comments Processing, Attn: FWS–R6–ES–2010–0047; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us

(see the **Request for Information** section below for more details).

FOR FURTHER INFORMATION CONTACT: Brian T. Kelly, Field Supervisor, Wyoming Ecological Services Field Office, 5353 Yellowstone Road, Room 308A, Cheyenne, WY 82009; by telephone (307–772–2374); or by facsimile (307–772–2358). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on *Pinus albicaulis* from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The status of the species throughout its range in the United States and Canada including:

(a) Historic and current range, including distribution patterns;

(b) Historic and current population levels, and current and projected trends;

(c) Past and ongoing conservation measures for the species, its habitat, or both; and

(d) Distribution and extent of threats faced by the species.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) The Potential effects of climate change on this species and its habitat.

If, after the status review, we determine that listing *Pinus albicaulis* is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by *P. albicaulis*, we request data and information on:

(1) What may constitute "physical or biological features essential to the conservation of the species,"

(2) Where these features are currently found, and

(3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as the full reference for scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and supporting documentation that we received and used in preparing this finding is available for you to review at *http://www.regulations.gov*, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Wyoming Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. 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 the 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, which is subsequently summarized in our 12–month finding.

Petition History

On December 9, 2008, we received a petition dated December 8, 2008, from Natural Resources Defense Council (NRDC) requesting that we list *Pinus albicaulis* as endangered throughout its range and designate critical habitat under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). In a January 13, 2009, letter to NRDC, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We also stated that we could not address the petition promptly because of staff and budget limitations. We indicated that we would process a 90–day petition finding as quickly as possible. This finding addresses the petition.

On December 23, 2009, we received NRDC's December 11, 2009, notice of intent to sue over the Service's failure to respond to the petition to list *Pinus albicaulis* and designate critical habitat. The Service responded in a letter dated January 6, 2010, indicating that preceding listing actions had priority but that we expected to complete the 90–day finding during the 2010 fiscal year. On February 24, 2010, the Service received a formal complaint from NRDC

for the Service's failure to comply with issuing a 90–day finding on the petition.

Previous Federal Actions

On February 5, 1991, the Great Bear Foundation of Missoula, Montana, petitioned the Service to list *Pinus albicaulis* under the Act. After reviewing the petition, we found that the petitioner had not presented substantial information indicating that listing *P. albicaulis* may be warranted. A not-substantial finding on the petition was made on January 13, 1994, and published in the **Federal Register** on January 27, 1994 (59 FR 3824).

Species Information

Pinus albicaulis is a 5-needled conifer species classified in the *Pinus* subsection *Cembrae*, or stone pines, which include five species worldwide (Tomback *et al.* 2001, p. 30; Lanner 1996, p. 26). The taxonomic characterization of *P. albicaulis* as a species is not disputed. Characteristics of stone pines include indehiscent cones (cones that remain essentially closed at maturity) and wingless seeds that are specialized for seed dispersal by nutcrackers in the avian family *Corvidae* (Tomback *et al.* 2001, p. 30; Burns and Honkala 1990, p. 271; Lanner 1996, p. 2). *Pinus albicaulis* seeds cannot be wind-disseminated like seeds of some other species of pines, and the species relies almost exclusively on Clark's nutcracker (*Nucifraga columbiana*) for seed dispersal (Lanner 1996, p. 7; Schwandt 2006, p. 2).

Pinus albicaulis typically occurs on cold, windy, moist, high-elevation or high-latitude sites in western North America, and as a result, many stands are geographically isolated. Its range extends longitudinally between 107 and 128 degrees west and latitudinally between 37 and 55 degrees north. The distribution of *P. albicaulis* includes coastal and Rocky Mountain ranges (Burns and Honkala 1990, p. 268) that are connected by the Selkirk Mountains of northeastern Washington and southeastern British Columbia. The coastal distribution of *P. albicaulis* extends from the Bulkley Mountains in British Columbia to the northeastern Olympic Mountains and Cascade Range of Washington and Oregon, to the Kern River of the Sierra Nevada Range of east-central California. Isolated stands are known from the Blue and Wallowa Mountains in northeastern Oregon and the subalpine and montane zones of mountains in northeastern California, south-central Oregon, and northern Nevada. The Rocky Mountain distribution of *P. albicaulis* ranges from northern British Columbia and Alberta to Idaho, Montana, Wyoming, and Nevada. Extensive stands occur in the Yellowstone ecosystem. The Wind River Range in Wyoming is the eastern-most distribution of the species (Tomback *et al.* 2001, p. 33; Burns and Honkala 1990, p. 268).

The upper elevational limits of *Pinus albicaulis* decrease with increasing latitude. It occurs from approximately 900 meters (2,950 feet) at its northern limit in British Columbia up to 3,660 meters (12,000 feet) in the Sierra Nevada. *Pinus albicaulis* is typically found at or slightly lower than alpine timberline in the upper montane zone, where it is associated with other conifer species that include Rocky Mountain lodgepole pine (*Pinus contorta* var. *latifolia*), Engelmann spruce (*Picea engelmannii*), subalpine fir (*Abies lasiocarpa*), and mountain hemlock (*Tsuga mertensiana*) in the Rocky Mountains, and Sierra-Cascade lodgepole pine (*Pinus contorta* var. *murrayana*) in the Sierra Nevada and Blue and Cascade Mountains in the western portion of its range (Tomback *et al.* 2001, pp. 33–34; Lanner 1999, revised 2007, p. 83). In the United States, approximately 98 percent of all *P. albicaulis* communities occur on public lands (Tomback *et al.* 2001, p. 12).

The interaction of *Pinus albicaulis* with its environment varies over its geographic range due to differences in climate, substrate, physical environment, competitors, and seasons (Tomback *et al.* 2001, p. 52). It is a stress-tolerant pine, and its hardiness allows it to grow where other conifer species cannot (Tomback *et al.* 2001, p. 10). *Pinus albicaulis* expresses superior hardiness in cold, dry, and windy settings; therefore, it becomes established and survives in environmental conditions where other conifer species are unable to establish and compete for space and light (Tomback *et al.* 2001, p. 75). In the upper subalpine ecosystem, *P. albicaulis* is considered a keystone species, or one that determines the ability of many other species to persist in a community, thereby increasing biodiversity (Tomback *et al.* 2001, pp. 7–8). It does this in multiple ways, including regulating runoff by slowing the progression of snowmelt, reducing soil erosion by physically stabilizing soils, initiating succession as a hardy pioneer or as an early seral (an intermediate stage in ecological succession) species after fire or other disturbance events, and providing seeds that are a high-energy food source for some birds and mammals (Tomback *et al.* 2001, pp. 8–11), including Clark's nutcracker (Tomback *et al.* 2001, pp. 121–131; Lanner 1996, p. 38), red squirrels (*Tamiasciurus spp.*), and grizzly bears (*Ursus arctos horribilis*) (Tomback *et al.* 2001, p. 123; Lanner 1996, pp. 71 and 73).

Evaluation of Information for this Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90–day finding, we evaluated whether information regarding threats to *Pinus albicaulis*, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below. If we had information available to us that differed from the information or conclusions presented in the petition, we describe the differences.

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat

The petitioner states the threats causing the present or threatened destruction, modification, or curtailment of *Pinus albicaulis'* high alpine habitat include changes in fire regimes due to fire suppression; the white pine blister rust pathogen, which is an introduced disease caused by the fungus *Cronartium ribicola*; and mountain pine beetles (*Dendroctonus ponderosae*) (NRDC 2008, p. 11). White pine blister rust and mountain pine beetles are addressed in greater detail under Factor C, *Disease or Predation*. The petitioner also addressed climate change under Factor E, *Other Natural or Manmade Factors Affecting Its Continued Existence*; however, because the petitioner's assertions regarding the impacts of climate change relate to changes to the species' habitat, we are addressing climate change under Factor A for this finding.

Fire Suppression and Changes in Fire Regimes

Information Provided in the Petition

The petitioner asserts that where fire suppression policies are in place, fire suppression has reduced fire frequency in subalpine communities, resulting in the successional replacement of *Pinus albicaulis* by more shade-tolerant species in many areas. The petitioner indicates that once *P. albicaulis* communities become established, they are perpetuated by low-intensity fires that kill the competing understory fir and spruce. Thus, the lack of fire provides a competitive advantage to other tree species, resulting in the eventual loss of *P. albicaulis* (NRDC 2008, p. 13).

Evaluation of Information Provided in the Petition

The petitioner indicates that the long-term consequence of fire suppression in the *Pinus albicaulis* ecosystem is successional replacement by other conifer species, resulting in conversion to a more shade-tolerant forest type. The petitioner cites decreases in *P. albicaulis* relating to advancing succession and subsequent increases in other conifer species at several sites in Montana, Idaho, Washington, and Oregon (NRDC 2008, p. 13). The fire regime subsequently changes from a low-to-moderate severity regime typical of *P. albicaulis* communities, to a stand-replacing, crown fire regime (NRDC 2008, p. 13). The petitioner does note that high-intensity, stand-replacing fires in many *P. albicaulis* seral communities have occurred historically (NRDC 2008, p. 13).

Evaluation of Information Available in Service Files

Information in our files indicates that stand-replacing fires (ones in which *Pinus albicaulis* trees are killed) can provide a successional advantage to the species. Although fire may accelerate the loss of *P. albicaulis* at a local level, fire is necessary to perpetuate the species' communities at a landscape scale (Tomback *et al.* 2001, p. 226). Stand-replacing fire disrupts the successional process and creates openings for repeated establishment of early colonizers like *P. albicaulis* (Tomback *et al.* 2001, p. 13). Nutcrackers disperse *P. albicaulis* seeds farther and faster than wind can disperse the seeds of competing tree species, and use openings created by stand-replacing fires as seed-caching sites (Tomback *et al.* 2001, pp. 8, 13, and 226). Therefore, *P. albicaulis* can establish more quickly in burned areas than can competing species (Tomback *et al.* 2001, p. 13).

Fire suppression, however, limits the burned areas available for nutcrackers to cache *Pinus albicaulis* seeds, thereby reducing areas for the species to regenerate (Tomback *et al.* 2001, p. 237), resulting in range contraction and potentially the species' decline. Information in our files indicates fire suppression during the last 60 to 80 years may have limited natural regeneration and subsequently contributed to conversion of some *P. albicaulis* stands to shade-tolerant species (Arno 2001, as cited in Schwandt 2006, p. 4). Prior to that period, the average *P. albicaulis* stand burned every 50 to 300 years. While only small amounts of *P. albicaulis* sites have burned more recently (less than 1 percent within the last 25 years; Schwandt 2006, p. 4), the 60- to 80–year fire suppression period is not outside the range of the 50- to 300–year average burn interval, suggesting that *P. albicaulis* systems may not be outside the historic range of fire frequency.

Information in our files (Tomback *et al.* 2001, pp. 237) indicates that wildland fire policies of natural resource management agencies have been revised in the recent past, allowing for greater levels of prescribed fire across large areas of forest with *Pinus albicaulis* communities. However, while wildland fire suppression policies are being modified to address potential concerns of fire suppression on this species, fire suppression and subsequent succession by other conifer species have been responsible for many stand conversions.

Fire has been an important landscape disturbance factor in the Cascade Range of Washington and Oregon, and the Rocky Mountains, for the past 10,000 years (Agee 1993, p. 54). The origin of fire suppression policies may be traced to about 1910 when the "Big Burn" of northern Idaho and northwestern Montana consumed approximately 1.2 million hectares (2.8 million acres). This fire generated national interest in protecting forests from fire, and thus led to the development of fire suppression policies (Agee 1993, p. 59). Suppression of fire has resulted in shifts in the composition of subalpine forests from shade-intolerant species like *P. albicaulis* to more shade-tolerant species such as *Abies lasiocarpa, Picea engelmannii*, or *Tsuga mertensiana*, thereby increasing the fuel load (Shoal *et. al.*, 2008, p. 19; Schwandt 2006, p. 5), reducing the opportunity for *P. albicaulis* regeneration, and adding stress to the remaining trees. The result is that remaining trees are more susceptible to stand replacing (high intensity) fires and to other damaging agents like white pine blister rust or mountain pine beetles (Schwandt 2006, p. 5). This may be the case in the northwestern United States (Tomback *et al.*, p. 82), but we lack data to analyze the extent of the decline throughout the species' entire range. Therefore, we find that the petition and information in our files presents substantial information that *P. albicaulis* habitat is being reduced or curtailed by fire suppression activities. We will seek additional information regarding the potential effects of fire suppression and fire suppression policies during the status review process.

Climate Change

Information Provided in the Petition

The petitioner asserts that climate change is one of the most significant threats to *Pinus albicaulis*. The petitioner cites a variety of sources supporting the claim that climate change will result in a shifting in the ranges of vegetation northward, and upward in elevation (NRDC 2008, p. 29), resulting in a reduction of *P. albicaulis* range and population. The petition also cites evidence of climate change-induced range shifts in an associated pathogen and pest, white pine blister rust and mountain pine beetle. The petition discusses how climate change is expected to facilitate the expansion of white pine blister rust and mountain pine beetles (further discussed under Factor C. *Disease or Predation*). The petitioner also cites literature indicating climate change may result in changes to fire patterns in western North America (NRDC 2008, p. 33).

Evaluation of Information Provided in the Petition

To support their assertion of *Pinus albicaulis* decline resulting from climate change, the petitioner cites model projections from the International Panel on Climate Change (IPCC) indicating that human-induced changes to natural greenhouse gases may result in warming of 1.1 °Celsius (°C) (2 °Fahrenheit (°F)) to 6.4 °C (12 °F) in the 21st century (NRDC 2008, p. 28). These projections are consistent with our review of IPCC models for other listing actions (e.g., 75 FR 13910, March 23, 2010). The petitioner also cites several other models under different scenarios predicting up to a 98 percent decline in *P. albicaulis* by the end of the century (NRDC 2008, p. 29). Additional literature is cited indicating that the predicted rate of climate change may threaten species incapable of migrating

to more suitable habitats or unable to migrate due to human-caused landscape fragmentation. As a high-elevation, long-lived species with limited mobility, *P. albicaulis* will be particularly vulnerable to climate change (NRDC 2008, p. 28). The information in our files, which includes Tomback *et al.* (2001, pp. 58–59) and Schwandt (2006, p. 6), supports this conclusion; however, these authors caution that predicting the overall effects of climate change is difficult due to the number of factors involved and the fact that the magnitudes of the likely changes are unknown (e.g., rangewide or local).

The petitioner asserts that climate change will alter fire patterns in western North America (NRDC 2008, p. 33). Changes in fire pattern include an increased fire season duration associated with increased spring and summer temperatures and associated early spring snow melt, increased time to extinguish fires, and increased area burned. The petitioner notes that one of the complications with identifying climate change as the definitive cause of increased fire frequency and intensity is the confounding effect of forest management and fire suppression (NRDC 2008, p. 34).

Evaluation of Information Available in Service Files

Literature in our files supports the assertion that increased fire frequency due to climate change is likely (Agee 1993, p. 405). The rationale for this claim is that as vegetation communities migrate north, the high frequency fire regimes of these forest types will change the fire frequency of a given area (Agee 1993, p. 405). The intensity of future fires in a changing climate is less certain; however, we do support the contention that changes in forest composition will occur, which will increase fuel loads and lead to greater stress in *Pinus albicaulis* forests. In turn, we conclude that this leads to a higher proportion of dead trees in stands, therefore making them more susceptible to fire (Agee 1993, p. 405; Agee pers. comm., 2010).

Information in our files provides numerous climate change model predictions describing future *Pinus albicaulis* scenarios (Tomback *et al.* 2001, pp. 57–59). Climate change is predicted to affect several aspects of the ecology of whitebark pine, including an increase in the length of the growing season (Cayan et al. 2001, p. 410–411), an increase in fire frequency and severity (McKenzie et al. 2004, p. 893; Westerling et al. 2006, pp. 942–943), spatial shifts in the distribution of suitable growing sites (Bartlein et al. 1997, p. 788), and an increase in both mountain pine beetle (Logan and Powell 2001, pp. 165–170; Williams and Liebhold 2002, p. 95) and white pine blister rust (Koteen 2002, pp. 352–364) outbreaks. However, because environmental conditions in *P. albicaulis* communities are highly variable and the magnitudes of potential changes are unknown, effects of climate change are uncertain (Kendall and Keane 2001, p. 236). Although the climate change information contains high variability as to the predicted magnitude of effects, both our files and the petition indicate that there are effects that warrant further examination.

Summary of Factor A

In summary, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to present or threatened destruction, modification, or curtailment of its habitat from fire suppression, subsequent alterations of fire regimes, and climate change. We will review the possible effects of these threats to *Pinus albicaulis* more thoroughly in our 12–month status review.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petitioner did not present information, nor do we have information in our files, suggesting that overutilization is threatening *Pinus albicaulis*. However, we will further investigate whether overutilization for commercial, recreational, scientific, or educational purposes is a potential threat in our 12–month status review of *P. albicaulis*.

C. Disease or Predation

Information Provided in the Petition

The petitioner indicates that *Pinus albicaulis* is currently being devastated by the combination of white pine blister rust and an epidemic outbreak of mountain pine beetle, a native species. The petitioner cites literature showing temporal and spatial changes in the distribution of white pine blister rust infections and mountain pine beetle infestations and describes the synergistic effects of white pine blister rust and mountain beetle to *P. albicaulis* (NRDC 2008, pp. 14–28). The petitioner summarizes literature on *P. albicaulis* declines from white pine blister rust in areas throughout the range of *P. albicaulis* in the United States and Canada.

Evaluation of Information Provided in the Petition

White Pine Blister Rust

The petitioner indicates that *Pinus albicaulis* and all 5-needled pines are highly susceptible to white pine blister rust (NRDC 2008, p. 14). Each year an infected tree lives, the rust continues to produce fungal spores, thereby perpetuating the disease. Where the fungus' alternate host (typically in the genus *Ribes* (currants or gooseberries)) is abundant and when summer weather is conducive to multiple cycles of fungal spore production, the result is a "wave" of new rust infections that spread into new areas or intensify in already infected stands. The frequency of wave years depends on various factors, including elevation, geographical region, topography, wind patterns, temperature, and humidity. White pine blister rust can kill cone-bearing branches years before the tree actually dies. While large *P. albicaulis* trees may survive white pine blister rust infection for a long time, the rust can kill small trees within a few years (NRDC 2008, pp. 16–17). The information in our files corroborates the petitioner's information (Tomback *et al.* 2001, pp. 193–214).

The petitioner cites surveys showing white pine blister rust infection rates of 83 percent in the Bob Marshall Wilderness Complex in Montana to 100 percent of trees in other unidentified locations within this geographic area. Overall infection rates in the drier, southern portion of the Rocky Mountains have increased from 10 to 20 percent during the last decade; however, the petitioner cites a 2004 study that found white pine blister rust on 71 percent of transects, indicating the disease is now more widespread and expanding (NRDC 2008, p. 18). In the coastal distribution of the species, the petitioner cites several studies indicating variable infection incidence, ranging from 0 to 100 percent, with the highest *Pinus albicaulis* mortality from white pine blister rust occurring in Mt. Hood National Forest (NRDC 2008, p. 19). Similarly, in British Columbia and Alberta, infection rates vary from 0 to 100 percent depending on location and other variables, with one study showing a *P. albicaulis* mortality increase from 26 to 61 percent in 7 years (NRDC 2008, p. 19). The petitioner claims that the incidence of the disease is steadily increasing in all areas sampled (NRDC 2008, p. 20).

The petitioner cites literature indicating white pine blister rust is

currently present at the northern range limits of *Pinus albicaulis* and at treeline, which may inhibit northerly and altitudinal migration of the species (NRDC 2008, p. 30), a necessary adaptation to climate change. The petitioner indicates that changes in frequency or persistence of rainfall patterns from climate change may also contribute to favorable white pine blister rust conditions, resulting in disease proliferation and intensification in various locations. The petitioner states that these conditions, combined with the buildup of white pine blister rust over the past decades, will likely result in larger transmission events in the future (NRDC 2008, p. 31).

Evaluation of Information Available in Service Files

Information in our files indicates that in the Rocky Mountains, the highest mortality from white pine blister rust generally occurs in northwestern Montana, northern Idaho, and the southern Canadian Rockies, where cool, moist climatic conditions are more favorable to white pine blister rust growth (Tomback *et al.* 2001, p. 15). Blister rust infections attack seedlings and mature trees, causing damage to upper canopy and cone-bearing branches, or death to branches or the entire tree (Tomback *et al.* 2001, pp. 15, 116, 195); however, some trees may persist, and long-term survival depends on local environmental conditions and specific tree health (Tomback *et al.* 2001, p. 195). Survey information in our files indicates that many stands have been infected with white pine blister rust, but we do not know how much regeneration is occurring in these areas; however, most remaining high-elevation *P. albicaulis* stands in the U.S. Intermountain West that are climax communities have little regeneration (Tomback *et al.* 2001, p. 228). White pine blister rust has spread throughout the range of *P. albicaulis* since introduction into the United States a century ago, and a summary of white pine blister rust analyses suggests that blister rust will continue to cause damage to *P. albicaulis* in the central Rocky Mountains (Tomback *et al.* 2001, pp. 197 – 211).

Based on information in our files (Tomback *et al.* 2001, pp. 15–16, 193–214, 221, and 234–237), the geographic extent of white pine blister rust appears to have changed little during the past 30 years; however, the incidence and intensity of infections have increased sharply, and it appears unlikely that any *Pinus albicaulis* stand is safe from damage by white pine blister rust.

Mountain Pine Beetle

Evaluation of Information Provided in the Petition

The petitioner states that *Pinus albicaulis* forests are suffering heavy mortality from mountain pine beetles, which usually colonize larger, mature trees where inner bark is thick enough to support beetle larvae. In addition, the beetles carry a blue-stain fungus (*Grosmannia clavigera*) on their mouth parts. The fungi interrupt the flow of resins that would ordinarily pitch out or kill the beetles, thus promoting beetle invasions and reducing a tree's defenses to beetle attack. The fungi also interrupt water flow to the tree's crown and within approximately 2 weeks of colonization, the tree's phloem layer is damaged enough to cut off water and nutrient flows and the tree starves to death. This impact is visible by the presence of reddened needles, often encompassing entire stands of trees (NRDC 2008, p. 23). The petitioner cites one study indicating that historically, conditions in high-elevation *P. albicaulis* habitat prevented sustained mountain pine beetle outbreaks, but today, climate change appears to be allowing outbreak populations to expand into these previously inhospitable areas (NRDC 2008, p. 22).

The petitioner summarizes literature on *Pinus albicaulis* declines from mountain pine beetle outbreaks in the Yellowstone Ecosystem; in the Selkirk Mountains of northern Idaho, Washington, and Oregon; and in British Columbia and Alberta, Canada (NRDC 2008, pp. 24–27). In the Yellowstone Ecosystem, the petitioner cites survey data within the last 3 years indicating *P. albicaulis* mortality from mountain pine beetles was 80 percent and 74 percent of trees greater than 5 inches diameter at breast height (DBH) on plots in Yellowstone National Park and the Gallatin National Forest, respectively (NRDC 2008, pp. 24–27). In northern Idaho's Selkirk Mountains, a loss of 45 to 82 percent of *P. albicaulis* trees greater than 5 inches DBH, primarily due to mountain pine beetle, was documented in 2000. In Washington and Oregon, overall mountain pine beetle incidence ranged from 0 to 34 percent and mortality from both mountain pine beetle and white pine blister rust averaged 33 percent. In British Columbia and Alberta, the petitioner cites literature from 2008, stating that given the extent of the current mountain pine beetle outbreak in lower elevation forests, a massive and imminent *Pinus albicaulis* decline is expected (NRDC 2008, p. 27). Losses by 2002 were considered minor, but more recent data indicate that pine beetle outbreaks are rapidly expanding in Canada. The petitioner asserts that outbreak severity has been aided by a series of warm winters and extensive availability of susceptible mature pine forests (NRDC 2008, p. 27).

The petitioner indicates that warming temperatures in recent years have provided favorable conditions for increasing widespread mountain pine beetle outbreaks. The petitioner cites literature indicating that a 2 °F (1.11 °C) temperature increase is the amount predicted to shift the mountain pine beetle's life cycle from semivoltine (more than one year required to produce a brood of offspring) to univoltine (produces one brood of offspring per year) and allow for synchronous emergence (from overlapping generations) – conditions that are conducive to massive beetle outbreaks (NRDC 2008, p. 32). Further, while mountain pine beetles are a native species in western North American forests, they have been rare in cold, high-elevation areas; however, outbreaks have occurred earlier than predicted in climate change models and are expanding into previously unoccupied areas (NRDC 2008, p. 33).

Evaluation of Information Available in Service Files

Information in our files (Tomback *et al.* 2001, pp. 14 and 299) indicates that large-scale outbreaks of mountain pine beetle have caused widespread *Pinus albicaulis* mortality. Mountain pine beetle infestations killed many *P. albicaulis* trees in the Selway-Bitterroot Wilderness in the late 1870s, 1930s, and late 1980s. Further, mountain pine beetles have expanded throughout the range of *P. albicaulis*, and because beetles preferentially attack larger cone-bearing trees, there has been a decrease in *P. albicaulis* seed production. Our information also states that absence of fire has resulted in *P. albicaulis* and *Abies lasiocarpa* forests increasing in age, thereby increasing their susceptibility to mountain pine beetle infestations. Trees infected by white pine blister rust are stressed and appear to be more attractive to mountain pine beetles or more vulnerable to attack (Tomback *et al.* 2001, p. 225). As a result, *P. albicaulis* has declined throughout major portions of its range during the past 50 years from several factors, including white pine blister rust and mountain pine beetle. Therefore, the information in our files corroborates the petitioner's information.

Summary of Factor C

We find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to disease or predation, specifically white pine blister rust and mountain pine beetle. We will review the possible effects of these threats to *Pinus albicaulis* more thoroughly in our 12–month status review.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petitioner provides information indicating that there are few, if any, regulatory mechanisms in place to protect *Pinus albicaulis* from the threats of climate change, white pine blister rust, and mountain pine beetles, or the combination of effects from some or all of these threats. The petitioner also asserts there are no mechanisms to effectively control greenhouse gas emissions in the United States and Canada (NRDC 2008, pp. 34–37).

Evaluation of Information Provided in the Petition

The petitioner states that existing forest management law in the United States, in particular the Healthy Forest Restoration Act of 2003 (916 U.S.C. 6501 et seq.), provides few regulatory standards or enforceable mandates to conserve *Pinus albicaulis* specifically and forest diversity in general. The petitioner asserts there are only ineffective mechanisms in place to control climate change pollution and there are inadequate mandates to conserve *P. albicaulis*. The petitioner also states that the Forest Service has not issued any directives mandating or prescribing *P. albicaulis* conservation (NRDC 2008, p. 35). The petitioner notes the Forest Service has put some effort into conserving *P. albicaulis* by assessing it rangewide and developing a conservation and restoration plan. However, the petitioner asserts that to date, efforts have been haphazard and uncoordinated between regions and lack funding for successful implementation (NRDC 2008, p. 36). The petitioner notes the Forest Service has acknowledged that climate change is beyond the capacity of the agency itself to address effectively (NRDC 2008, p. 36).

The petitioner asserts that Canadian laws and regulations also lack adequate protections for *Pinus albicaulis* and its habitat. However, the petitioner also cites the British Columbia Ministry of Environment's addition of *P. albicaulis* to its "blue-list," which lists special conservation concerns, in this case due to a "severe negative long-term trend expected from mountain pine beetle infections, white pine blister rust epidemics, climatic warming trends, and successional replacement" (NRDC 2008, pp. 36–37).

Evaluation of Information Available in Service Files

However, on December 18, 2009 (after the NRDC petition was submitted and received) (74 FR 67059), the U.S. Forest Service reinstated their 2000 Planning Rule, which does include standards (a required action in a land management plan) for timber management. Further, publications from the Forest Service in our files (Lorenz *et al.* 2008; Shoal *et al.* 2008; Aubry *et al.* 2008) advocate actions to reduce threats from white pine blister rust and mountain pine beetles to *P. albicaulis*. These strategies, however, are relatively recent, are specific to the Pacific Northwest, and may be inadequate to reduce threats throughout the entire range of the taxon. Additionally, the need for funding to implement the actions may be inadequate to reduce threats rangewide. While there is uncertainty about whether or not existing regulatory mechanisms are adequate for protecting *P. albicaulis*, the petitioner presents substantial information for further consideration of this factor.

Summary of Factor D

In summary, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to the inadequacy of existing regulatory mechanisms addressing threats specifically from climate change, white pine blister rust, mountain pine beetle, fire suppression, and forest management. We will review the possible effects of these threats on *P. albicaulis* more thoroughly in our 12–month status review.

E. Other Natural or Manmade Factors Affecting its Continued Existence

The petitioner discussed the threat of climate change under this factor; however, we have addressed it under Factor A. We will investigate whether there are any other natural or manmade factors that are potential threats to *Pinus albicaulis* when we address Factor E in our 12–month status review.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that listing *Pinus albicaulis* throughout all or a significant portion of its range may be warranted. This finding is based on substantial information provided by the petitioners and in our files for Factor A, Factor C, and Factor D.

Because we have found that the petition presents substantial information indicating that listing *Pinus albicaulis* may be warranted, we are initiating a status review to determine whether listing *P. albicaulis* under the Act is warranted. As part of our status review we will examine available information on the threats to the species and make a final determination in a 12–month finding on whether the species is warranted for listing as endangered or threatened under the Act. To ensure that the status review is complete, we are requesting scientific and commercial information regarding *P. albicaulis* (as described above under the Information Requested section). The petition also asks us to designate critical habitat for this species. If we determine in our 12–month finding that listing *P. ablicaulis* is warranted, we will address the designation of critical habitat in the subsequent proposed listing rule, if we conclude critical habitat is prudent and determinable.

The "substantial information" standard for a 90–day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90–day finding does not constitute a status review under the Act. In a 12–month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90–day finding. Because the Act's standards for 90–day and 12–month petition findings are different, as described above, a substantial 90–day finding does not mean that the 12–month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Wyoming Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this notice are the staff members of the Wyoming Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated:July 9, 2010

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2010–17650 Filed 7–19– 10; 8:45 am]

BILLING CODE S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2009–0047]
[92210–1111–0000 B2]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Amargosa Toad as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12–month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12–month finding on a petition to list the Amargosa toad (*Anaxyrus nelsoni*) as threatened or endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended. After review of all available scientific and commercial information, we find that listing the Amargosa toad is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to the Amargosa toad or its habitat at any time.

DATES: The finding announced in this document was made on July 20, 2010.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R8–ES–2009–0047. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 4701 N. Torrey Pines Dr., Las Vegas, NV. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Robert D. Williams, State Supervisor, Nevada Fish and Wildlife Office; by mail (see ADDRESSES); by telephone at 775–861–6300; or by facsimile at 775–861–6301*mailto:*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Endangered and Threatened Species that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Species. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12–month findings in the **Federal Register.**

Previous Federal Actions

On August 2, 1977, the Service included the Amargosa toad on a list of amphibians that we were reviewing to determine whether those species should be proposed for listing as endangered or threatened (42 FR 39121). Subsequently, we assigned the Amargosa toad as a category 1 candidate species under the Act in 1982 (47 FR 58454, December 30, 1982) and 1994 (59 FR 58982, November 15, 1994); and designated it as a category 2 candidate in 1985 (50 FR 37958, September 18, 1985); 1989 (54 FR 554, January 6, 1989); and 1991 (56 FR 58804, November 21, 1991). A category 1 species was a taxon for which the Service has substantial information on hand to support the biological appropriateness of proposing to list as endangered or threatened under the Act. A category 2 species was a taxon for which the Service has information indicating that proposing to list the species as endangered or threatened is possibly appropriate, but that information is not conclusive data on biological vulnerability or threats that would support a proposed listing.

On September 21, 1994, the Service received a petition from the Biodiversity Legal Foundation of Boulder, Colorado, requesting emergency listing of the Amargosa toad as endangered. At the time we received the petition, the Amargosa toad was a category 1 candidate species. On March 23, 1995, we announced our 90–day finding that the petitioned action may be warranted and initiated a status review of the species (60 FR 15280). On July 26, 1995, the Service recommended removal of the Amargosa toad from category 1 candidate status based on information we obtained during the status review. On February 28, 1996 (61 FR 7596), we removed the Amargosa toad from candidate status. On March 1, 1996, we announced our 12–month finding that listing the Amargosa toad as endangered or threatened was not warranted (61 FR 8018).

On February 27, 2008, we received a petition from the Center for Biological Diversity (CBD) and Public Employees for Environmental Responsibility (PEER), hereinafter referred to as "petitioners," requesting that the Amargosa toad be listed as endangered or threatened and that critical habitat be designated under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required in 50 CFR 424.14(a). In a letter to the petitioners dated May 1, 2008, we responded that we had reviewed the petition and found that an emergency listing was not warranted and we anticipated making an initial finding on the petition during Fiscal Year 2008. On March 11, 2009, we received a 60–day notice of intent to sue from CBD alleging violations of the Act because we did not publish our 12–month finding within 12 months of receiving the petition. On September 10, 2009, we published a 90–day finding stating the petition contained substantial information to indicate the petitioned action may be warranted, and we announced the initiation of a status review of the species (74 FR 46551).

On April 26, 2010, CBD amended its Complaint in *Center for Biological Diversity* v. *Salazar, U.S. Fish and Wildlife Service*, Case No.: 1:10–cv–230–PLF (D.D.C.), adding an allegation that the Service failed to issue its 12–month petition finding on the Amargosa toad within the mandatory statutory timeframe. This notice constitutes the 12–month finding on the February 27, 2008, petition to list the Amargosa toad as threatened or endangered with critical habitat.

Species Information

In addition to the information provided below, refer to the 90–day finding (74 FR 46551) for additional information on the Amargosa toad.

Taxonomy and Species Description

The Amargosa toad is a member of the family Bufonidae, which includes North American true toads. Stejneger (1893, cited in Lannoo 2005, p. 427) described the Amargosa toad as *Bufo boreas nelsoni*, a subspecies of the western toad (*Bufo boreas*). Savage (1959, pp. 251–254) was the first to refer to the Amargosa toad as *Bufo nelsoni* in accordance with the rules of the International Code of Zoological Nomenclature. Feder (1997, cited in Lannoo 2005, p. 428) diagnosed *Bufo nelsoni* by allozymic data and concluded that the Amargosa toad warrants species status. Mitochondrial DNA analyses by Goebel (1996, cited in Lannoo 2005, p. 429) are consistent with species status for the Amargosa toad. In 2002, *Bufo nelsoni* was listed as a full species in the Integrated Taxonomic Information System database compiled by the Smithsonian Institution, with the highest credibility rating by their Taxonomic Working Group (Lannoo 2005, p. 427). Frost *et al.* (2006) moved North American toads from *Bufo* to *Anaxyrus* (Tschudi 1845, cited in Frost *et al.* 2006, p. 363), which was accepted in 2008 by the Committee on Standard and Scientific Names (Committee; Crother 2008, pp. 2–4). The Committee, sanctioned by the Society for the Study of Amphibians and Reptiles, the American Society of Ichthyologists and Herpetologists, and The Herpetologists' League, is tasked to develop standard English names and publish a list of the current scientific names of North American herpetofauna. This is considered the official list for those societies.

Adult male Amargosa toads typically have a snout-vent length of 1.6 to 2.7 inches (in.) (42 to 68 millimeters (mm)); for females it is typically 1.8 to 3.5 in. (46 to 89 mm) (Nevada Department of Wildlife (NDOW) 2000, p. A–2). The dorsal body of the Amargosa toad has three paired rows of wart-like skin projections called tubercles. Their backs have black speckling or asymmetrical spots. Background coloration ranges from almost black to brownish or pale yellow-brown or olive, and may vary considerably among individual toads in the same population. A light mid-dorsal stripe occurs along the backbone. The large, wart-like parotid glands located behind the eye are tawny to olive. Underneath, the Amargosa toad is whitish or pale olive, with scattered black spots that merge above the legs to form the appearance of "pants."

Current and Historic Ranges

Amargosa toads are endemic to the Amargosa River drainage in southwestern Nevada (Goebel *et al.* 2009, p. 210). Available historic accounts (Maciolek 1983a, p. 11) do not provide any specific indication of wider distribution. Toads that occur in downstream reaches of the Amargosa River corridor (e.g., Ash Meadows area) anecdotally exhibit some taxonomic similarities; however, they have not been identified as Amargosa toads. The area occupied by the Amargosa toad is isolated, with no known or probable connections to members of the western toad complex (NDOW 2000, p. A–1). The nearest known record for a western toad is approximately 35 linear miles (mi) (56 kilometers (km)) away at Furnace Creek in Death Valley National Park, California, where an introduced population of western toad occurs. The historical and current range of the Amargosa toad occurs within Oasis Valley, along an approximately 10-mi (16–km) stretch of the Amargosa River and nearby spring systems, roughly between the towns of Springdale and Beatty. Oasis Valley occurs along U.S. Highway 95 between Bullfrog Hills and the Nevada Test Site.

In 2007, the Amargosa Toad Working Group (ATWG) prepared a map of all known and potential habitat for the species, including potential movement corridors, and posted the map on the Internet at: *http://www.fws.gov/nevada/nv_species/amargosa_toad.html*. The total amount of known and potential Amargosa toad habitat delineated by the ATWG is approximately 8,440 acres (ac) (3,416 hectares (ha)).

Life History and Ecology

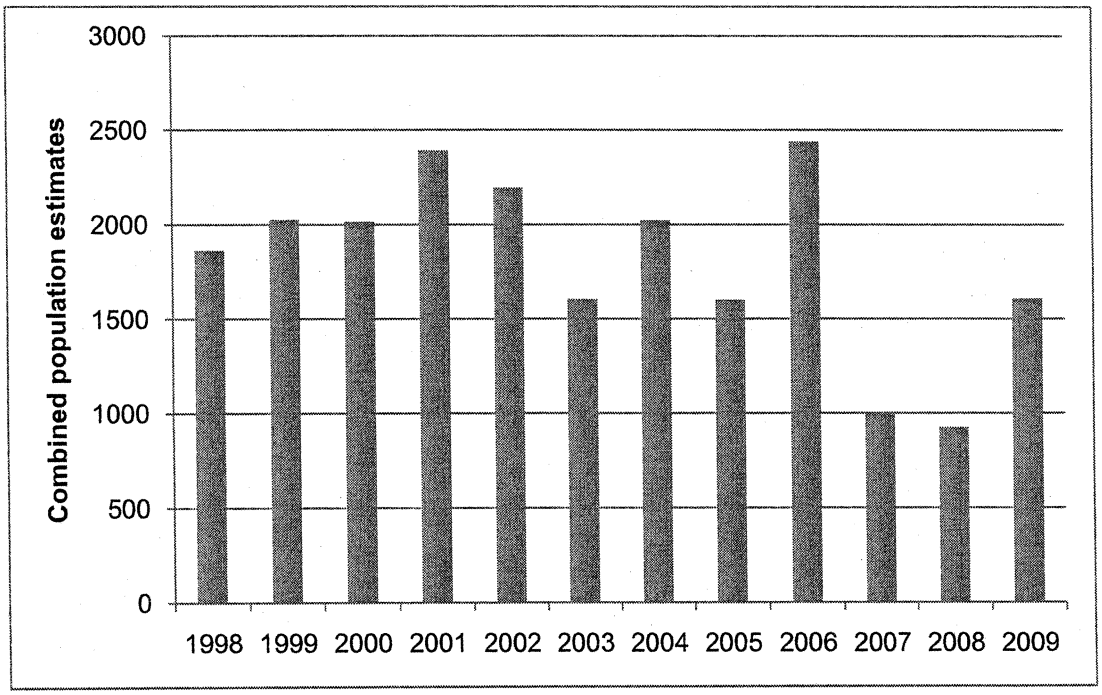
Amargosa toad habitat requirements for breeding and population recruitment include the presence of open, ponded, or flowing water, with riparian vegetative cover in an early-to-intermediate successional stage to form a partial canopy for shade with minimal emergent vegetation at the water's edges. Immature (metamorphs or toadlets) and adult Amargosa toads are dependent upon the areas described above, as well as areas they can use for shelter, including burrows, debris piles, spaces under logs or rocks, and areas of dense vegetation (NDOW 2000, p. A–2). Adult toads also require adjacent vegetated uplands for nocturnal foraging. Dense vegetation and advanced successional stages of riparian vegetation appear to limit habitat suitability and occupancy by all life stages, particularly where open water is not present (NDOW 2000, p. A–2). Toads can be abundant in irrigated and disturbed areas.

The breeding season for the Amargosa toad begins in mid-February and may extend into July, during which time adults congregate at breeding sites. A female toad may produce over 6,000 eggs in a single reproduction event (Altig 1987, p. 277; Heinrich 1995, p. 2). Amargosa toad tadpoles require relatively open water that persists long enough for the completion of metamorphosis and development into toadlets, which occur over approximately 30 days. Predation and early desiccation of wetlands needed for breeding may destroy an entire breeding effort. Although Amargosa toads typically live 4 to 5 years, individual toads are known to live up to 17 years based on data from NDOW's population monitoring program (Hobbs 2010, p. 1.).

Population Status and Trends

In 1998, NDOW initiated a long-term population monitoring program for the Amargosa toad using mark-recapture methods at 11 sites of the 18 known sites occupied by toads. The 11 sites are grouped into 4 spatial areas described below (see distribution map available at *http://www.fws.gov/nevada/nv_species/amargosa_toad.html*). The monitoring program was identified in the Amargosa Toad Conservation Agreement and Strategy (CAS) as an conservation action (NDOW 2000, p. A–11) and involves capture and marking (with implanted tags) of all juvenile to adult age-class Amargosa toads found that are 2 in. (50 mm) or greater in length. The NDOW maintains a database on Amargosa toad population monitoring data as prescribed in the CAS (NDOW 2000, pp. A–12 and 13). As of November 2009, a total of 6,739 Amargosa toads had been captured and tagged. In 2009, captures increased 77 percent over 2008, with a total of 768 toads captured and tagged, 519 of which were captured for the first time. The 2009 population estimate for monitored sites is 1,623, which is 13.6 percent less than the average of 1,826 for the period 1998 through 2008 (Hobbs 2009, p. 1). Unsuitable weather conditions during the 2007 and 2008 surveys may have resulted in lower than average toad activity (Figure 1; Hobbs 2009, p. 2). Habitat improvements and disturbance of aquatic systems at monitored sites have resulted in increases in toad captures and reproduction (Hobbs 2009, pp. 2–4; Saving Toads thru Off-Road Racing, Ranching, and Mining in Oasis Valley (STORM–OV) 2009b, p. 1).

Figure 1. Amargosa toad population estimates for all surveyed sites.



Simandle (2006, p. 42) determined that Amargosa toads meet the criteria and expectations of metapopulations. This means that occupied habitats, unoccupied but suitable habitats, and intervening habitat that may be occasionally used during infrequent migration events should all be considered as conservation priorities. Metapopulations can be expected to have local extirpations in some patches, resulting in the existence of empty but suitable habitat that subsequently may be recolonized in the future (Simandle 2006, p. 8). Events such as floods may simultaneously destroy existing occupied habitat, create new suitable habitat, and facilitate infrequent movement among different sites. Habitat conditions and the number of toads that occur at specific sites and metapopulations change from year to year, thus requiring site-specific management strategies.

Population Groups

The 11 monitored sites occupied by the Amargosa toad occur in three groups: Harlan-Keal, Amargosa River, and Spicer/Mullin/Torrance; and Angel's, a single site outside the three groups. The sites associated with each group are discussed below.

Harlan-Keal Group

The Harlan-Keal Group consists of four sites: 5 ac (2 ha) of private land (Harlan-Keal), including an irrigated garden area and 200-square foot (ft^2) (18.6-square meter (m^2)) pond; a spring and associated pond (Crystal Spring); and two seeps named Trespass and Wild Burro. Crystal Spring and the two seeps occur on lands administered by the BLM.

The Harlan-Keal pond was restored in 2003–2004, and has early successional habitat where toad reproduction occurs and may serve as a source population. The 2009 population estimate for the Harlan-Keal Group was 156, which was 22 percent below the 12–year average for this group of sites (Hobbs 2009, p. 2). Because of its elevation, ambient air temperatures at this site are always cooler than at other sites. This will likely affect the number of toads captured during surveys.

The Crystal Spring site consists of a spring, pond, and outflow on BLM land. In 1995, a wild burro exclosure was constructed around Crystal Spring to reduce trampling and overuse of the spring. This caused an increase in emergent vegetation that has reduced the extent of open water, which in turn resulted in few toads remaining at the site. Historically, this site was maintained by ranchers and other private efforts which removed sediment and excess vegetation that maintained open water in the pond. Planning is under way to rehabilitate this site in 2010 to benefit Amargosa toads (STORM–OV 2009a, pp. 1–3).

Trespass Seep is a low-flow spring site without any substantial ponded area that has never supported many toads. During surveys, the highest number of toads captured at Trespass Seep was 12 in 1998. In August 2009, improvements were made to Trespass Seep by a private landowner that resulted in a substantial increase in ponded surface water and toad habitat. Within a few weeks after improvements to the seep, Amargosa tadpoles were observed at the site (STORM–OV 2009b, p. 1).

Wild Burro seep consists of a low-flow spring, an excavation with groundwater exposed, and wet meadow. In 1998, 12 ac (4.9 ha) surrounding the seep was fenced by BLM to exclude wild burros that overused the site. Currently this site provides little habitat for the Amargosa toad, with only a few toads documented at this site each year. In November 2009, STORM–OV submitted a plan to the BLM to create and enhance toad habitat at this site (STORM–OV, 2009c, pp. 1–6). STORM–OV is a local nonprofit organization representing the off-road, ranching, and mining interests, dedicated to Amargosa toad conservation projects.

Amargosa River Group

The Amargosa River consists of three monitored segments characterized by riparian vegetation interspersed with flowing, open water. Amargosa toad population monitoring occurs along a 2-mi (3.2-km) section of the Amargosa

River that is mostly perennial, from just north of the Stagecoach Casino and Hotel to the Narrows, south of Beatty, Nevada (see distribution map available at *http://www.fws.gov/nevada/nv_species/amargosa_toad.html*). Land ownership is a mosaic of private, local, and Federal (BLM) lands. Most habitat for the Amargosa toad exists along this monitored section of the river, and most toads are found along the river corridor where perennial water occurs and bullfrogs (*Lithobates (=Rana) catesbeiana*) and crayfish (*Procambarus* sp.) are few or absent. In a typical year, tens or hundreds of thousands of Amargosa toad tadpoles are produced within the Amargosa River. The 2009 population estimate for this group was 14 percent lower than the 12–year average (Hobbs 2009, p. 3). This lower population estimate for the Amargosa River may be the result of low detectability of Amargosa toads due to dense vegetation, no substantial habitat improvements during the last few years, and predation from bullfrogs and crayfish.

Spicer/Mullin/Torrance Group

This group consists of three privately held properties which include the Spicer site (320 ac; 129 ha); Mullin site (80 ac; 32 ha); and Torrance Ranch (130 ac; 52 ha). The Torrance Ranch was purchased by The Nature Conservancy (TNC) in 1999 to protect the Amargosa toad and to provide a site for experimental habitat management to benefit the Amargosa toad. All three sites are contiguous or in close proximity to each other, which allows movement of Amargosa toads among all three sites. The 2009 population estimate for this group was 86 percent above the 12–year average for these sites. All three property owners are conservation partners with the Service and NDOW, and have accomplished or cooperated on numerous toad habitat improvement projects.

Angel's Site

This 296-ac (120-ha) site consists of a single location on private property. A spring-fed, cement lined pond that has an outflow to a wetland pasture provides breeding and oviposition habitat for the Amargosa toad. No habitat changes have been observed in at this site since monitoring efforts began in the mid-1990s. The pond was dry in 2007 and no evidence of reproduction was observed in 2008. The population estimate for this site declined 33 percent in 2009 compared to 2008, and 23 percent below the 12–year average for this site (Hobbs 2009, p. 5). Crayfish and bullfrogs occur at this site.

Other Sites

A 2.6 mi (4.2 km) stretch of the *Amargosa River north of the Stagecoach Hotel and Casino*, has intermittent and perennial flow in sections, mostly associated with spring outflow. Land ownership is a mosaic of private and BLM lands. Cursory surveys conducted in this area by NDOW biologists have detected Amargosa toads. Several private properties are known to have suitable Amargosa toad habitat. Surveys have not been conducted on these properties; however, anecdotal observations of toads have been reported (Maciolek 1983a, pp. 9–10; 1983b, pp. 4, A1–4). In 1993 and 1994, Heinrich (1995, p. 8) documented toads at eight sites, including the *Manley* property (spring and outflow), *Parker Ranch* (Ute Spring), and *LaFleur Spring* site (Roberts Field). No population size estimates or trends have been made for these other sites. Amargosa toads at these sites are not included in the rangewide population estimates.

LaFleur Spring is a historic site for Amargosa toads near the northern range limit of the species. Altig (1987, p. 277) found up to 74 toads at this site during 5 visits to the site in 1981. Altig further concluded that the toad population at the LaFleur site is small, with no recruitment observed in 1980 or 1981. No surveys have been conducted at this site since the 1980s. The Springdale site provides approximately 1 ac of (2.5 ha) toad habitat; toads were reported to be present in July and August 1983 by Maciolek (1983a, p. 8). Habitat improvements have occurred, including the removal of salt cedar. The Springdale site is not included in the population monitoring program for Amargosa toads.

Parker Ranch (24 ac; 212 ha) was purchased by TNC in December 2000, with assistance from the State of Nevada, the National Fish and Wildlife Foundation, and the U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS), to protect and restore unique biological resources, including Amargosa toad habitat. Parker Ranch is approximately 4 mi (6.4 km) north of Beatty and includes Ute Spring. Parker Ranch is currently being grazed by 74 cattle by a local rancher to reduce the amount of emergent wetland vegetation to increase open water areas (Moore 2010, p. 3). The spring source was fenced off and outflow stream channels were reconstructed in recent years to prevent damage to stream banks (Moore 2010, p. 3). The NRCS is monitoring the vegetation condition to determine when cattle should be moved to other properties in Oasis Valley. The newly constructed stream channel and toad pond system has been dry for almost 2 years due to insufficient water and overgrowth of emergent wetland vegetation near the spring. Amargosa toads continue to breed in the fenced-off spring and outflow channel on the 6-ac (2.5-ha) private inholding. No population estimates are available for this area.

The *Indian Springs Complex* consists of Upper, Middle, and Lower Indian Springs. Lower Indian Spring consists of two springs, Lower Indian and Cave Springs. Upper Indian Spring is the location of a municipal well that provides water to the town of Beatty. Middle Indian Spring is mostly dry, with several mature cottonwood trees. Little if any toad habitat currently occurs at either Upper or Middle Indian Springs. At Lower Indian Spring, an approximate 10-ac (4-ha) wild burro/livestock exclosure that surrounds two springs was constructed by the BLM in 1994, along with a water pipe and trough outside the exclosure to provide water to burros, livestock, and wildlife. Currently, this site is nearly dry, with no water exiting the exclosure. Toads have been captured at Lower Indian Spring as recently as 1996. No population estimates are available for this area. Attempts to restore toad habitat at this site in 1998 were unsuccessful, but new techniques have been developed, and the ATWG proposed habitat rehabilitation in 2010.

Other private lands have been or could be occupied by Amargosa toads. *Revert Spring* (303 ac; 123 ha) is privately owned by the owner of the Stagecoach Hotel and Casino. Revert Spring is an important water source for Amargosa toad habitat in the river. Although Maciolek (1983a, p. 10) documented Amargosa toads at Revert Spring in July and August 1983, the current status of toads at the Revert Spring site is unknown. *Coffer Ranch* (900 ac; 364 ha) occurs at the northernmost edge of the range of the Amargosa toad and is owned and managed by a cattle company. Maciolek (1983b, p. A–1) reported that Amargosa toads were present at the Coffer Ranch, and suitable Amargosa toad habitat was present. However, no population estimates are available for these or other privately owned lands where Amargosa toads may occur.

Amargosa Toad Working Group (ATWG) and Amargosa Toad Conservation Agreement and Strategy (CAS)

In 1996, the ATWG was organized to provide recommendations for

management and conservation of the Amargosa toad. The ATWG consists of representatives of the Service, NDOW, TNC, Nevada Department of Conservation and Natural Resources, Bureau of Land Management (BLM), Nye County, Beatty Town Board, Beatty Habitat Committee, The Amargosa Conservancy, private landowners in the Beatty community, the University of Nevada at Reno, and others. The ATWG meets semiannually to present and exchange information on the toad and its habitat, including the status of habitat conditions and ongoing habitat projects, potential threats to the toad, and population monitoring data, and to identify new conservation tasks.

In 2000, the ATWG completed the Amargosa Toad CAS (NDOW 2000, pp. 1–12), which provides management and conservation guidance for the Amargosa toad. The CAS informs management of the conservation needs of the toad, prioritizes tasks, and provides an implementation schedule. The ATWG is currently updating the CAS to include accomplishments and updated conservation needs for the toad.

The CAS was developed to expedite toad conservation over a period of 10 years by providing guidance and a framework for implementation of cooperative long-term conservation actions to benefit the toad and co-occurring species. Signatories to the CAS include NDOW, Nye County Department of Natural Resources, the Service, BLM, TNC, the Nevada Natural Heritage Program, and the University of Nevada at Reno. The signatories provide representatives to the ATWG. The signatories and ATWG are committed to implementing specific conservation actions (tasks) which identify, reduce, or eliminate threats to the species, and maintain and enhance a properly functioning ecosystem for the Amargosa toad and other indigenous species of Oasis Valley. The ATWG meets semiannually to plan Amargosa toad conservation actions. Most conservation actions in the CAS are implemented by local private land owners, and land and resource managers.

Many of the conservation actions implemented by the ATWG and its various partners are a direct result of the commitments made in the CAS for the Amargosa toad (NDOW 2000, pp. 1–12). The goals of the CAS are to manage threats, maintain habitats, monitor populations, and test and evaluate habitat manipulations. Completed conservation actions identified in the CAS have addressed threats identified in Factors A, B, C, and E (see below). We consider the CAS successful if considerable progress is made towards achieving these goals. CAS accomplishments that have contributed towards success include 12 years of population monitoring and maintaining population data in a database; salt cedar removal; habitat rehabilitation and enhancement; research; public education and outreach; and habitat acquisition as discussed in Factor A. Other CAS accomplishments include control of predators through habitat manipulation and work with the local community to achieve conservation such as an open space plan. The CAS signatories and the ATWG, in cooperation with local landowners, have planned and initiated multiple projects to protect, restore, and enhance toad habitat, and create new habitat. Overall success is measured by population monitoring data that show that rangewide, Amargosa toad populations are relatively stable and respond promptly and positively to habitat improvements. Previous habitat improvements on the Amargosa River, Harlan-Keal, Mullin, and Spicer sites have all resulted in substantial population increases of toads. In 2005, vegetation was removed by NDOT at the U.S. 95 Highway bridge over the Amargosa River in Beatty. This resulted in a positive response by toads as shown by a large reproductive event and a 2006 population estimate of 1,854 for the river which was the highest on record (ATWG 2005, p. 2; Wixson 2006, p. 3). Again in 2005, vegetation was cleared from the pond at the Harlan-Keal site with funding from the Service and NDOW which resulted in an estimated 90 percent increase in the population in 2006 over the 2005 estimate (Wixson 2006, p. 2).

The ATWG is in the process of updating the CAS and anticipates a revised CAS by the end of 2010. The revised CAS will acknowledge accomplishments and identify the conservation needs of the toad for the next 10 years. The revised CAS will operate in a similar manner as the existing one. The CAS has proven, based on its 10 year track record, to be an effective tool in furthering the long-term conservation of the species.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. In making this finding, information pertaining to the Amargosa toad in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

In making our 12–month finding on a petition to list the Amargosa toad, we considered and evaluated the best available scientific and commercial information. The analysis of potential threats to the Amargosa toad discussed below includes those identified in the petition and those that we considered to be substantial in our 90–day finding (74 FR 46551).

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Private Land Development

The petition identified several potential residential or commercial developments on private land that could adversely affect the Amargosa toad or its habitat. However, based on information provided by TNC during our review (Moore 2010, pp. 1–3), none of the proposed developments appear to be viable. Real estate and development markets in nearby Pahrump and Las Vegas influence markets in the Beatty area, and each of these three areas have experienced a downturn in both the general economy and the housing market. Plans for a shooting range across from Torrance Ranch have been abandoned and the property was recently sold to an individual who plans to build a home on the 40-ac (16-ha) site (Moore 2010, p. 3). A geothermal project at a hot spring on private lands identified by CBD as a threat (2009, p. 2) has been abandoned (Moore 2010, pp. 1–3). Although development may occur within the range of the Amargosa toad over the near term, it is difficult to predict the scope of that development based on the available information. Furthermore, humans and Amargosa toads have coexisted in the Beatty area since the early 1900s. Amargosa toads at the Harlan-Keal site and other sites where residential or commercial development and toads co-occur demonstrate that toad and human interface can be compatible. Toads occur in most disturbed and developed areas with surface water and may be locally abundant. During our review, we

found no indication that the economic growth of Beatty will change substantially in the foreseeable future. Due to the absence of potential developments identified in the petition and the ability of toads to coexist with humans in developed and disturbed areas, we conclude habitat loss as a result of development on private land is not a substantial threat to the Amargosa toad now or in the foreseeable future.

Groundwater Development and Extraction

The petitioners provided information that claimed existing and future water uses and developments are important threats that reduce surface water available for Amargosa toads in Oasis Valley and that result in habitat loss. The majority of water right allocations within the basin are spring diversions for irrigation and livestock watering. Priority dates for groundwater rights, including those of Beatty Water and Sanitation District (BWSD), range from the 1920s to 1996, with the majority dating to the late 1980s or earlier. The priority dates are the dates the application are submitted and determine the seniority of the water right relative to other water rights in the affected basin. Spring diversions are located primarily along or near the Amargosa River channel. Groundwater rights are limited to approximately one sixth of water right allocations in the valley (by volume), 85 percent of which are held by the BWSD as a source of supply for homes and businesses in the town of Beatty. The BWSD holds water rights for three wells in the town of Beatty and two wells several miles northwest of town (including one at Indian Springs), in addition to a groundwater right at the Barrick Mine in Amargosa Valley (Nevada Division of Water Resources, *http://water.nv.gov/*). Other groundwater rights in Oasis Valley (a total of 8) are for irrigation, recreation, livestock watering, and minor commercial and mining activities, most in the amount of 20 acre-feet per year (afy) or less.

Currently, TNC is negotiating purchase of the water rights (500 afy) at Revert Spring with the owner of the Stagecoach Hotel and Casino to establish long-term protection measures for the water flowing from the spring source into the Amargosa River. Acquisition of this important water source can reduce the threat of its use for commercial purposes and enable TNC to meet its commitment in the CAS to work with private landowners to pursue conservation actions such as acquisitions and easements (NDOW 2000, p. A–20). However, we recognize that this transaction has yet to be completed, and cannot be certain that these rights will be secured.

Groundwater level records for Oasis Valley, which are both recent and long enough to assess trends (e.g., over the last 10 years or more), are limited to monthly and bimonthly measurements collected by the U.S. Geological Survey (USGS) for the U.S. Department of Energy (USDOE) as part of the USDOE Environmental Restoration Program (USGS/U.S. DOE Cooperative Studies in Nevada, http://nevada.usgs.gov/doe_nv/). Specifically, groundwater level measurements are available for seven wells or nested wells along or near the Amargosa River channel in Oasis Valley and a number of additional wells to the north and east within the valley and up gradient basins for the period 1998 to late 2009. The wells range in depth from 200 ft (61 m) or less in consolidated sedimentary deposits to thousands of feet in the volcanic rock aquifer. Trends in groundwater levels along the Amargosa River channel from 1998 to 2009 are mixed, some increasing moderately, some decreasing moderately, and some relatively constant on an annual basis. Water levels in two of the seven monitoring wells located along or near the Amargosa River channel (well ER–OV–03 and the Beatty Wash Terrace Well) decreased 1.3 to 1.5 ft (0.4 to 0.5 m) from 2000 to late 2009. However, these declines occurred in no clear relation to permitted or certificated groundwater rights (pumping at permitted supply wells). Rather, they may be indicative of local evapotranspiration responses. Elsewhere along the river channel, groundwater levels were unchanged, or increased a few tenths of a foot from 2000 to late 2009 (ER–OV04a, Springdale Upper Well, ER–OV–02, ER–OV–05, and ER–OV–06a).

In areas to the north and east which supply groundwater to the vicinity of the Amargosa River channel and Amargosa toad habitat in Oasis Valley, specifically northeastern Oasis Valley and the area of Pahute Mesa (the latter located in the Gold Flat and Forty mile Canyon-Buckboard Mesa basins) (Laczniak *et al.* 1996, pp. 18–19; Reiner *et al.* 2002, pp. 8–9; Fenelon *et al.* 2010, pp. 22–23 and Plate 5), water levels in USDOE Environment Restoration Program wells increased a few tenths of a foot to approximately 1.5 ft over this same period.

No groundwater level data are available for the vicinity of the BWSD supply wells. As such, the effects of BWSD pumping on surface water resources cannot be evaluated at this time except as they may be judged from the results of biannual Amargosa toad surveys. This suggests that any reduction in population is limited to the area of Indian Springs. BWSD pumping at the Indian Springs well has decreased since the late 1990s, but Indian Springs remains one of three primary supply wells in Oasis Valley for the town of Beatty. With respect to the potential for additional groundwater pumping in Oasis Valley, actual groundwater withdrawals by the BWSD have been limited to approximately 10 to 15 percent of their existing rights over most of the last decade (Eng 2010, p. 1). Whereas substantially more groundwater could be pumped for municipal purposes under existing BWSD rights, their pumping within Oasis Valley has been fairly constant. Overall demand has decreased approximately 25 percent (coupled with a decrease in pumping at the Barrick Mine) over this same period of time based on pumping inventories provided by the Nevada State Engineer (NSE). Additionally, BWSD demand varies seasonally, with demand at a minimum from December through March, the latter of which coincides with the beginning of the Amargosa toad breeding season. Moreover, the NSE has ruled that the degree of hydraulic connection between groundwater and surface water in Oasis Valley is such that they constitute a single source (NSE Ruling 4669, 1998) and that no unappropriated water existed in the basin as of 1995 (NSE Ruling 4174, 1995), making additional allocations, groundwater or surface water, unlikely.

Excessive groundwater withdrawals have the potential to affect springs and rivers that depend on groundwater for recharge or base flows. Field reconnaissance and Nevada Division of Water Resources well drilling records identified approximately 15 springs and 20 nonmunicipal wells that supply water to individual homes and ranches in Oasis Valley (Reiner *et al.* 2002, p. 33). A reasonable estimate of groundwater withdrawal consumed from each of these sources is 1 afy (Reiner *et al.* 2002, p. 33). Based on this consumption rate and the number of supply sources, a reasonable estimate of the nonmunicipal use of groundwater from Oasis Valley is 35 afy. Estimates of the total annual groundwater withdrawal from Oasis Valley, computed by combining municipal and non-municipal estimates, declined from 440 afy in 1996, when Beatty's human population was 2,068, which was the highest during the period 1991–2007 (Stantec 2009, p. 22), to 210 afy in 1999, when Beatty's population declined to 1,703.

The population estimates for Beatty in 2007 indicate a resident base of approximately 1,068 persons (Stantec Consulting 2009, p. 22). This estimate reflects a declining population trend during the period 1991–2007. While the future population size of Beatty is unknown, we found no indication that the human population will increase beyond historic levels and we do not anticipate an increase in use of groundwater to support new residential development. We conclude that future human population effects on the Amargosa toad are driven by the economic status and growth of the Beatty. Since there is no indication that growth will increase, we conclude that demand for groundwater is not likely to rise.

The petitioners submitted comments that identified a proposed solar energy project in Amargosa Valley requiring 3,000 afy of groundwater for wet-cooling and operation (CBD 2009, pp. 1–2). This energy project remains proposed but has been modified to use dry-cooling that would reduce groundwater use to 400 afy. The 400 afy of groundwater proposed for the project is currently used for agriculture and, therefore this level of groundwater use is not anticipated to significantly affect existing groundwater levels in the up gradient areas where Amargosa toads occur (Peterson 2010, p. 1).

The petitioners also identified 11 Department of Energy (DOE) applications for water rights in Oasis Valley as a potential threat to the toad through groundwater withdrawal effects (CBD 2009, p. 2). The DOE applications were submitted for construction of a railroad to a proposed nuclear waste repository and were protested by the petitioners and others. The Service recommended that DOE transport water needed for this project from sources other than those associated with the Amargosa toad, Ash Meadows, and Devils Hole. In February 2010, DOE withdrew their applications for water rights in the Oasis Valley.

Based on the available information on volume, timing, and location of groundwater withdrawals, historic use of groundwater, and water-level measurements, we conclude that water use and development in Oasis Valley is not a substantial threat to the Amargosa toad at this time or in the foreseeable future. No declines in groundwater or toad numbers have been observed at monitored sites as a result of pumping. The current and foreseeable demand for groundwater in Oasis Valley remains consistent with historical uses.

Inadequate Habitat Enhancement Planning and Implementation

The petitioners state that BLM failed to initiate planning for habitat enhancement projects including Wild Burro Seep and Upper Cave Spring in the Lower Indian Spring system (CBD 2009, p. 20). In fall 2009, STORM–OV, in cooperation with BLM and the ATWG, modified Wild Burro Seep and greatly increased the extent of surface water and toad habitat at the site. STORM–OV and BLM developed plans to restore Lower Indian Springs and Crystal Spring in 2010 and 2011 (STORM–OV 2009a, pp. 1–3; Spicer 2009, pp. 1–5). Habitat enhancement is a conservation action in the CAS (NDOW 2000, p. A–11).

The Stagecoach Hotel and Casino owner is a conservation partner with TNC and the Service. In 2001, the Service's Partners for Fish and Wildlife Program funded habitat improvements in the vicinity of the Stagecoach to benefit the Amargosa toad. The owner and TNC continue to improve habitat along the river behind the property, which is part of a parcel identified as a fee-title donation to TNC for conservation purposes pursuant to prescribed conservation actions in the CAS. In addition, TNC and the Nevada Department of Transportation (NDOT) are working to remove debris from the riverbank, which should improve habitat for the Amargosa toad.

In 2007, 30 ac (12 ha) of nonnative trees were removed from the Mullin site and replaced with native willows and cottonwoods as prescribed in the CAS (NDOW 2000, p. A–11). During the 2009 survey, 137 Amargosa toads larger than 2 in (50 mm) were captured on the Mullin site. This was the highest number of captures for this site (Hobbs 2009, p. 4).

Three springs on the Spicer site have been enhanced for the Amargosa toad by the landowner. Surface water is distributed on the Spicer site through a system of pipes which provides most of the water for toad habitat. Manipulation of the distribution pipes provides a habitat management tool to allow ponds to be created, or dried to remove crayfish and bullfrogs as prescribed in the CAS (NDOW 2000, pp. A–11 and A–12). Amargosa toads responded positively to the habitat improvements in 2009, increasing by 300 percent of captured and marked toads since 2008 (Hobbs 2009, p. 4).

The Amargosa River Planning Team was formed in October 2009 as a result of a recommendation by the ATWG that was included in the CAS (NDOW 2000, p. A–14). The team consists of ATWG representatives including the Service, NDOW, Nye County, BLM, and TNC, but also local landowners. The purpose of the team is to monitor habitat conditions of the river, develop management recommendations, and coordinate habitat improvement with landowners and managers on behalf of the signatories of the CAS and the ATWG.

The overall habitat suitability of individual sites varies from year to year depending on conditions and may become unsuitable for toads. Because the Amargosa toad occurs as metapopulations, toads will move back into these sites from neighboring sites once the habitat becomes more suitable. In the absence of natural disturbance such as flood events and wildfires, toad habitat will likely require periodic manipulation or other forms of disturbance such as burro or cattle use to sustain toad populations. Based on the metapopulation structure of the toad, successful habitat projects and disturbance by burros and cattle, we anticipate that habitat planning and implementation have resulted in positive responses by toads. We expect the Amargosa River Planning Team, TNC, BLM, Service, and private landowners to continue their efforts to maintain and improve toad habitat into the foreseeable future in accordance with the CAS. We expect members of the ATWG and private landowners to continue their current efforts to maintain and improve toad habitat, as they have in the past, in accordance with the CAS into the future. As a result, we have determined that habitat planning and implementation is not a threat to the Amargosa toad now, nor is it expected to be so in the foreseeable future.

Vegetation Overgrowth

Overgrowth of vegetation in aquatic habitats is an ongoing management objective for the Amargosa toad as specified in the CAS (NDOW 2000, pp. A–11 and A–16). Habitat for Amargosa toads at several spring sites including Torrance Ranch, Lower Indian Spring, and Crystal Spring, has degraded as a result of overgrowth of emergent vegetation and loss of open water. Overgrowth of vegetation occurs mostly at small spring sites and in the absence of disturbance or management. Although Lower Indian Spring and Crystal Spring are small spring sites and represent only a small fraction of the species' individuals and distribution, the ATWG considers vegetation management a priority for these sites. Mechanical removal, controlled burns, and grazing are proven tools to manage vegetation in spring systems at Harlan-Keal (ATWG 2004, p. 3) and Torrance Ranch (ATWG 2007, attachment 1, p. 1).

Spring-supplied ponds typically require disturbance or periodic removal of vegetation to maintain suitable habitat conditions (e.g., open water) for the Amargosa toad. Local ranchers historically managed Crystal Spring and other springs to maintain open water (Spicer 2010, p. 1). Limited use by livestock or feral burros provides disturbance that benefits toads; however, excessive use by livestock or feral burros result in degradation of habitat. Current and future habitat projects at spring sites are designed to minimize vegetation growth, compensate for potential reductions in spring flow due to overgrowth of vegetation, and maintain proper habitat conditions for the toad. Currently, excess vegetation conditions occur at Crystal and Lower Indian Springs, but habitat modification proposed for 2010 and 2011 at these sites (STORM–OV 2009a, pp. 1–3; Spicer 2009, pp. 1–5) is anticipated to substantially improve habitat conditions for the toad. As stated previously, we expect the efforts to maintain and improve toad habitat which includes control of vegetation to continue in accordance with the CAS. Therefore vegetation overgrowth is not a significant threat to the Amargosa toad now, nor is it expected to be so into the foreseeable future.

Grazing and Trampling

The petitioners state that use of springs by feral burros and cattle may result in degraded habitat and reduced numbers of Amargosa toads (CBD and PEER 2008, pp. 17–18, 21 and 23–25). The current level of burro occurrence in Amargosa toad habitat varies by site and ranges from zero to moderate with most use along the Amargosa River. Cattle use of Amargosa toad habitat is limited to the northern sites where a cattle operation is located (Coffer Ranch) and sites targeted for vegetation reduction. While burros and livestock (ungulates) may trample Amargosa toad eggs and larvae, light to moderate disturbance is important to the Amargosa toad which is a disturbance-dependant species (ATWG 2005, p. 2). In the absence of disturbance, vegetation grows uncontrolled and reduces open areas necessary for the toads. Intensive and uncontrolled use of Amargosa toad habitat by ungulates may threaten the species by degrading habitat and killing individual toads; however, light to moderate use is known to be beneficial to the Amargosa toad. Complete removal of ungulates could lead to overgrowth of vegetation, and may pose a more serious threat to the Amargosa toad than moderate ungulate use. Fencing installed at the Crystal and Indian spring sites to exclude feral burros most likely has contributed to declines in toad populations at these sites by reducing habitat disturbance. BLM manages the burro population and conducts burro "gathers" when the burro numbers exceed the appropriate management level for the area in accordance with the CAS (NDOW 2000, p. A–16). Most feral burro use of monitored sites occurs along the river. We conclude that light to moderate ungulate use is not a substantial threat to the toad and likely provides some benefit to the Amargosa toad. Although the number of feral burros fluctuates, we do not anticipate the level of burro use in Amargosa toad habitat to increase so that it would affect toad populations in the foreseeable future.

Recreation and Off-Highway Vehicle (OHV) Activity

OHV activity affects Amargosa toads most during the breeding season and during the especially vulnerable egg and tadpole stages of development. OHV effects are only known to be a concern along the Amargosa River near the Stagecoach Hotel and Casino. TNC biologists have observed small isolated pools containing egg strands or tadpoles in various stages of development that were affected by OHVs in the riverbed within the Town of Beatty. The local nonprofit group, STORM–OV, is attempting to educate the OHV users about the need to avoid ponded water during the toad breeding season, a conservation action prescribed in the CAS (NDOW 2000, p. A–18). In addition, TNC plans to use its river properties behind the Stagecoach Hotel and Casino and northward in educational opportunities. These two groups propose to conduct town meetings to inform Beatty residents of the need to avoid damaging toad breeding pools during the defined breeding season. While localized OHV use may cause a relatively small number of eggs or tadpoles to be removed from the affected population, this level of loss is not substantial in the context of the potentially tens or hundreds of thousands of Amargosa toad eggs and tadpoles produced in a typical year.

No landowners or managers have identified, nor are we aware of any spring sites that are substantially affected by OHV activity. The petitioners identified an OHV race that passes near Crystal Spring as a potential threat to the toad. In 2008, BLM chose an alternate route away from toad habitat for OHV events near Crystal Spring and continues to consider the toad during OHV permitting actions. Due to the absence of substantial effects resulting from recreation or OHV use in toad habitat and the location of many of the spring sites on private land that have no OHV use, we do not expect effects from recreation and OHV use to increase or become a threat to the toad in the foreseeable future.

Invasive Plant Species

The petitioners assert that introduced invasive trees have become established along stretches of the Amargosa River and springs, which may reduce prey and microhabitat available for the Amargosa toad (CBD and PEER 2008, pp. 24 and 26).

Salt cedar is an exotic, invasive species that grows in shrub form to medium tree size and is native to Eurasia. Removal of salt cedar is identified as a conservation action in the CAS (NDOW 2000, p. A–11). Native aquatic and wetland herpetofauna may be negatively impacted in areas where salt cedar draws down surface water (Shafroth *et al.* 2005, pp. 237–238). Water-use studies indicate that increases in water yield following salt cedar control are likely to occur only when a salt cedar stand containing high leaf area is replaced by vegetation with a lower leaf area (Shafroth *et al.* 2005, pp. 237–238). The native vegetation in Oasis Valley requires more water than is provided by local rainfall. As a result of high evapotranspiration rates during the summer, these plants must rely on local groundwater for sustenance (Reiner *et al.* 2002, p. 42). Anderson *et al.* (2004, cited in Shafroth *et al.* 2005, pp. 237–238) present data from the lower Colorado River suggesting that abundances of several of the most common insect families in riparian areas occur in comparable or greater abundance on salt cedar than on most native vegetation. Efforts to remove salt cedar and other nonnative, invasive plants from the Amargosa River watershed have occurred since 2003. Replacing salt cedar with native vegetation may result in lower evapotranspiration rates. Eleven grants provided $118,500 for salt cedar removal from 11 private properties and BLM, NDOT, and BWSD-managed land. Salt cedar has been removed from approximately 1,895 ac (767 ha) of Amargosa toad habitat, and salt cedar removal efforts will likely continue. Amargosa toad population monitoring data may be used to assess and measure the effect of salt cedar removal on the toad. We do not believe salt cedar is a significant threat to the Amargosa toad now or in the foreseeable future because salt cedar has been removed from toad habitat and those efforts continue in accordance with the CAS.

Failure of the CAS to Protect Toads and Habitat

The petitioners claim that the CAS failed to protect Amargosa toads and increase toad populations. The CAS is a voluntary, non-regulatory agreement. The CAS was developed to expedite Amargosa toad conservation over a period of 10 years by providing guidance and a framework for implementation of cooperative long-term conservation actions to benefit the toad and co-occurring species. Signatories to the CAS include NDOW, Nye County Department of Natural Resources, the Service, BLM, TNC, the Nevada Natural Heritage Program, and the University of Nevada at Reno. The signatories provide representatives to the ATWG. The signatories and ATWG are committed to implementing specific conservation actions (tasks) which identify, reduce, or eliminate threats to the species, and maintain and enhance a properly functioning ecosystem for the Amargosa toad and other indigenous species of Oasis Valley. The ATWG meets semi-annually to assess the conservation needs of the toad and plan Amargosa toad conservation actions. Most conservation actions in the CAS are implemented by local private land owners, and land and resource managers.

Many of the conservation actions implemented by the ATWG and its various partners are a direct result of the commitments made in the CAS for the Amargosa toad (NDOW 2000, pp. 1–12). The goals of the CAS are to manage threats, maintain habitats, monitor populations, and test and evaluate habitat manipulations. Completed conservation actions in the CAS have addressed threats identified in Factors A, C, and E. We consider the CAS successful as considerable progress has been made towards achieving these goals. The CAS accomplishments that have contributed towards success include 12 years of population monitoring and maintaining population data in a database; burro management through monitoring and gathers; salt cedar removal; habitat rehabilitation and enhancement; research; public education and outreach; and habitat acquisition as discussed above in this factor. Other CAS accomplishments include control of predators through habitat manipulation and work with the local community to achieve conservation such as an open space plan. The CAS signatories and the ATWG in cooperation with local landowners have planned and initiated multiple projects to protect, restore, and enhance toad habitat, and create new habitat. Overall success is measured by population monitoring data that show that rangewide, Amargosa toad populations are relatively stable and respond promptly and positively to habitat improvements. Previous habitat improvements on the Amargosa River, Harlan-Keal, Mullin, and Spicer sites have all resulted in substantial population increases of toads. In 2005, vegetation was removed by NDOT at the U.S. 95 Highway bridge over the Amargosa River in Beatty. This resulted in a positive response by Amargosa toads as shown by a large reproductive event and a 2006 population estimate of 1,854 for the river which was the highest on record (ATWG 2005, p. 2; Wixson 2006, p. 3). In 2005, vegetation was cleared from the pond at the Harlan-Keal site with funding from the Service and NDOW which resulted in an estimated 90 percent increase in the population in 2006 over the 2005 estimate (Wixson 2006, p. 2).

The ATWG is in the process of updating the CAS and the group anticipates a revised CAS by the end of 2010. The revised CAS will acknowledge accomplishments and identify the conservation needs of the Amargosa toad for the next 10 years. The existing CAS and revision will function similarly. Although the CAS is a voluntary, non-regulatory agreement, we conclude that the CAS efforts have been very successful in establishing a coalition of partners, including State and Federal agencies, local government, private landowners, and conservation organizations committed to reduce or eliminate the threats to the species and assure long-term conservation for the Amargosa toad. In the absence of the CAS, conservation progress would proceed at a reduced rate but would not result in the species becoming threatened. Therefore, based on implementation of various conservation actions resulting from the CAS as discussed in the factor above, we find that the existence and implementation of the CAS do not pose a threat to the species.

Summary of Factor A

Development on private lands and use of groundwater are not significant threats to the Amargosa toad. Most previously proposed developments have been abandoned. With potential development stalled, growth activity within Beatty is not expected to change substantially in the foreseeable future. Groundwater use in the Beatty area has decreased or remained constant, and groundwater levels have fluctuated but these fluctuations do not appear to affect Amargosa toad numbers or distribution. Habitat has been improved at several sites and improvements at other sites are planned for 2010 and 2011. Although some sites are affected by overgrowth of vegetation, past and ongoing conservation and management actions have improved toad habitat and contributed to stable Amargosa toad populations, as reflected in the 11 years of population monitoring. In one particular instance, a habitat manipulation project was developed and implemented, and was very successful in transforming a small seep into a new breeding site for toads (STORM–OV 2009a, p. 1). Amargosa toad population estimates are an indication of habitat quality at a given site, and in those areas where habitat improvements have been conducted, Amargosa toad populations have increased substantially. Grazing by cattle and feral burros may be locally excessive, but moderate use provides needed disturbance to the aquatic systems that improves Amargosa toad habitat. Some local areas are impacted by OHV use but not to the extent that population declines can be identified. There has been no apparent reduction in the current range of the Amargosa toad compared to the historical range. As a result of conservation efforts accomplished by TNC through habitat acquisition and improvements, and by various groups through other habitat improvement projects at Mullins, Harlan-Keal, Spicer, and Torrance, along the River, and at Parker Ranch and Trespass Seep, there has been an increase in habitat quality or quantity for the Amargosa toad at these sites. Additionally, private landowners have recently become and remain involved in conservation efforts. Salt cedar has been substantially removed from private and BLM land. Completed actions prescribed in the CAS to conserve the Amargosa toad have been shown to be successful in meeting the objectives in the CAS and reducing or eliminating the threats to the Amargosa toad under Factor A. We conclude that the present or threatened destruction, modification, or curtailment of the habitat or range of the Amargosa toad is not a significant threat to this species now or in the foreseeable future, due to the limited growth projected for Beatty, current and anticipated groundwater use and levels; completed and proposed habitat improvements including removal of salt cedar; continuing management of the Amargosa River and adjacent habitat under the direction of the Amargosa River Planning Team, a subcommittee of the ATWG; and continued implementation of conservation

measures in accordance with the revised CAS.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petitioners provided no information regarding threats under this factor, nor do we have information on the potential threat of overcollection or overutilization for commercial, recreational, scientific, or educational purposes. There is no information to indicate this factor will become a threat to the species in the foreseeable future. We find overutilization for commercial, recreational, scientific, or educational purposes does not threaten the Amargosa toad. Based on a review of the best available scientific and commercial data, we find no indication that overutilization for commercial, recreational, scientific, or educational purposes is a threat to the Amargosa toad now or in the foreseeable future.

Factor C. Disease or Predation

Disease

Chytridiomycosis is an infectious disease of amphibians caused by the chytrid fungus *Batrachochytrium dendrobatidis*. Although the fungus has been detected in bullfrogs in the Oasis Valley, it has not been detected in Amargosa toad populations. Chytrid fungus has been identified in western toad (*Anaxyrus boreas*) populations in Colorado where western toad occurrence is restricted to high elevations (7,200 to 11,150 ft [2,200 to 3,400 m]; Muth *et al.* 2003, p. 358). The Service and NDOW have no evidence that chytrid or other diseases are affecting or will affect the Amargosa toad population. No sign of chytrid fungus or other disease has been observed in the hundreds of Amargosa toads captured and inspected rangewide every year since 1995. Further, no ill or dying toads have been reported by landowners or agency biologists. Population monitoring data do not indicate a decline in Amargosa toad numbers. Therefore, we find disease is not a threat to the Amargosa toad now or in the foreseeable future.

Predation

Predation of all life stages of the Amargosa toad by nonnative crayfish and bullfrogs is a threat to the Amargosa toad at the metapopulation level. However, metapopulations of a species allow for the coexistence of predators and prey, or coexistence of competitors. While local extinctions may occur, the species may persist regionally if the metapopulation structure ensures that predator and prey are not present in all occupied patches all of the time (Simandle 2006, p. 9).

Currently, the most promising management tool for nonnative predators involves manipulating and enhancing habitat for Amargosa toads while making habitat less suitable for bullfrogs and crayfish, as prescribed in the CAS (NDOW 2000, p. A–12). This is accomplished by drawing down ponded areas that contain nonnative predators and allowing them to be dry for a period of time long enough to kill the nonnative predators and cause toads to move to nearby sites. Recently completed and proposed habitat projects have incorporated the capability of adding or removing water to allow sites to dry to remove or reduce numbers of bullfrogs and crayfish, and are designed to provide an advantage to Amargosa toads including substrate selection and water depth. One of the goals of the CAS is to manage threats to the Amargosa toad. We consider the CAS successful as considerable progress has been made towards achieving this goal and addressing threats to the Amargosa toad under Factor C.

The life history of the toads further reduces the threat of nonnative predators. Under average conditions, toads produce tens or hundreds of thousands of eggs, larvae, and toadlets each year, most of which will not survive to adults with or without predatory pressure.

Although bullfrogs are known to occur at 10 of 18 sites occupied by Amargosa toads, the monitoring data do not indicate a declining toad population trend. We have documented Amargosa toads in the stomach contents of bullfrogs (ATWG 2003, p. 2). While there is no coordinated control effort, bullfrogs are removed from the Amargosa River and other sites occupied by Amargosa toads during population surveys. All toad habitat improvement projects consider the needs of the toad and select against bullfrogs. Bullfrogs generally require deeper, impounded perennial waters, which are more limited than shallow stream and spring outflow habitat in Oasis Valley. Observation and removal of bullfrogs from stream and spring outflows can be very effective in controlling bullfrog numbers.

Since their introduction in the mid-1980s, nonnative crayfish have become established along most of the Amargosa River and at seven spring sites occupied by the Amargosa toad. We have no Amargosa toad population data prior to the introduction of crayfish, bullfrogs, or other nonnative Amargosa toad predators into Oasis Valley; therefore, we cannot assess the potential impact of predators on the Amargosa toad population. However, we do have Amargosa toad survey data collected since 1998 for sites occupied and unoccupied by bullfrogs and crayfish. Population numbers at sites with predators and without predators have fluctuated in a similar manner, which indicates there is no population level of effect that can be attributed to predation. This is consistent with the way in which a metapopulation structure of interconnected populations functions; thus, in certain areas Amargosa toads may become extirpated, but repopulate those areas at a later time. The capability of toads to move among these sites in response to threats and habitat condition allows toads to coexist with nonnative predators. For instance, the population estimate for the Spicer property in 2009 increased from 53 to 167, even though it is a site where crayfish and bullfrogs are abundant. The increase in Amargosa toad numbers in 2009 at the Spicer site is most likely a result of habitat improvements, which demonstrates the success of habitat condition. We are unaware of any extirpations that can be attributed to crayfish or bullfrogs, but Amargosa toads have been extirpated or nearly extirpated from Lower Indian Spring and Crystal Spring as a result of poor habitat conditions mostly due to overgrowth of vegetation.

In 2009, NDOW, TNC World Wide Office, and Arizona Game and Fish Department provided funding to TNC to develop crayfish removal strategies which included habitat characterization, crayfish distribution, and control techniques in a five-state effort (AZ, NM, CA, UT, and NV). These studies are currently under contract; the first phase is to be completed by June 30, 2010.

We expect the current level of predation by crayfish and bullfrogs to continue into the foreseeable future, but do not consider this level of predation a significant threat due to the life history characteristics of the Amargosa toad and their ability to coexist with nonnative predators and move among metapopulations. This determination is based on the Amargosa toad metapopulation structure; habitat projects that select for toads; the life history of the toad; and 12 years of toad population monitoring data that shows toads can coexist with nonnative predators.

Predation by Fish Species

The majority of habitats in Oasis Valley supporting Amargosa toad populations are not structurally capable of supporting the large-bodied predatory

fish that would be capable of significant predation on Amargosa toads (NDOW 2009, p. 4). Largemouth bass (*Micropterus salmoides*) are known to occur in at least one pond on private property in Oasis Valley, but Amargosa toads are not a primary component of their diet. Black bullhead catfish (*Ictalurus melas*) and Amargosa toads have co-occurred at one pond on private land at the Harlan-Keal site for at least 10 years; however, the pond dried during the summer 2009, and catfish are not expected to persist at this site. Therefore, we do not consider largemouth bass or catfish to be a significant threat to the Amargosa toad now or in the foreseeable future.

Mosquito fish (*Gambusia affinis*) have been introduced into waters of Oasis Valley and occur at most sites occupied by toads. Mosquito fish have been observed to prey on eggs of the arroyo toad (*Anaxyrus* (=*Bufo) californicus*; Lannoo 2005, p. 399) and may also prey on Amargosa toad eggs. During our review of the status of the Amargosa toad, no information was available that suggests mosquito fish are important predators of toad eggs. No observations of mosquito fish preying on toad eggs have been reported during the 12 years of population monitoring. NDOW is actively working with a variety of partners, including Nye County, to limit the use and distribution of mosquito fish in the Oasis Valley and to develop alternative vector control strategies that do not use mosquito fish as the control agent. We have no information to indicate that the presence of, or predation by, mosquito fish is a significant threat to the Amargosa toad or that such predation will become a threat in the foreseeable future.

Summary of Factor C

Based on a review of the best available scientific and commercial data, we find no indication of a potential threat of disease. We have no reason to conclude disease is currently or will become a threat to the species in the foreseeable future, due to an absence of sign of disease in Amargosa toads. Predation by bullfrogs, crayfish, and mosquito fish continues to affect Amargosa toad populations but not to an extent that threatens the species. Largemouth bass do generally occur in waters occupied by toads and do not substantially affect the toad. Based on the best scientific information available, there is no indication that predation is resulting in negative population wide effects. Completed actions prescribed in the CAS to conserve the Amargosa toad have been shown to be successful in meeting the objectives in the CAS and reducing or eliminating the threats to the Amargosa toad under Factor C. Therefore, after a review of the best scientific and commercial information, we conclude disease and predation are not significant threats to the Amargosa toad and are not likely to become significant threats in the foreseeable future. This determination is based on the absence of signs of disease; Amargosa toad metapopulation structure; habitat projects that select for toads; the life history of the toad; and 12 years of toad population monitoring data that shows toads can coexist with nonnative predators.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The petitioners claim the existing regulatory mechanisms, including Nevada State law protections, have been ineffective in preventing the decline of and mitigating the principal threats to the species. The petitioners claim that the State of Nevada fails to provide adequate protection for the Amargosa toad through existing statutes, particularly regarding permit exemptions for residential groundwater use up to 1,800 gallons per day (CBD and PEER 2008, pp. 20 and 28). Generally, domestic wells that draw less than 1,800 gallons per day do not require a permit (NRS 534.180). However, the NSE may require the registration of domestic wells in certain groundwater basins that it designates and may limit the amount of groundwater extracted from a permitted well to an amount below the full permitted amount under certain conditions. No declines in groundwater levels or toad numbers have been observed at monitored sites as a result of groundwater pumping. In our review in Factor A, we concluded that Amargosa toad populations have not been affected and are not likely to become affected by groundwater extraction. Groundwater use is currently consistent with historic use and will not likely increase due to lack of growth in the area.

The Amargosa toad was classified as a protected amphibian by the State of Nevada through an action of the Nevada Board of Wildlife Commissioners in 1998, under authority of NAC 503.075, and NAC 503.090 provides that no open season shall be designated for species of resident wildlife classified as protected which includes collection or possession. Through NDOW, the State plays an important role in ensuring conservation actions are achieved for this species under these and other authorities.

The Amargosa toad is designated by the BLM Nevada State Director as a BLM sensitive species. This requires BLM to ensure that actions they authorize, fund, or carry out do not contribute to the need to list the species as threatened or endangered (BLM Manual section 6840.06 C). The BLM's Tonopah Resource Management Plan and Record of Decision (RMP) determined that habitat for BLM sensitive species be managed to maintain or increase current populations of these species (BLM 1997, p. 9).

The petitioners identified privately owned Amargosa toad habitat and the lack of a final master plan for the Oasis Valley as potential threats to the toad. Considering the limited extent and use of private lands in Oasis Valley, a master plan would likely be unnecessary to guide development. However, on November 3, 2009, the Nye County Board of County Commissioners approved the Beatty Open Space Plan (Stantec Consulting 2009, pp. 1–45 plus appendices). This final plan provides the framework by which the County may pursue more specific actions to preserve BLM land for the benefit of the Town of Beatty and private land for the preservation of Amargosa toad habitat and a walking trail along the Amargosa River. Open space in the plan is defined as land that is not intensively developed for residential, commercial, industrial, or institutional use. The plan identifies 26,778 ac (10,837 ha) of land administered by the BLM as open space, which includes most of the range of the Amargosa toad (Stantec Consulting 2009, Appendix A). The broad goals for the Beatty Open Space Plan as defined by the stakeholders include: Install signage and implement a community-wide education program on the importance of staying out of the riverbed, particularly with ATVs, to protect the toad habitat; protect sensitive habitats; and identify appropriate activities in Amargosa toad habitat (Stantec Consulting 2009, p. 24). As a signatory to the CAS, Nye County committed to coordinate conservation with the local community such as development of the open space plan (NDOW 2000, p. A–15). We conclude that the completion of a final open space plan is an important conservation achievement that demonstrates the cooperative relationship and strong partnership among all levels of government, Beatty landowners, and the Beatty community. Adoption of an open space plan and BLM's protection of Amargosa toad habitat through implementation of the Tonopah RMP provide some mechanisms that reduce the potential threats to the species.

Summary of Factor D

We have reviewed the best available scientific and commercial information, and conclude that the Amargosa toad is not threatened by the existence of inadequate regulatory mechanisms. There are no significant threats to the species, and Amargosa toad populations are stable based on annual population estimates.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

In our 90–day finding, we concluded that natural or manmade factors, particularly small populations, small range size, and environmental changes due to climate change, could exacerbate threats identified under Factor A. In this 12–month finding, we determined that no significant threats were found under Factor A.

Small Range and Population Size

The range of the Amargosa toad is approximately 8,440 ac (3,416 ha) and the rangewide total number of adult toads is estimated at 2,500 to 4,000 toads. No reductions in the range of the Amargosa toad have been documented. Although no historic estimates of population size are known (NDOW 2009, p. 1), there is also no indication that historical population levels were significantly higher than current levels. Population data collected over the past 12 years show 5 years of population increases, 6 years of declines, and data for 2000 was essentially the same as 1999; no declines occurred over any consecutive 3–year period (Hobbs 2009, p. 2). Amargosa toad data collected by NDOW as prescribed in the CAS (NDOW 2000, p. A–13), and as part of the mark-recapture program document individual toad movements among metapopulations and across dry desert uplands to remote Trespass Seep and from the Harlan-Keal site to the river south of Beatty (approximately 8 mi (13 km)). Amargosa toad metapopulations are mostly limited by habitat conditions. Amargosa toads disperse among sites when habitat conditions are suitable, and Amargosa toad numbers at any given site can range from historic lows to record highs in one year (Hobbs 2009, pp. 1–6). Small population and small range sizes are not necessarily threats to a species. With the ability to move across large expanses of unsuitable habitat, and recolonize suitable habitat patches, the Amargosa toad exhibits a classic and strong metapopulation structure. This allows the Amargosa toad to take advantage of newly available resources, or quickly rebound after localized population extirpations. Therefore, we conclude that the small range and population size of the species is not a significant threat to the species, nor do we expect the range or population size to decrease in the foreseeable future due for the reasons stated above.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) has high confidence in predictions that extreme weather events, warmer temperatures, and regional drought are very likely to increase in the northern hemisphere as a result of climate change (IPCC 2007, pp. 15–16). Climate models show the southwestern United States has transitioned into a more arid climate of drought that is predicted to continue into the next century (Seager *et al.* 2007, p. 1181). In the past 60 years, the frequency of storms with extreme precipitation has increased in Nevada by 29 percent (Madsen and Figdor 2007, p. 37). Changes in local southern Nevada climatic patterns cannot be definitively tied to global climate change; however, they appear to be consistent with IPCC-predicted patterns of extreme precipitation, warmer than average temperatures, and drought. Information on specific effects from climate change to the Amargosa toad and to individual habitats and aquatic systems is not available, and effects are difficult to predict and likely to vary from site to site over time. However, as detailed under Factor A, previous habitat improvements on the Amargosa River, Harlan-Keal, Mullin, and Spicer sites have all resulted in substantial positive responses by Amargosa toads. To meet objectives under the CAS, Amargosa toad conservation partners have implemented design strategies and are continuing to develop and implement appropriate strategies that build resiliency into habitat projects. We conclude that continuing to maintain and actively manage the matrix of habitats that support the population of the Amargosa toad reduces the potential threat of climate change to the toad to the extent that Amargosa toads will continue to occupy most sites currently occupied by the species which will continue into the foreseeable future. In the absence of active management, several spring sites may become degraded; however, the river and larger spring sites are expected to maintain their function to provide the ecological needs for the species.

Stochastic Events

The petitioners claim stochastic events such as drought, floods, and fires are threats to the Amargosa toad because of the limited distribution of the toad. Major flood events have occurred in the Amargosa River; however, Amargosa toads continue to occur in the river and may benefit from the disturbance created by such events. Although floods may result in short-term adverse effects to the Amargosa toad, the disturbance created by flooding events may scour dense emergent vegetation and create and increase open water pools that are preferred by the species.

Some studies suggest that amphibian responses to fire and associated habitat alteration are species-specific, incompletely understood, and variable among habitats and regions (Pilliod *et al.* 2003, p. 165). We found no information that any wildfire occurred in Amargosa toad habitat in recent history. However, controlled burns on TNC properties have resulted in positive responses by toads by reducing emergent aquatic vegetation and providing open water (ATWG 2009, p. 3) that is beneficial to the species.

The metapopulation structure of the Amargosa toad allows local extirpations and recolonization following stochastic events. Such fluctuation in Amargosa toad numbers has been observed after prescribed burns and habitat improvement projects that resulted in disturbance to Amargosa toad habitat. Drought effects on the Amargosa toad may include a reduction of surface water, prey, and wetland habitat; however, we found no evidence of long-term effects to the Amargosa toad as a result of drought. We expect stochastic events to occur periodically in the future; however toads may benefit from the disturbance. If the number of toads at a given site is reduced or toads become extirpated from a site, we expect recolonization to occur from other metapopulations. Therefore, we do not expect stochastic events to be a threat to the toad in the foreseeable future.

Contaminants

Radiation poisoning through groundwater contamination from atomic testing on the Nevada Test Site (NTS) was cited as a threat by the petitioners (CBD and PEER 2008, p. 21). The movement of radiation in groundwater in Oasis Valley is currently being studied. Geologic faults allow alluvial groundwater connection between the Amargosa River and the Pahute Mesa aquifer, which includes areas used for atomic testing (Reiner *et al.* 2002, p. 61). There have been no reports of abnormal toads, reduced reproduction, or death of multiple toads at any given site that would suggest radiation or contaminant

effects. In 2006, DOE contracted sampling of nine wells and three springs in Oasis Valley wells for radioactivity (tritium) in groundwater (DOE 2006, pp. 4.1–4.30). The investigators concluded that no groundwater (wells or springs) sampled downgradient of the NTS, including Oasis Valley where Amargosa toads occur, had been impacted by NTS nuclear test operations as of 2006. In all cases, measured tritium levels in wells and springs sampled in Oasis Valley were below or just above the laboratory detection limit, and three orders of magnitude less than the U.S. Environmental Protection Agency established maximum contaminant level for drinking water. Because the Town of Beatty uses groundwater from the Oasis Valley, monitoring for potential contaminants in groundwater will continue for human health. Based on the available information, there is no indication that radioactive groundwater is a concern for the Amargosa toad, or that radioactive groundwater from the Pahute Mesa aquifer will become a threat to the toad in the foreseeable future.

The petitioners also assert that pollution of unknown levels on private land is a threat to the Amargosa toad (CBD and PEER 2008, p. 25). During monitoring of toad populations from 1998 to 2009 as prescribed in the CAS, no environmental evidence was observed to suggest that contaminants from private lands are affecting Amargosa toads. Although Amargosa toads have not been examined to assess contaminant levels, no Amargosa toad developmental anomalies or die-offs have been reported. Due to the high level of monitoring and close proximity to residents who consistently communicate with the Service on the Amargosa toad, we believe any detrimental environmental effects would be observed and reported. Therefore, we conclude that contaminants are not a threat to the toad. We do not anticipate that contaminants will become a threat to the toad in the foreseeable future due to our expectation that the metapopulation structure will persist and monitoring will continue which would detect any effects of contaminants at the level of the individual or population.

The petitioners claim that the CAS failed to protect Amargosa toads and increase toad populations. The CAS is a voluntary and non-regulatory agreement. As discussed above, the CAS has proven to be an effective tool in furthering the long term conservation of the species, as well as reducing or eliminating the threats to the species. Please see our discussion for specific information regarding the CAS in the background section of this finding. Based on implementation of various conservation actions resulting from the CAS as discussed in the factors above, we find that the existence and implementation of the CAS do not pose a threat to the species.

Summary of Factor E

We have reviewed the best available scientific and commercial information and find that small range and population size, climate change, stochastic events, or contaminants are not significant threats to the species. While we have no Amargosa toad population estimates prior to the mid-1990s, the best available information indicates that the historic range of the toad approximates its current range. Based on 12 years of population monitoring data, toad populations estimates are stable. The range and population numbers will not decrease in the foreseeable future in consideration of the habitat improvements identified in Factor A and overall absence of significant threats to the species. While climate change effects are mostly uncertain, we conclude that sufficient resiliency has been provided to the toad through project that established of a matrix of habitats and metapopulations. Stochastic events will continue but will benefit the toads by providing disturbance or result in recolonization from adjacent populations. Monitoring and oversight by the signatories of the CAS, ATWG, and local landowners will continue and detect any impacts to the toad that may result from contaminants. Therefore, we conclude that other natural or manmade factors are not affecting the continued existence of the Amargosa toad, now or in the foreseeable future.

Finding

As required by the Act, we considered the five factors in assessing whether the Amargosa toad is threatened or endangered throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Amargosa toad. We reviewed the petition, information available in our files and other available published and unpublished information, and we consulted with recognized Amargosa toad experts and other Federal, State, local agencies, and nongovernment organizations. In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of threatened or endangered under the Act.

We analyzed the potential threats to the Amargosa toad including: Private land development resulting in habitat loss and water use; groundwater development/extraction; habitat degradation including overgrowth of vegetation; grazing and trampling by livestock; recreation and OHV activity; invasive plants species; disease; predation by nonnative bullfrogs, crayfish, and fishes; lack of regulatory control of residential groundwater withdrawal; inadequate protection on privately owned land including lack of a final master plan for the Oasis Valley; small range and population size; climate change; stochastic events; and contaminants.

We found that habitat loss as a result of development on private land is not a substantial threat to the Amargosa toad, and we do not believe that the toad population is declining rangewide. In addition, we found no indication that the human population will increase beyond historic levels, and we do not anticipate an increase in future use of groundwater to support new residential development in the Town of Beatty and Oasis Valley. Based on the volume, timing, and location of groundwater withdrawal; historic use of groundwater, and water-level measurements, we concluded that water use and development in Oasis Valley are not a substantial threat to the Amargosa toad. Overgrowth of vegetation in aquatic habitats is an ongoing management concern for the Amargosa toad because it can result in degraded habitat. However, various tools, such as habitat improvement and

enhancement projects, have been and continue to be implemented to manage this potential threat to the Amargosa toad. Continued implementation of conservation actions as outlined in the CAS by regulatory agencies and a coalition of partners has reduced and continues to minimize threats to the Amargosa toad. Light to moderate ungulate grazing and trampling are not a substantial threat to the toad and likely provide some benefit to the habitat for the Amargosa toad. Excessive ungulate grazing in Amargosa toad habitat is localized and mostly occurs in the Amargosa River channel south of Beatty. Use by OHVs, particularly in wet areas (along the Amargosa River), can be an issue, especially when Amargosa toad eggs and tadpoles are present. However, efforts have been undertaken (e.g., rerouting of OHV races out of habitat) or are proposed to reduce OHV use in these areas so that OHV use is not a significant threat to the species. In addition, no spring sites have been identified that are substantially affected by OHV activity. Efforts to remove salt cedar and other nonnative, invasive plants from the Amargosa River watershed have occurred since 2003. Efforts will continue to remove salt cedar and replace it with native shrubs and trees, which may improve toad habitat and increase toad numbers. We conclude that the present or threatened destruction, modification, or curtailment of toad habitat or its range is not a significant threat to the Amargosa toad now or in the foreseeable future.

We found no information that overcollection or overutilization for commercial, recreational, scientific, or educational purposes is a threat or will become a threat to the species in the future. Therefore, we find overutilization for commercial, recreational, scientific, or educational purposes does not threaten the Amargosa toad now or in the foreseeable future.

We also found no evidence that chytrid or other diseases are affecting the Amargosa toad population, and therefore, disease does not threaten the Amargosa toad. Predation by nonnative species has affected, and will continue to affect Amargosa toad populations; however, metapopulations are allowing the coexistence of the Amargosa toad with predators and competitors. Amargosa toad populations appear to be generally stable over the long-term, including sites where toads coexist with nonnative predators and competitors. Habitat projects have been designed and constructed to provide an advantage to Amargosa toads and reduce numbers of nonnative predators. Therefore, we conclude that disease or predation are not significant threats to the Amargosa toad now or in the foreseeable future.

The Amargosa toad is classified as a protected amphibian by the State of Nevada under authority of NAC 503.075, and it is also designated as a BLM sensitive species in Nevada. Completion of a final open space plan for the Oasis Valley, approved by the Nye County Board of Commissioners, indicates a cooperative conservation effort among all levels of government, Beatty landowners, and the Beatty community to protect Amargosa toad habitat.

The current range of the Amargosa toad is approximately the same, and possibly larger, than its historical range as a result of conservation efforts accomplished by the various entities working to ensure long-term conservation of the Amargosa toad. In summary, we concluded that inadequate regulatory mechanisms are not a threat to the Amargosa toad now or in the foreseeable future.

The range and small population size of the toad have characterized the species during modern times with no significant changes. Current monitoring efforts will continue and inform the ATWG and others of any habitat improvement needs for the species. Climate change is likely to continue for the foreseeable future, but there is substantial uncertainty as to how climate change will affect the Amargosa toad and its habitat. We found no information to suggest that climate change will result in an altered landscape to the extent that it will negatively affect Amargosa toads. Stochastic events (such as floods, fire and drought) have occurred on the landscape where Amargosa toads occur in Oasis Valley. The metapopulation structure of the Amargosa toad would allow local extirpations as a result of these stochastic events, but also recolonization following the events. Controlled burns have resulted in positive responses by Amargosa toads by reducing vegetation and providing open water. By maintaining and actively managing the matrix of habitats that support the population of the Amargosa toad, the uncertainties and threats of climate change and stochastic events should be reduced. The ability to modify site conditions where Amargosa toads occur in response to environmental changes has been demonstrated as a significant management tool for Amargosa toad conservation efforts to address various threats, including stochastic events and invasive species, as well as possible changed conditions from climate change in the future. No environmental evidence has been observed to suggest that contaminants from private lands are affecting Amargosa toads. We believe any detrimental environmental effects would be observed and reported to the Service or NDOW. Continued implementation of conservation actions as outlined in the 2000 CAS by NDOW, other signatories, and a coalition of partners has reduced and continues to minimize threats to the Amargosa toad. We conclude that other natural or manmade factors are not significant threats to the Amargosa toad now or in the foreseeable future.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the threats are not of sufficient imminence, intensity, or magnitude to indicate that the Amargosa toad is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened). Therefore, we find that listing the Amargosa toad as a threatened or endangered species is not warranted.

Evaluation of Distinct Population Segment (DPS)

Having determined that the Amargosa toad does not meet the definition of a threatened or endangered species, we must next consider whether there are any segments within the population that meet the Service's DPS policy. Under the DPS policy (61 FR 4722; February 7, 1996), three elements are considered in the decision concerning the establishment and classification of a possible DPS. These are applied similarly for additions to or removal from the Federal List of Endangered and Threatened Wildlife. These elements include:

(1) The discreteness of a population in relation to the remainder of the species to which it belongs;

(2) The significance of the population segment to the species to which it belongs; and

(3) The population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification (i.e., is the population segment endangered or threatened).

Under the DPS Policy, we must first determine whether the population qualifies as a DPS; this requires a finding that the population is both: (1) Discrete in relation to the remainder of the species to which it belongs; and (2) biologically and ecologically significant to the species to which it belongs. If the population meets the first two criteria under the DPS policy, we then proceed

to the third element in the process, which is to evaluate the population segment's conservation status in relation to the Act's standards for listing as an endangered or threatened species. The DPS evaluation in this finding concerns the Amargosa toad that we were petitioned to list as threatened or endangered.

Discreteness

Under the DPS Policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following conditions:

(1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation. (2) It is delimited by international governmental boundaries within which 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.

Markedly Separated From Other Populations of the Taxon

As described previously (see Species Information above), the Amargosa toad is characterized by metapopulations across its range. Individual Amargosa toads move among these metapopulations, and there is no indication that physical, physiological, ecological, or behavioral barriers exist that would render any portions of the species' range markedly separate from other portions. Furthermore, we have no quantitative data such as genetic information to suggest any portions of the species to be markedly separate from others. Therefore, we conclude there are no portions of the species' range that meet the discreteness criterion of the Service's DPS policy. Since both discreteness and significance are required to satisfy the DPS policy, we have determined that there are no populations of the Amargosa toad that qualify as a DPS under our policy. As a result, no further analysis under the DPS policy is necessary.

Significant Portion of the Range

Having determined that the Amargosa toad does not meet the definition of a threatened or endangered species, we must next consider whether there are any significant portions of the range where the Amargosa toad is in danger of extinction or is likely to become endangered in the foreseeable future.

We considered whether any portions of the Amargosa toad's range warrant further consideration. We found that there is no area within the range of the Amargosa toad where the potential threat of development or groundwater withdrawal is significantly concentrated or may be substantially greater than in other portions of the range. Some sites including Crystal and Lower Indian Springs may become overgrown with vegetation and cause the site to become unsuitable and require rehabilitation. Cattle and feral burros may provide the necessary disturbance to improve and maintain Amargosa toad habitat but may cause short-term overuse of some sites. Use by OHVs may cause localized impacts but we do not anticipate these effects to result in population declines. Although nonnative toad predators such as crayfish, bullfrogs, and mosquito fish occur throughout much of the range of the toad and likely impact the toad to some extent, we have found that toads have, and will continue to coexist with these predators. There is no indication that stochastic events, climate change, or environmental contaminants differentially affect any given site.

On the basis of our review, we found no areas within the species' range where threats are geographically concentrated. The species is characterized by metapopulations across its range which allows for an individual site to be extirpated and become repopulated from neighboring populations. The factors affecting the species are essentially uniform throughout its range, indicating that no portion of the Amargosa toad's range warrants further consideration of possible threatened or endangered status.

We do not find that the Amargosa toad is in danger of extinction now, nor is it likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, listing the Amargosa toad as threatened or endangered under the Act is not warranted throughout all or a significant portion of its range at this time.

We request that you submit any new information concerning the status of, or threats to, the Armargosa toad to our Nevada Fish and Wildlife Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor the Amargosa toad and encourage its conservation. If an emergency situation develops for the Amargosa toad, we will act to provide immediate protection.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Nevada Fish and Wildlife Office (see **ADDRESSES** section).

Author(s)

The primary authors of this notice are staff with the Nevada Fish and Wildlife Office, Las Vegas.

Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 9, 2010

Wendi Weber,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2010–17647 Filed 7–19– 10; 8:45 am]

BILLING CODE S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2009–0073] [92210–1117–0000–B4]

RIN 1018–AW54

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for *Brodiaea filifolia* (Thread-leaved Brodiaea)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on our December 8, 2009, proposed revised designation of critical habitat for *Brodiaea filifolia* (thread-leaved brodiaea) under the Endangered Species Act of 1973, as amended. We also announce the availability of a draft economic analysis (DEA) and an amended required determinations section of the proposal. We are reopening the comment period for an additional 30 days to allow all interested parties an opportunity to comment on all of the above. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in our final determination.

DATES: We will consider public comments received on or before August 19, 2010. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit comments by one of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments on Docket No. FWS–R8–ES–2009–0073.

U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS–R8–ES–2009–0073; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone (760) 431–9440; facsimile (760) 431–5901. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from the proposed rule is based on the best scientific data available and will be accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested parties during this reopened comment period on our proposed rule to revise critical habitat for *Brodiaea filifolia*, which we published in the **Federal Register** on December 8, 2009 (74 FR 64930), the DEA of the proposed designation, and the amended required determinations provided in this document. We are particularly interested in comments concerning:

(1) The reasons why we should or should not revise the critical habitat under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to *Brodiaea filifolia* from human activity, the type of human activity causing these threats, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation, such that the designation of critical habitat is not prudent.

(2) Specific information on:

• Areas that provide habitat for *Brodiaea filifolia* that we did not discuss in our proposed revised critical habitat rule (December 8, 2009; 74 FR 64930).

• Areas containing the physical and biological features essential to the conservation of *B. filifolia* that we should include in the final critical habitat designation and why. Include information on the distribution of these essential features and what special management considerations or protections may be required to maintain or enhance them.

• Areas we proposed as revised critical habitat that do not contain the physical and biological features essential to the conservation of the species and that should therefore not be designated as critical habitat.

• Areas not occupied at the time of listing that are essential for the conservation of the species and why.

(3) Land use designations and current or planned activities in the areas occupied by the species, and their possible impacts on proposed revised critical habitat.

(4) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe landscapes identified as containing the physical and biological features essential to the conservation of the species.

(5) Any foreseeable economic, national security, or other relevant impacts that may result from designating particular areas as critical habitat, and, in particular, any impacts to small entities (e.g., small businesses or small governments), and the benefits of including or excluding areas from the proposed revised designation that exhibit these impacts.

(6) Whether any specific subunits being proposed as revised critical habitat should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area in critical habitat.

(7) The likelihood of adverse social reactions to the designation of critical habitat, and how the consequences of such reactions, if they occur, would relate to the conservation of the species and regulatory benefits of the proposed revised critical habitat designation.

(8) Information on the extent to which the description of potential economic impacts in the DEA is complete and accurate, and specifically:

• Whether there are incremental costs of critical habitat designation (e.g., costs attributable solely to the designation of critical habitat for *Brodiaea filifolia*) that have not been appropriately identified or considered in our economic analysis, including costs associated with future administrative costs or project modifications that may be required by Federal agencies related to section 7 consultation under the Act; and

• Whether there are incremental economic benefits of critical habitat designation that are not appropriately identified or considered in our economic analysis.

(9) The potential effects of climate change on this species and its habitat and whether the critical habitat may adequately account for these potential effects.

(10) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate concerns and comments.

If you submitted comments or information on the proposed revised rule (74 FR 64930) during the initial comment period from December 8, 2009, to February 8, 2010, please do not resubmit them. These comments are included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determination. Our final determination concerning the revised critical habitat for *Brodiaea filifolia* will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within the proposed revised critical habitat designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning our proposed rule, the associated DEA, and our amended required determinations section by one of the methods listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hard copy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hard copy comments on *http://www.regulations.gov*. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation used to prepare this notice, will be available for public inspection at *http://www.regulations.gov*, or by appointment, during normal business

hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed revision of critical habitat (74 FR 64930) and the DEA on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2009–0073, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the proposed revised designation of critical habitat for *Brodiaea filifolia* in this notice. For more information on previous Federal actions concerning *B. filifolia*, see the 2005 designation of critical habitat published in the **Federal Register** on December 13, 2005 (70 FR 73820), see the proposed revised designation of critical habitat published in the **Federal Register** on December 8, 2009 (74 FR 64930), or contact the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

The Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California on December 19, 2007, challenging our designation of critical habitat for *Brodiaea filifolia* and *Navarretia fossalis* (*Center for Biological Diversity* v. *United States Fish and Wildlife Service et al.,* Case No. 07–CV–2379–W–NLS). This lawsuit challenged the validity of the information and reasoning we used to exclude areas from the 2005 critical habitat designation for *B. filifolia*. We reached a settlement agreement on July 25, 2008, in which we agreed to reconsider critical habitat designation for *B. filifolia*. The settlement stipulated that we submit a proposed revised critical habitat designation for *B. filifolia* to the **Federal Register** for publication by December 1, 2009, and submit a final critical habitat designation to the **Federal Register** for publication by December 1, 2010. We published the proposed revised critical habitat designation in the **Federal Register** on December 8, 2009 (74 FR 64930).

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions under section 7(a)(2) of the Act.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available after taking into consideration the economic impact, impact on national security, and any other relevant impact of specifying any particular area as critical habitat.

We prepared a DEA (Industrial Economics, Incorporated (IEc) 2010) that identifies and analyzes the potential impacts associated with the proposed revised designation of critical habitat for *Brodiaea filifolia* that we published in the **Federal Register** on December 8, 2009 (74 FR 64930). The DEA looks retrospectively at costs incurred since the October 13, 1998 (63 FR 54975), listing of *B. filifolia* as threatened. The DEA quantifies the economic impacts of all potential conservation efforts for *B. filifolia*; some of these costs will likely be incurred regardless of whether or not we finalize the revised critical habitat rule. The economic impact of the proposed revised critical habitat designation is analyzed by comparing a "without critical habitat" scenario with a "with critical habitat" scenario. The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the critical habitat designation for *B. filifolia*. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat relative to areas that may be excluded under section 4(b)(2) of the Act. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat.

The 2010 DEA (made available with the publication of this notice and referred to as the DEA throughout this document unless otherwise noted) estimates the foreseeable economic impacts of the proposed revised critical habitat designation for *Brodiaea filifolia*. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation, which are those costs attributed to critical habitat over and above those baseline costs coextensive with listing. It also discusses the benefits of critical habitat designation. These benefits are primarily presented in a qualitative manner. The DEA describes economic impacts of *B. filifolia* conservation efforts associated with the following categories of activity: (1) Residential and commercial development; (2) transportation, utility, and flood control projects; and (3) public and conservancy lands management.

Baseline economic costs are those that result from listing and other conservation efforts for *Brodiaea filifolia*. The baseline costs are assuming a 7 percent discount rate and are identified in Appendix E of the DEA (IEc 2010, Appendix E–1). Impacts associated with baseline protection for *B. filifolia* within the proposed revised critical habitat designation are estimated to be $5.31 million to $8.16 million (approximately $486,000 to $720,000 annualized) over the next 20 years (2011–2030). Baseline impacts to development are estimated to be $4.60 million to $7.46 million. This represents approximately 83 to 89 percent of the total baseline impacts. Baseline impacts to transportation, utility, and flood control activities are estimated to be $657,000. This represents approximately 8 to 12 percent of the total baseline impacts. Baseline impacts to public and conservancy lands management are estimated to be $49,500. This represents approximately 0.6 to 0.9 percent of the total baseline impacts.

Incremental impacts associated with the proposed revised critical habitat designation are estimated to be $425,000 to $529,000 (approximately $37,500 to $46,700 annualized), assuming a 7 percent discount rate, over the next 20 years (2011–2030). These impacts are due to a reduction in land value following the designation of critical habitat for *Brodiaea filifolia* and the cost of section 7 consultation for pipeline maintenance activities (IEc 2010, p. ES–9). Incremental impacts to development

are estimated to be $207,000 to $311,000. This represents approximately 49 to 59 percent of the total incremental impacts. No incremental costs related to public and conservancy lands management are expected from the designation (IEc 2010, p. ES–10).

The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on transportation, utility, flood control projects, Federal lands, small entities, and the energy industry. Decisionmakers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

Required Determinations——Amended

In our proposed rule published in the **Federal Register** on December 8, 2009 (74 FR 64930), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations.

In this document, we affirm the information in our December 8, 2009, proposed rule (74 FR 64930) concerning Executive Order (E.O.) 12866 (*Regulatory Planning and Review*), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 13211 (Energy Supply, Distribution, or Use), E.O. 12630 (Takings), and the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions), as described below. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide the analysis for our determination whether or not the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for *Brodiaea filifolia* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that the rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually.

If we finalize the proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Incremental impacts to small entities may occur as a direct result of a required consultation under section 7 of the Act. Additionally, even in the absence of a Federal nexus, indirect incremental impacts may still result because, for example, a city may request project modifications due to the designation of critical habitat via its review under the California Environmental Quality Act (CEQA). Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process because *Brodiaea filifolia* is federally listed as a threatened species under the Act.

In the DEA, we evaluated the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for *Brodiaea filifolia* (IEc 2010, Appendix A, pp. 1–7). The analysis was based on the estimated incremental impacts associated with the proposed rulemaking as described in sections 3 through 5 of the DEA. The SBREFA analysis evaluated the potential for economic impacts related to several categories, including: (1) Residential and commercial development; (2) transportation, utility, and flood control projects; and (3) management of public and conservation lands (IEc 2010, Appendix A, p. 4).

The DEA found there are no incremental impacts related to the management of public and conservation lands. Impacts to small entities are only anticipated due to residential and commercial development. No impacts are anticipated due to transportation, utility, and flood control because the incremental costs are associated with activities conducted by the Metropolitan Water District of Southern California, which is not a small business or government as defined by the Small Business Administration (IEc 2010, Appendix A, p. 4).

The DEA estimated that there will be approximately 23 landowners impacted over the next 20 years with an incremental impact estimated to be

$311,000 assuming a 7 percent discount rate. This impact is related to the decrease in land value for areas designated as critical habitat and may be borne by the current landowner in the form of percent of average value lost. In a regional context, we looked at the number of homeowners in each county as a representation of the total number of property owners in Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties. There are approximately 443,000 to over 1.6 million homeowners in these counties (IEc 2010, Appendix A, p. 5). The 23 landowners that may be impacted represent approximately less than 1 percent of the total number of landowners in Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties. We do not believe that this represents a substantial number of landowners. Additionally, we evaluated the decrease in property value by looking at the average parcel value by county and the percent of the value lost. We found that the land value lost ranged from 0.02 to 17.3 percent of the total value (IEc 2010, Appendix A, pp. 5–6). To some individual property owners this may represent a significant impact, but on a regional scale we do not believe an incremental impact of $311,000 in reduced land value represents a significant economic impact. As a result of this analysis, we find that the designation of critical habitat for *Brodiaea filifolia* will not have a significant economic impact on a substantial number of small entities.

In summary, we considered whether the proposed revised designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revised critical habitat for *Brodiaea filifolia* will not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As discussed in Appendix A, the DEA finds that none of these outcomes are possible in the context of this analysis (IEc 2010, Appendix A, pp. 7–8). The DEA concludes that no incremental impacts on the production, distribution, or use of energy are forecast associated specifically with this rulemaking (IEc 2010, Appendix A, p. 7). Therefore, designation of critical habitat is not expected to lead to any adverse outcomes (such as a reduction in electricity production or an increase in the cost of energy production or distribution), and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments," with two exceptions. First, it excludes "a condition of federal assistance." Second, it also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

Critical habitat designation does not impose a legally binding duty on non-Federal government entities or private parties. The only regulatory effect is that under section 7 of the Act, which requires that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action that may be indirectly impacted by the designation of critical habirat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) As discussed in the DEA of the proposed revised designation of critical habitat for *Brodiaea filifolia*, we do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The DEA concludes that incremental impacts may occur due to conservation costs associated with residential and commercial development, and with transportation, utility, and flood control projects; however, these are not expected to affect small governments (IEc 2010, Appendix A, p. 4). Incremental impacts associated with these activities are expected to be borne by the Transportation Corridor Agencies and San Diego Gas and Electric, which are not considered small governments. Consequently, we do not believe that the proposed revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630 — Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we analyzed the potential takings implications of proposing revised critical habitat for *Brodiaea filifolia* in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits. The proposed revised critical habitat for *B. filifolia* does not pose significant takings implications for the above reasons.

References Cited

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at *http://www.regulations.gov* or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this notice are staff members of the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 7, 2010

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–17708 Filed 7–19– 10; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2010–0023]
[MO 92210–0–0008–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Giant Palouse Earthworm (*Driloleirus americanus*) as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90–day finding on a petition to list the giant Palouse earthworm (*Driloleirus americanus*) as threatened or endangered under the Endangered Species Act of 1973, as amended, (Act) and to designate critical habitat. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing the giant Palouse earthworm as threatened or endangered may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the giant Palouse earthworm is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12–month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before September 20, 2010. Please note that if you are using the *Federal eRulemaking Portal* (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is Eastern Time on this date.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov. In the box that* reads "Enter Keyword or ID," enter the docket number for this notice, which is **docket number FWS–R1–ES–2010–0023**. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: **FWS–R1–ES–2010–0023**; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information received on *http://www.regulations.gov. This* generally means that we will post any personal information you provide us (see the **Information Solicited** section below for more details).

After the date specified in **DATES**, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

FOR FURTHER INFORMATION CONTACT: Ken Berg, Manager, Washington Fish and Wildlife Office, 510 Desmond Dr. SE, Suite 102, Lacey, WA 98503; by telephone (360–753–9440); or by facsimile (360–753–9405). If you use a telecommunications device for the deaf (TDD) please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the giant Palouse earthworm (GPE) from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species and/or its habitat.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) Information on grassland or other natural habitats within the range of the species including distribution of known or potential habitats; information on ongoing or future activities in potential GPE habitat; information on life history of the GPE and evidence supporting its endogeic (earthworms that live in mineral soil and consume organic matter within the soil or at the soil-litter interface) or anecic (earthworms that inhabit deep vertical burrows and emerge at night to consume relatively fresh plant detritus on the surface) life-history mode; and information on other native or nonnative earthworm distributions in the range of the species.

If, after the status review, we determine that listing the GPE is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by the GPE, we request data and information on:

(1)What may constitute "physical or biological features essential to the conservation of the species,"

(2)where these features are currently found, and

(3)whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov, your entire submission—including any personal identifying* information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we received and used in preparing this finding, will be available for you to review at *http://www.regulations.gov,* or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. 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 the 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 conduct a status review, which is subsequently summarized in our 12–month finding.

Previous Federal Action(s)

On August 30, 2006, we received a petition from three private citizens and three other parties (the Palouse Prairie Foundation, the Palouse Audubon Society, and Friends of the Clearwater) to list the GPE (*Driloleirus americanus*). On October 9, 2007, we published a 90–day finding stating that the August 30, 2006, petition did not provide substantial scientific or commercial information to indicate that listing the GPE may be warranted (72 FR 57273). On January 24, 2008, the petitioners filed a lawsuit in the U.S. District Court, Eastern District of Washington against the U.S. Department of the Interior and the Service challenging the "not substantial" decision (*Palouse Prairie Foundation et al.* v. *Dirk Kempthorne, et al., No. 2:08–cv–0032–FVS*). On February 12, 2009, the District Court denied the Appellants' motion for summary judgment and granted summary judgment in favor of the Service, upholding the October 9, 2007, determination. The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court ruling on June 14, 2010.

History of Current Petition

On July 1, 2009, we received a petition dated June 30, 2009, from Friends of the Clearwater, Center for Biological Diversity, Palouse Audubon, Palouse Prairie Foundation, and Palouse Group of the Sierra Club (petitioners) requesting that the GPE be listed as threatened or endangered and that critical habitat be designated under the Act. The petitioners also requested that we list the GPE as a threatened or endangered species either in the entirety of its range, or in the Palouse bioregion as a significant portion of its range. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a).

The July 1, 2009, petition was accompanied by a letter from Samuel W. James, an earthworm taxonomist, and additional information about GPE and threats to the species that was not available to the Service during our evaluation of the August 30, 2006, petition. In an August 5, 2009, letter to the petitioners, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We also stated that we would not be able to further address the petition at that time, but that we would complete the action when funding became available in fiscal year 2010. This finding addresses the petition.

Species Information

The GPE was first described by Smith in 1897, based on a collection near Pullman, Washington. At the time of this collection, Smith stated: "this species is very abundant in that region of the country and their burrows are sometimes seen extending to a depth of over 15 feet" (Smith 1897, pp. 202–203). Although only a few specimens have been collected, early descriptions indicate that the GPE can be as long as 3 feet (0.9 meters). Some consider the GPE to be an endemic species (a species native to a particular region), that uses grassland sites with good soil and native vegetation of the Palouse bioregion (James 1995, p. 1; Niwa *et al.* 2001, p. 34). The Palouse bioregion is an area of rolling hills and deep soil in southeastern Washington and adjacent northwestern Idaho.

The petition acknowledges (Petition, pp. 1, 3) four positively identified collections of this species in the past 110 years (Sánchez-de León and Johnson-Maynard 2008, p. 2), compared to the species being described as "very abundant" in Smith (1897, p. 202). Three of the collection locations were in the Palouse River basin (one between Moscow and Pullman, one at Moscow Mountain, Idaho (Petition cover letter, p. 2), and one at a prairie remnant, Smoot Hill Biological Preserve (Sánchez-de León and Johnson-Maynard 2008, p. 6)). The fourth location was in the hills west of Ellensburg, Washington (Fender and McKey-Fender 1990, p. 358), outside of the Palouse bioregion. We were unable to clearly match the dates of collection with the exact

locations based on information in the petition and references. However, several GPE were collected in 1978 near Pullman and Moscow (Petition, p. 5; Johnson-Maynard 2009b, p. 2), a collection was made in 1988 by Johnson and Johnson at a forest clearing near Moscow (Sánchez de León and Johnson-Maynard 2008, p. 2; Johnson-Maynard 2009b, p. 3), and a specimen was collected in 2005 by a University of Idaho graduate student near Pullman (Johnson-Maynard 2009b, p. 3; Mullins 2006, p. 1). The Ellensburg, Washington specimen was collected before 1990 (Petition, p. 5; Fender and McKey-Fender 1990, p. 358). Follow-up surveys in previous collection locations were unsuccessful in locating the GPE. Several of these collection locations had major ground-disturbing activities. One site was converted into a parking lot and another was "very disturbed with graveling" (Petition, p. 5). James (2000, p. 5) states that only a small portion of suitable earthworm habitat in the Columbia Basin area has been surveyed. Since 2005, two *Driloleirus* genus earthworms have been documented, one south of Moscow, Idaho, and one near Leavenworth, Washington (University of Idaho 2008, p. 1; Johnson-Maynard 2009b, p. 3), but the specimen could not be verified to species level due to damage during collection.

The GPE is described as an anecic earthworm (James 2000, p. 5) based on its functional role in the soil ecosystem. Anecic earthworms are the largest and longest lived of the three earthworm types (James 2000, p. 2; 1995, p. 6), and transport fresh plant material from the soil surface to subterranean levels. We reviewed the 2006 petition within the context of this information. However, after additional scrutiny, James (2009, p. 3) determined that, based on its pale pigmentation, the species is endogeic rather than anecic. Endogeic earthworms live entirely in the soil and rely on subsurface organic matter, rather than transporting plant material below ground. Life-history forms aside, we accept the characterization of the GPE as a species (Smith 1897, p. 203; Fender and McKey-Fender 1990, p. 372; Fender 1995, pp. 53–54). While the naming conventions of the GPE has changed over time, (*Megascolides americanus* in 1897 (Smith 1897, p. 203); changed to *Driloleirus americanus* by 1990 (Fender and McKey-Fender 1990, p. 372), there is no information provided in the petition or in our files that would indicate scientific disagreement about its status as a species.

Evaluation of Information for this Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering what factors might constitute threats, we must look beyond the exposure of the species to a factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat and, during the subsequent status review, we attempt to determine how significant a threat it is. The threat is significant, if it drives, or contributes to, the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined in the Act. However, the identification of factors that could impact a species negatively may not be sufficient to compel a finding that the information in the petition and our files is substantial. The information must include evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

In making this 90–day finding, we evaluated whether information regarding threats to the GPE, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

Petition Information on Habitat Loss and Fragmentation in the Palouse Bioregion

The petitioners claim that the GPE is threatened by habitat conversion, loss, and fragmentation from agriculture and urban sprawl in the Palouse region (Petition, pp. 1, 7). The petitioners cite Sánchez-de León and Johnson-Maynard (2008, p. 1) who state that combined effects of land-use change, habitat fragmentation, and competitive interactions have decimated native earthworms. James (2009, p. 1) states that earthworms are sensitive to habitat disturbance, and that to find indigenous earthworms one must work in undisturbed or mildly disturbed vegetation. Undisturbed vegetation is rare in the Palouse bioregion, since the native grassland habitat has been reduced to less than 1 percent of the pre-agricultural extent (Petition, p. 8; James 2009, p. 1; Noss *et al.* 1995, p. 74). The petition lists a dozen locations in the Palouse area that contain prairie remnants (Petition, p. 5). In a survey of four prairie remnants and adjacent conservation reserve program (CRP) fields (areas set aside from farming and mainly planted with nonnative grasses), Sánchez-de León and Johnson-Maynard (2008, pp. 1, 4; Petition, p. 4) found one GPE in one prairie remnant. Sánchez-de León and Johnson-Maynard (2008, p. 6; Petition, p. 5) observed that many remaining prairie remnants are not suitable for tillage (preparing land for the raising of crops by plowing) as they are often steep, rocky, or contain shallow soil and, therefore, may also be less suitable for earthworms (Sánchez-de León and Johnson-Maynard 2008, p. 6; Petition, p. 5).

Evaluation

Information in the petition and in the Service's files indicates native habitats are rare and fragmented in the Palouse bioregion. The estimated amount of habitat conversion varies, but several studies have determined that the conversion of native habitats is very high: 99.9 percent of Palouse prairie habitats to agriculture (Noss 1995, p. 74); 94 percent of the grasslands and 97 percent of the wetlands in the Palouse bioregion have been converted to crop, hay, or pasture (Black *et al.* 1998, pp. 9–10); 21 percent of previously forested lands have been converted to agriculture or urban uses; and less than 1 percent of the original bunchgrass prairie habitat remains (Gilmore 2004, p. 3; Donovan *et*

al. 2009, p. 1). Although the Palouse prairie grasslands habitat has been extensively impacted by agriculture and development, very limited information exists on the specific habitat needs of the GPE. If the species is endemic to good soil ("good" soil was not defined in references) and native vegetation of the Palouse bioregion, as stated by some scientists (James 1995, p. 1; Niwa *et al.* 2001, p. 34), the best available information may indicate that remaining prairie remnants are not the best habitat for the GPE (Sánchez-de León and Johnson-Maynard 2008, p. 6).

Although its habitat may be limiting, there also may be sampling challenges that could bias available information on GPE. Sánchez-de León and Johnson-Maynard (2008, p. 7) explained that hand sampling methods may underestimate abundance of deep-burrowing species; while James (2009, p. 3) states that, if present, an endogeic earthworm such as the GPE should be moderately easy to find.

Petition Information on Habitat Loss and Fragmentation in the Ellensburg Area

The GPE occurs both in the Palouse bioregion and in central Washington near Ellensburg. The petitioners claim that, similar to the Palouse bioregion, the areas around Ellensburg have also been extensively modified by agriculture (Adolfson Associates 2005, p. 2; Petition, p. 8).

Evaluation

There is little information in the petition or the Service's files on the habitat associated with the GPE collected near Ellensburg. Fender and McKey-Fender (1990) described the location as "in the hills west of Ellensburg," and they noted that the range of GPE extends into "treeless areas" (pp. 358, 366). The Adolfson Associates report (2005, p. 1) was limited to the city and the urban growth area around Ellensburg. The location of the Ellensburg collection site is uncertain, and the petitioners did not provide additional information on potential GPE habitat other than the Adolfson Associates report. James (2000, p. 8; 1995, p. 2) confirms that GPE collection data provides little detailed information about habitat types, and he included the Ellensburg collection site, among others, as being generally located in what is now agricultural land, grassland, and shrubland.

Petition Information on Habitat Impacts from Agriculture and Urban Development

The petitioners claim that earthworms or their grassland habitats are influenced by soil disturbance, tillage, traffic, food sources, chemical and pesticide residues, and soil microclimate (Jennings *et al.* 1990, p. 75; Edwards & Bohlen 1996b, pp. 283–289; Edwards *et al.* 1995, pp. 200–201; USDA–NRCS 2001, p. 2; Petition, p. 10). The petitioners also claim that it is appropriate to use other earthworms as proxies for effects to the GPE as long as they are similar biologically and ecologically (Sappington *et al.* 2001, p. 2869; Caro *et al.* 2005, p. 1821; Petition, p. 10).

An Australian study showed 3 years of tillage reduced earthworm burrow density by nearly 90 percent (Chan 2004, p. 89; Petition, p. 10), and that tillage changes water infiltration into soil through burrows. In the Palouse bioregion, tillage removes the original topsoil, which may reduce earthworm burrow densities, soil aeration, soil infiltration rates, and the amount of organic matter available to the GPE for forage (Veseth 1986b, p. 2; Petition, pp. 10–11). All original topsoil has been removed from 10 percent of Palouse cropland, and another 60 percent of cropland has lost 25 to 75 percent of the topsoil (Veseth 1986b, p. 2).

Moisture, temperature, and food availability influence earthworm populations in general, and earthworms need the organic matter found in the topsoil that agriculture removes (James 2000, pp. 1–2; Petition, p. 11). Bare soil also increases effects of flooding, drought, or other weather conditions due to the lack of vegetation that buffers soil from extreme moisture, dryness, and temperature fluctuations. These fluctuations can temporarily or permanently make soils unusable by earthworms (James 2000, pp. 1–2; Petition, p. 11).

Soil compaction from livestock grazing or farm machinery can affect earthworms by making burrowing and feeding more difficult (James 2000, p. 9), by decreasing soil pore size and thereby decreasing nutrient retention and changing the soil food web (Niwa *et al.* 2001, p. 7), or by favoring nonnative earthworms that prefer course soils rather than the fine soils preferred by the GPE (Fender and McKey-Fender 1990, p. 364; Petition, p. 11). In addition to soil compaction, livestock grazing changes the quality and accessibility of detrital material, decreasing organic matter available to earthworms through conversion of herbage to partly digested clumps of organic matter (James 2000, p. 9; Petition, p. 14).

The petitioners also claim that chemicals and some soil chemistry effects, notably a reduction in soil pH, negatively impact earthworms (Petition, p. 11). Soil pH is a factor that often greatly affects earthworm populations, both in numbers of individuals and numbers of species; in general there are fewer species in the more acidic soils below pH 5 than in more alkaline soils (Edwards and Lofty 1977, p. 234). Nitrogenous fertilizers reduce pH levels (Ma *et al.* 1990, p. 76).

Pesticide applications can be extremely toxic to earthworms, and have indirect effects on vegetation (Edwards and Bohlen 1996a, pp. 282–288). Like other farmers, growers in the Palouse region apply many herbicides (Hall *et al.* 1999, p. 12 Table 3.08; Kellog *et al.* 2000, p. 2), including Triazine (Atrazine) herbicides that may have negative effects on earthworm numbers (Edwards and Bohlen 1996a, p. 285), and which may include indirect effects due to their influence on weeds as a source of supply of organic matter on which worms feed in the soil. Traces of Triazine herbicides were found in surface-water samples from the Palouse River basin (Wagner *et al.* 1995, p. 15, Table 4). The petition also states no-till farming uses herbicides rather than tilling for weed-control, resulting in higher herbicide use in no-till fields than is used in tilled fields (Veseth 1986a, p. 1; Petition, p. 12).

The petitioners claim that urban sprawl and rural development negatively impact habitats in the Palouse and Ellensburg areas. The Ellensburg, Washington; Pullman Washington; and Moscow, Idaho populations increased by approximately 76, 88, and 73 percent since 1980, respectively (Petition, p. 12; *www.census.gov, figure 4).* The petition states that urban development compacts soils, removes topsoil, and favors nonnative invasive earthworms (Petition, pp. 12–13). New road construction affects remaining prairie remnants (Petition, p. 13), including a potential rerouting of U.S. 95 through a large prairie remnant in the Palouse bioregion.

Evaluation

Information in the petition and the Service's files indicates that tillage may affect earthworms, and the use of surrogate species (such as other earthworms) may be useful for evaluating potential effects to the GPE, provided such studies are conducted with appropriate scientific controls and precautions. Caro *et al.* (2005, p. 1821)

states that "for substitute species to be appropriate, they should share the same key ecological or behavioral traits that make the target sensitive to environmental disturbance and the relationship between populations vital rates and level of disturbance should match that of the target; these conditions are unlikely to pertain in most circumstances and the use of substitute species to predict endangered populations' responses to disturbance is questionable."

Chan's study (2004, p. 90) compared effects to an anecic Megascolecidae (the same family as the GPE) by assessing burrows in pastures, no-till agriculture, one-pass tilled agriculture; and two-pass conventional tilled agriculture (Chan 2004, p. 94). The effect of tillage on earthworm abundance was usually negative because tilling causes physical damage and burial of residues; alternatively it can increase abundance of some earthworm species due to incorporation of residues into the soil (Chan 2004, p. 90). Tillage decreases burrow density, and related water conduction into the soil (Chan 2004, p. 94). Some preservation of earthworm burrows can be achieved by adopting conservation tillage techniques (no-till) (Chan 2004, p. 96).

Since the earthworm species used in Chan's studies was anecic, whereas the GPE may be endogeic, the effects of tilling within the plow zone may not be applicable to the GPE. Edwards and Bohlen (1996b, p. 215) also stated that earthworm populations were larger in soil that was not cultivated and had crops drilled directly. No-till agriculture occurs on about five percent of Palouse acreage considered in a survey by Hall (1999, p. 15). More tillage destroys burrows, while less tillage leaves residues and improves environments for earthworms (USDA-NRCS 2001, p. 3).

Tillage and cultivation impacts to the GPE may vary depending on whether it is has an endogeic or anecic life-history form. James (2009, p. 3) believes the GPE is endogeic, and lives entirely in the soil, feeding on organic matter in varying stages of decomposition. According to James, a large endogeic species is probably more susceptible to habitat changes than an anecic species, and that agricultural conversion stabilizes soil organic matter at a low level, with only the lowest quality and most resistant organic matter remaining. Because of these low levels of organic material, the GPE could starve, even if it could survive mechanical disturbances and chemicals associated with agricultural conversion (James 2009, p. 4).

Degradation of the land base from topsoil losses, changes in soil structure and chemistry, and reduced soil organic matter has resulted from tillage methods, crop rotations, and fertilization practices used historically in the Palouse region (Jennings *et al.* 1990, p. 75). There was no detailed information provided on agriculture activities in the Ellensburg area outside of the urban growth area. Furthermore, no information was provided by the petitioner, and no information is available in our files on the extent of livestock ranching impacts in the Palouse or Ellensburg areas.

The petitioners cite soil chemistry effects, notably a reduction in soil pH, as having deleterious effects on earthworms, and state that generally, earthworms do not thrive in soils with a pH below 5 (Petition, p. 11); however, our review of information on pH effects to earthworms showed both supportive and contradictory information relevant to the petitioners' claims. Fender (1995, p. 56) stated that Argilophiline worms (a tribe of earthworms that includes the GPE) appear to have higher tolerance than Lumbricidae (night crawler earthworms) for low pH (acid) soils, high clay, and resinous low-nitrogen plant litter. A tribe is a taxonomic ranking between the family and genus rankings in Linnaean taxonomy. Sánchez-de León and Johnson-Maynard (2008, pp. 5, 7) found more nonnative earthworms in lower pH soils (pH 5.9 to 6.2) in Conservation Reserve Program (CRP) sites, than in prairie remnants with higher pH soils (pH 6.3 to 6.6). As a result, the researchers question whether it is possible that lower pH correlates with some other non-measured soil parameter, such as previous fertilizer applications and resultant increased organic matter (Sánchez-de León and Johnson-Maynard 2008, p. 7).

Ma *et al.* (1990, p. 75) found different results: the lower the pH (the more acidic), the smaller the endogeic earthworm populations. The lower pH resulted in larger accumulations of organic matter or thatch, indicating decreased rates of decomposition and microbial mineralization (Ma *et al.* 1990, p. 79). A Natural Resource Conservation Service (USDA-NRCS) report states inorganic fertilizers can have a positive impact on earthworms due to increased biomass (USDA-NRCS 2001, p. 5), but that earthworms do not thrive in soils with a pH below 5 (USDA-NRCS 2001, p. 2; Edwards and Lofty 1977, p. 234). In summary, studies regarding earthworms and soil pH indicate that earthworm response may vary with species, location, or other attributes and it is unclear how the GPE may react to different soil acidity, which makes it difficult to determine if reduced pH is negatively impacting the species.

Information in the petition and available in the Service's files on the GPE and pesticides (used here as a general term, including herbicides, fungicides, and insecticides) found that some chemical applications may impact earthworms, and potentially the GPE. Edwards and Bohlen (1996, p. 283) state that the toxicities of different chemicals and pesticides on earthworms vary greatly, and summarize the toxicities of many pesticides. Edwards and Bohlen (1996, p. 285; USDA-NRCS 2001, p. 6) state that some herbicides, including Triazine herbicides, are moderately toxic to earthworms. Carbamates are toxic to earthworms (USDA-NRCS 2001, p. 6). Wagner *et al.* (1996, pp. 21–22) listed multiple pesticides used in a subset of the Palouse bioregion, and found several, including Triazine (Atrazine), in water samples (pp. 15–16). No information was provided in the petition on the use of, or surveys of, pesticides in the Ellensburg area.

We acknowledge several differences between information presented by the petitioner and other information available in our files with regard to claims made in the 2006 and 2009 GPE petitions. The 2006 petition stated that the GPE was endemic to the Palouse bioregion (Petition, p. 2); the 2009 petition expanded the petitioned area, stating that the species is native to the Columbia River basin of eastern Washington and northern Idaho (Petition, p. 1). We evaluated the petitioner's 2006 claim that the species may be affected by agricultural practices that use chemicals and result in soil compaction, but were unable to verify that these activities presented a threat (72 FR 57273).

The 2009 petition includes a letter of support from Samuel W. James, Biodiversity Institute, University of Kansas (James 2009, pp. 1-4). Mr. James states that he is the only earthworm taxonomist operating in the United States, and has extensive experience in biodiversity inventory of earthworms. In one of the references provided in support of the 2006 petition, James (1995, p. 12), stated that he can "confidently state that nothing is known of the impact of any management practice on any Columbia River Basin native earthworm species."

For purposes of the 2009 petition, James now believes the GPE is endogeic and not anecic as he previously thought, and states that, "I have no doubt that *Driloeirus americanus* is in danger of

extinction" (James 2009, p. 1). James also states that "this re-evaluation is significant to the petition to list *D. americanus*, because a large endogeic species is probably more susceptible to habitat changes than an anecic" (James 2009, p. 3). This finding fully considers the new information presented by the petitioner. Our review for purposes of a 90–day finding is limited to a determination of whether the information in the petition meets the "substantial information" threshold. We do not conduct additional research at this point, nor do we subject the petition to rigorous critical review.

In summary, our review and the 2009 petition indicate there has been extensive agricultural conversion in the Palouse bioregion, and the petition states that similar conversion has taken place in the central Washington area. Other threats identified by the petitioner include habitat fragmentation, urban development, pesticides, and soil compaction. The petitioner presents a reasonable argument that the GPE may be exposed to the above threats in the entirety of its range or in what may constitute a significant portion of its range (Petition, p. 3). Although the species' responses to these threats are still undeterminable at this time due to the lack of specific information on the species' biology and habitat needs, James (2009, p. 3) provides a logical explanation as to why a species like the GPE may be susceptible to these threats. The limited and fragmented remnant deep-soil habitats in the Palouse bioregion, and the potential impacts to any GPE from ongoing agriculture activities, including tilling, may negatively impact the species. However, the magnitude of these threats could differ, depending on whether the species exhibits an anecic or endogeic life history. The species may be affected by pesticides, although based on the best available information, we are unable to verify or quantify these threats at this time.

In James (2000, p. 10), the author identifies certain research and monitoring priorities, including experimentally testing hypotheses of the mechanisms through which habitat disturbance, exotic species invasions, and other human-caused factors may affect native (earthworm) species, beginning with those species potentially threatened such as the GPE. In his 2009 letter, James states that in his opinion, the GPE is in danger of extinction (James 2009, p. 1); we have no other expert opinion or conflicting information in our files in this regard.

We acknowledge there are gaps in the data presented by the petitioner, and that we have very little specific information on the GPE in our files. Nonetheless, in conclusion, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to the present or threatened destruction, modification, or curtailment of the species' habitat or range.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition did not identify overutilization for commercial, recreational, scientific, or educational purposes as a potential threat to the GPE. In our October 9, 2007, 90–day finding (72 FR 57273) we acknowledged that three GPE individuals were inadvertently killed during research activities. Researchers have yet to find an efficient survey method that reliably finds the GPE without damaging it (Johnson-Maynard 2009b, p. 7). While we continue to acknowledge mortality of several GPE individuals due to scientific collection, we do not have population size information indicating that the loss of three individuals or the sampling risk in the future may be a threat to the continued existence of the species. Therefore, we do not have substantial information indicating that overutilization for commercial, recreational, scientific, or educational purposes may present a threat to the continued existence of the GPE.

C. Disease or Predation

The petition did not identify any threats to the GPE related to disease or predation; however, we found some relevant information available in our files. Hendrix and Bohlen (2002, p. 802) state that imported nonnative earthworms may be vectors for plant or animal pathogens or viruses, but do not correlate this potential threat to the GPE. Although James (1995, p. 11) states that predation on earthworms can be accentuated by tilling the soil and exposing earthworms to bird predators, the correlation to the GPE is inconclusive given uncertainties regarding its anecic or endogeic life-history form. Because of these uncertainties, we are unable to determine if the amount of predation would rise to the level of a threat to the species at this time. Other impacts from agricultural tilling are discussed in more detail under Factor A. In summary, we conclude neither the petition nor information in our files presents substantial scientific or commercial information to document that disease or predation presents a threat to the continued existence of the GPE.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petition claims that there are no Federal, State, or local regulations that specifically protect the GPE or its habitat. The Washington Department of Fish and Wildlife identifies the GPE as a species of concern (WDFW 2009, p. 1), although this status does not provide any regulatory protection for the species. The petition indicates that the Palouse Subbasin Management Plan, developed as part of the Northwest Power and Conservation Council review process for the subbasins in the Columbia River Basin, contains three objectives (7, 8, and 15) that are relevant to the GPE and its habitat. Objective 7 is designed to protect native grassland habitat within the Palouse subbasin; however, this objective is voluntary in nature and does not provide specific protection for the GPE. Objective 8 is designed to restore lost or degraded grassland habitat within the Palouse subbasin by identifying feasible opportunities for restoration. This objective does not define ''feasible opportunities,'' and appears to rely on a voluntary approach, which provides no regulatory protection for GPE habitat. Objective 15 is designed to increase wildlife habitat value on agricultural land for focal species; however, it is also voluntary in nature and does not provide specific protection for the GPE or its habitat.

The petition states that the Forest Service, Bureau of Land Management, Fish and Wildlife Service, Environmental Protection Agency, and NOAA Fisheries signed a memorandum of understanding (MOU) agreeing to implement the Interior Columbia Basin Strategy. The MOU commits the agencies to use information developed during the Interior Columbia Basin Ecosystem Management Project in future planning processes; however, neither the MOU nor the accompanying strategy specifically mention the GPE or create any regulatory mechanisms to provide protections for its habitat (petition p. 15).

According to the petition, the regulation of earthworms imported into the United States is based on the Federal Plant Pest Act (7 U.S.C. 150aa–150jj, May 23, 1957, as amended 1968, 1981, 1983, 1988 and 1994), under which the Animal and Plant Health Inspection Service controls imports containing soil that might carry

pathogens. The petition cited Hendrix and Bohlen (2002, p. 809), who state, "In the absence of pathogens, it appears that any earthworm species may be imported, that is, there is no specific consideration of earthworms as invasive organisms." The petition claims that regulation has not been effective in reducing the importation of nonnative earthworm species to the United States from other parts of the world, which poses a direct threat to the existence of the GPE and other native earthworm species (see Factor E for more information on impacts from nonnative earthworms).

Evaluation

Information in the petition and available in Service files indicates that there are limited regulatory mechanisms that may be protective of the GPE or its habitat. As we found in Factor A, the petition provided sufficient information indicating the species may be threatened by destruction, modification, or curtailment of its habitat or range from agricultural conversion, habitat fragmentation, urban development, pesticides, and soil compaction. Below, in Factor E, we discuss how the petitioner provided sufficient information indicating nonnative earthworm species impacts or competition may also present a threat to the GPE. Since we determine that the petition provided sufficient information indicating that both habitat loss and introduction of nonnative earthworms may be a threat to the GPE, the inadequacy of regulatory mechanisms to control these factors may also be a threat. Although the magnitude of this threat is presently indeterminable based on uncertainties regarding the species' biology, habitat needs, and its anecic or endogeic life history, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to the inadequacy of existing regulatory mechanisms.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Information Provided in the Petition

The petitioners claim that the GPE is threatened by invasive nonnative earthworms (Petition, p. 1). In a 3–year study of earthworms in the Palouse region of eastern Washington and Idaho, Sánchez-de León and Johnson-Maynard (2008, p. 8) found a dominance of invasive exotic earthworms in both native and nonnative grasslands. Exotic (nonnative) earthworms can invade new habitats, change the ecological soil functions, and displace native species (Hendrix and Bohlen 2002, p. 805; Petition, p. 16). Earthworm populations are dominated by nonnative earthworms in agricultural sites and native prairie remnants in the Palouse region (Fauci and Bezdicek 2002, p. 257; Sánchez-de León and Johnson-Maynard 2008, pp. 7–8; Petition p. 16). Habitat conversion favors invasion of nonnative earthworm species that are better adapted to a disturbed or degraded environment (Petition, p. 16; James 1995, p. 5). Some exotic earthworm species may be highly competitive with a deeper-dwelling species like the GPE. James (2000, p. 2) states that invasive earthworm species present a potential threat to the GPE. He describes the loss of a deep-dwelling Illinois earthworm species as an example, and states that the GPE is probably endogeic (deep-dwelling) as well (James 2009, p. 3).

We acknowledge that there are substantial weaknesses in extrapolating data from an Illinois species to the GPE, since we have no information that would indicate the responses of the Illinois species and the GPE to invasive earthworms would be similar. However, since we have no conflicting information in our files on this potential threat to the GPE, we are deferring to the expert's opinion for purposes of this 90–day finding.

The petitioners also describe the existence of introduced annual grasses and noxious weeds in the Palouse region, including: Kentucky bluegrass, crops, cheatgrass, and yellow-star thistle (Gilmore 2004, pp. 1–87), and assume these plants do not provide the same quality and quantity of earthworm forage as native vegetation (Petition, p. 17). The petitioners also claim that climate change resulting in changing weather patterns will impact the GPE (Petition, p. 17), since the amount of annual precipitation is a parameter that influences GPE habitat (Fender & McKey-Fender 1990, p. 366).

Evaluation

Information in the petition and available in our files indicates that other natural or manmade factors, including potential nonnative earthworm species impacts or competition may present a threat to the GPE. In a recent study in the Palouse region of southeastern Washington and northern Idaho, Sánchez-de León and Johnson-Maynard compared four paired sites of prairie remnants and CRP lands (2008, pp. 2, 8). The main purpose of the study was to characterize and compare native and exotic earthworm populations in two important grassland ecosystems of the Palouse region, native prairie remnants and CRP set asides.

One invasive earthworm species (*Aporrectodea trapezoides*) made up 90 percent of the total earthworm density in the paired comparison study (Sánchez-de León and Johnson-Maynard 2008, p. 4). The researchers also observed that *A. trapezoides* may compete with GPE for food in upper layers of soil (Sánchez-de León and Johnson-Maynard 2008, p. 6). One GPE was found at one of the four prairie remnant study sites used for the study. The researchers state that the rarity of native earthworms in their prairie site surveys lends support for the theory that native earthworms are being replaced by nonnative earthworms, even in visibly intact remnants of fragmented habitats (Sánchez-de León and Johnson-Maynard 2008, p. 6).

The researchers also present several scenarios regarding the GPE and nonnative earthworms: The GPE may be able to coexist with some species; some nonnative species may be replacing the GPE; or the GPE may remain only in lower quality prairie remnants (shallow rocky soils) (Sánchez-de León and Johnson-Maynard 2008, p. 6). The researchers propose that a combination of extensive habitat fragmentation in the Palouse region, low habitat quality of remaining prairie remnants, and possible competitive interactions with exotic earthworms, decimated GPE populations at their study sites (Sánchez-de León and Johnson-Maynard 2008, p. 6).

The Service agrees with the petitioner that native plant communities in the Palouse are susceptible to invasion by nonnative plants (Gilmore 2004, pp. 1-26; James 2000, p. 8), that domination of deep-soil sites by Kentucky bluegrass is common, and that in shallow soils cheatgrass and yellow-star thistle weeds compete with native grasslands. However, we have no information from the petitioner or our files that documents a threat to the GPE from these nonnative plants.

Although the petition expresses a concern about future climate change and its effects on the GPE, it does not present information or data in this regard. The Service evaluated information available in our files related to this potential threat. Lawler and Mathias (2007, pp. 19–20) investigated possible climate change impacts to vascular plants, stating that plants may mature earlier creating potential mismatches between pollinators and plants, parasites and hosts, and herbivores and food sources; increased summer temperatures and decreased

summer precipitation may lead to changes in distribution of some plant species; sagebrush steppe and grasslands may contract while dry forests and woodlands expand; and plant distribution changes will depend in part on plant water-use efficiencies. Based on the best available information, it is difficult to predict how or if future changes in growth or distribution of vegetation will affect local conditions for weeds, native vegetation, or both. It is also unclear how or if this will have an adverse or beneficial impact on the GPE or its habitat.

We acknowledge that the magnitude of the above threats is uncertain because we lack specific information on the species' biology and habitat needs. In addition, the species' exposure and response would likely differ, depending on whether it exhibits an anecic or endogeic life history. However, we find that the information provided in the petition, as well as other information in our files, presents substantial scientific or commercial information indicating that the petitioned action may be warranted due to other natural or man-made factors, in particular due to the presence of nonnative invasive earthworms.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we find that the petition presents substantial scientific or commercial information indicating that listing the GPE throughout its entire range may be warranted. This finding is based on information provided under factors A, D and E.

Because we have found that the petition presents substantial information indicating that listing the GPE may be warranted, we are initiating a status review to determine whether listing the GPE under the Act is warranted. The petition asserts that the GPE is also threatened or endangered throughout a significant portion of its range. Accordingly, a significant portion of the range analysis will be conducted during the status review if we determine that listing the species in its entire range is not warranted.

The "substantial information" standard for a 90–day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90–day finding does not constitute a status review under the Act. In a 12–month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90–day finding. Because the Act's standards for 90–day and 12–month findings are different, as described above, a substantial 90–day finding does not mean that the 12–month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov and upon request from the Washington Fish and Wildlife* Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this notice are the staff members of the Eastern Washington Field Office.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 2, 2010

Wendi Weber

Acting Director, U.S. Fish and Wildlife Service

[FR Doc. 2010–17709 Filed 7–19–10; 8:45 am]

BILLING CODE 4310–55–S

Notices

Federal Register
Vol. 75, No. 138
Tuesday, July 20, 2010

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

Forest Service

Southwest Mississippi Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southwest Mississippi Resource Advisory Committee will meet in Meadville, Mississippi. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to hold the first meeting of the 2010 committee.

DATES: The meeting will be held on August 5, 2010, and will begin at 6 p.m.

ADDRESSES: The meeting will be held at the Franklin County Public Library, 106 First Street, Meadville, MS. Written comments should be sent to David Chabreck, Homochitto National Forest, 1200 Highway 184 East, Meadville, MS 39653. Comments may also be sent via e-mail to *dochabreck@fs.fed.us,* or via facsimile to 601–384–2172.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Homochitto National Forest, 1200 Highway 184 East, Meadville, MS 39653. Visitors are encouraged to call ahead to 601–384–5876 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: David Chabreck, Designated Federal Officer, USDA, Homochitto National Forest, 1200 Highway 184 East, Meadville, MS 39653; (601) 384–5876; E-mail *dochabreck@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel. (2) Selection of a chairperson by the committee members. (3) Receive materials explaining the process for considering and recommending Title II projects; and (4) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: July 13, 2010.

David Chabreck,

Designated Federal Officer.

[FR Doc. 2010–17610 Filed 7–19–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Chequamegon Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Nicolet Resource Advisory Committee will meet in Crandon, Wisconsin. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to hold the first meeting of the newly formed committee.

DATES: The meeting will be held on August 10, 2010, and will begin at 9:30 a.m.

ADDRESSES: The meeting will be held at the Forest County Courthouse, County Board Room, 200 East Madison Street, Crandon, WI. Written comments should be sent to Penny McLaughlin, Chequamegon-Nicolet National Forest, 4978 Hwy 8 West, Laona, WI 54541. Comments may also be sent via e-mail to *pmclaughlin@fs.fed.us,* or via facsimile to 715–674–2545.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Chequamegon-Nicolet National Forest, 4978 Hwy 8 West, Laona, WI 54541. Visitors are encouraged to call ahead to 715–674–4481 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Penny McLaughlin, RAC coordinator, USDA, Chequamegon-Nicolet National Forest, 4978 Hwy 8 West, Laona, WI 54541; (715) 674–4481; E-mail *pmclaughlin@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel; (2) Receive materials explaining the process for considering and recommending Title II projects; (3) Selection of a chairperson by the committee members; and (4) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: July 13, 2010.

Paul I. V. Strong,

Forest Supervisor.

[FR Doc. 2010–17676 Filed 7–19–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–894]

Certain Tissue Paper Products From the People's Republic of China: Notice of Continuation of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty order on certain tissue paper products (tissue paper) from the People's Republic of China (PRC) would be likely to lead to continuation or recurrence of

dumping and of material injury to an industry in the United States within a reasonably foreseeable time, the Department is publishing notice of the continuation of this antidumping duty order.

DATES: *Effective Date:* July 20, 2010.

FOR FURTHER INFORMATION CONTACT: Rebecca Trainor or Brandon Farlander, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2010, the Department initiated and the ITC instituted a sunset review of the antidumping duty order on tissue paper from the PRC, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). *See also Notice of Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 16223 (March 30, 2005).

The Department conducted an expedited sunset review of this order. As a result of its review, the Department found that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping, and notified the ITC of the magnitude of the margins likely to prevail were the order to be revoked. *See Certain Tissue Paper Products from the People's Republic of China: Final Results of Expedited Sunset Review,* 75 FR 32910 (June 10, 2010) (*Final Results*).

On July 8, 2010, the ITC published its determination pursuant to section 751(c) of the Act, that revocation of the antidumping duty order on tissue paper from the PRC would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Certain Tissue Paper Products from China; Determinations,* 75 FR 39277 (July 8, 2010).

Scope of the Order

The tissue paper products covered by the order are cut-to-length sheets of tissue paper having a basis weight not exceeding 29 grams per square meter. Tissue paper products subject to the order may or may not be bleached, dye-colored, surface-colored, glazed, surface decorated or printed, sequined, crinkled, embossed, and/or die cut. The tissue paper subject to the order is in the form of cut-to-length sheets of tissue paper with a width equal to or greater than one-half (0.5) inch. Subject tissue paper may be flat or folded, and may be packaged by banding or wrapping with paper or film, by placing in plastic or film bags, and/or by placing in boxes for distribution and use by the ultimate consumer. Packages of tissue paper subject to the order may consist solely of tissue paper of one color and/or style, or may contain multiple colors and/or styles.

The merchandise subject to the order does not have specific classification numbers assigned to them under the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may be under one or more of several different subheadings, including: 4802.30, 4802.54, 4802.61, 4802.62, 4802.69, 4804.31.1000, 4804.31.2000, 4804.31.4020, 4804.31.4040, 4804.31.6000, 4804.39, 4805.91.1090, 4805.91.5000, 4805.91.7000, 4806.40, 4808.30, 4808.90, 4811.90, 4823.90, 4802.50.00, 4802.90.00, 4805.91.90, 9505.90.40. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.[1]

Excluded from the scope of the order are the following tissue paper products: (1) Tissue paper products that are coated in wax, paraffin, or polymers, of a kind used in floral and food service applications; (2) tissue paper products that have been perforated, embossed, or die-cut to the shape of a toilet seat, *i.e.,* disposable sanitary covers for toilet seats; (3) toilet or facial tissue stock, towel or napkin stock, paper of a kind used for household or sanitary purposes, cellulose wadding, and webs of cellulose fibers (HTSUS 4803.00.20.00 and 4803.00.40.00).

Continuation of the Order

As a result of the determinations by the Department and the ITC that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty orders on tissue paper from the PRC.

U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of this order will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of this finding not later than June 2015.

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: July 15, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–17704 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–DS–P

[1] On January 30, 2007, at the direction of U.S. Customs and Border Protection, the Department added the following HTSUS classifications to the antidumping duty/countervailing duty module for tissue paper: 4802.54.3100, 4802.54.6100, and 4823.90.6700. However, we note that the six-digit classifications for these numbers were already listed in the scope.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of State Coastal Management Programs and National Estuarine Research Reserves

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Office of Ocean and Coastal Resource Management, National Ocean Service, Commerce.

ACTION: Notice of Intent to Evaluate.

SUMMARY: The NOAA Office of Ocean and Coastal Resource Management (OCRM) announces its intent to evaluate the performance of the Elkhorn Slough (California) National Estuarine Research Reserve.

The National Estuarine Research Reserve evaluation will be conducted pursuant to sections 312 and 315 of the CZMA and regulations at 15 CFR Part 921, Subpart E and Part 923, Subpart L. Evaluation of a National Estuarine Research Reserve requires findings concerning the extent to which a State has met the national objectives, adhered to its Reserve final management plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA.

Each evaluation will include a site visit, consideration of public comments, and consultations with interested Federal, State, and local agencies and members of the public. A public meeting will be held as part of the site visit. When the evaluation is completed, OCRM will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings. Notice is hereby given of the date of the site visit

for the listed evaluation, and the date, local time, and location of the public meeting during the site visits.

DATES: *Dates and Times:* The Elkhorn Slough (California) National Estuarine Research Reserve evaluation site visit will be held August 2–6, 2010. One public meeting will be held during the week. The public meeting will be held on Tuesday, August 3, 2010, at 6 p.m. at the Elkhorn Slough National Estuarine Research Reserve, Administration Building Conference Room, 1700 Elkhorn Road, Watsonville, California.

ADDRESSES: Copies of the State's most recent performance reports, as well as OCRM's evaluation notification and supplemental information request letters to the State, are available upon request from OCRM. Written comments from interested parties regarding this Program are encouraged and will be accepted until 15 days after the public meeting. Please direct written comments to Kate Barba, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, N/ORM7, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Kate Barba, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, N/ORM7, Silver Spring, Maryland 20910, (301) 563–1182.

Dated: July 15, 2010.

Donna Wieting,

Director, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration.

Federal Domestic Assistance Catalog 11.419, Coastal Zone Management Program Administration.

[FR Doc. 2010–17629 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1695]

Expansion of Foreign-Trade Zone 152, Burns Harbor, Indiana

Pursuant to its authority under the Foreign-Trade Zones (FTZ) Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Ports of Indiana, grantee of Foreign-Trade Zone No. 152, submitted an application to the Board for authority to expand FTZ 152 in the Burns Harbor, Indiana, area, within the Chicago Customs and Border Protection port of entry (FTZ Docket 56–2009, filed 12/14/2009);

Whereas, notice inviting public comment was given in the **Federal Register** (74 FR 69329, 12/31/2009) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 152 is approved, subject to the Act and the Board's regulations, including Section 400.28. Signed at Washington, DC, this 8th day of July 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–17707 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX61

Fisheries of the South Atlantic and Gulf of Mexico; South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council (SAFMC) will hold a meeting of its Scientific and Statistical Committee (SSC) to discuss Acceptable Biological Catch (ABC) Control Rules, and recommend ABC values for South Atlantic managed species. See **SUPPLEMENTARY INFORMATION**.

DATES: The meeting will be held August 16–17, 2010. See **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held at the Town and Country Inn, 2008 Savannah Highway, Charleston, SC 29407; telephone: (800) 334–6660; fax: (843) 766–9444.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; e-mail: *Kim.Iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Reauthorized Act, the SSC is the body responsible for reviewing the Council's scientific materials. The SSC will discuss ABC control rules for stocks which do not have peer reviewed quantitative stock assessments and develop ABC recommendations.

Meeting Schedule:

August 16, 2010, 1 p.m. - 6 p.m.

August 17, 2010, 8:30 a.m. - 1 p.m.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 3 business days prior to the meeting.

Dated: July 14, 2010.

William D. Chappell,

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

[FR Doc. 2010–17582 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX62

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council)

Salmon Technical Team (STT) and Habitat Committee (HC) sub-committees will hold a joint meeting to develop a draft assessment of the factors triggering an overfishing concern for SRFC. The report will include analyses of fishing and non-fishing related factors, and recommendations for stock rebuilding. This meeting of the STT and HC sub-committees is open to the public.

DATES: The meeting will be held Tuesday, August 31, 2010, from 8:30 a.m. to 4:30 p.m.

ADDRESSES: The meeting will be held at the California Department of Fish and Game, 474 Aviation Blvd., Suite 130, Santa Rosa, CA 95403.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to update a report assessing the cause of SRFC failing to meet the 122,000 adult spawner conservation objective, and the implication to the long-term productivity of the stock not meeting that objective, for three consecutive years.

When a salmon stock managed by the Pacific Council fails to meet its conservation objective for three consecutive years, an overfishing concern is triggered according to the terms of the Pacific Coast Salmon Plan (Salmon Plan). The Salmon Plan requires the Pacific Council to direct its STT and HC to undertake a review of the status of the stock in question and determine if excessive harvest was responsible for the shortfall, if other factors were involved, and the significance of the stock depression with regard to achieving maximum sustainable yield. The assessment is scheduled to be completed in time to report to the Pacific Council at its March 2011 meeting.

Although non-emergency issues not contained in the meeting agenda may come before the subcommittees for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: July 14, 2010.

William D. Chappell,

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

[FR Doc. 2010–17583 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–893]

Certain Frozen Warmwater Shrimp from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 20, 2010.

FOR FURTHER INFORMATION CONTACT: Robert Palmer or Kabir Archuletta, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; (202) 482–9068 or (202) 482–2593, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 9, 2010, the Department of Commerce ("Department") published a notice of initiation of an administrative review of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China ("PRC") covering the period February 1, 2009 through January 31, 2010. *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*, 75 FR 18154 (April 9, 2010) ("*Initiation*").

On July 6, 2010, the Ad Hoc Shrimp Trade Action Committee[1] ("Petitioners") withdrew their request for an administrative review of Allied Pacific Aquatic Products Zhanjiang Co. Ltd. and Allied Pacific Food (Dalian) Co., Ltd. Petitioners were the only party to request a review of these companies.

[1] Ad Hoc Shrimp Trade Action Committee ("AHSTAC") is the petitioner in the underlying investigation. The members of AHSTAC are: Nancy Edens; Papa Rod, Inc., Carolina Seafoods; Bosarge Boats, Inc.; Knight's Seafood Inc.; Big Grapes, Inc.; Versaggi Shrimp Co.; and Craig Wallis.

Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. Petitioners' request was submitted within the 90 day period and, thus, is timely. Because Petitioners' withdrawal of requests for review is timely and because no other party requested a review of the aforementioned companies, in accordance with 19 CFR 351.213(d)(1), we are partially rescinding this review with respect to the above listed companies.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. As the companies for which this review has been rescinded have a separate rate, antidumping duties shall be assessed, at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded, as of the publication date of this notice, of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial

protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: July 14, 2010.

Edward C. Yang,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–17706 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XX27

Taking and Importing Marine Mammals; Operations of a Liquified Natural Gas Port Facility in Massachusetts Bay

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

ACTION: Notice; proposed incidental harassment authorization and receipt of application for five year regulations; request for comments and information.

SUMMARY: NMFS has received a request from the Northeast Gateway Energy Bridge™ L.L.C. (Northeast Gateway or NEG) and its partner, Algonquin Gas Transmission, LLC (Algonquin), for authorization to take marine mammals incidental to operating a liquified natural gas (LNG) port facility by NEG and Algonquin, in Massachusetts Bay for the period of August 2010 through August 2011. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an authorization to Northeast Gateway and Algonquin to incidentally take, by harassment, small numbers of marine mammals for a period of 1 year.

DATES: Comments and information must be received no later than August 19, 2010.

ADDRESSES: Comments should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910 3226. The mailbox address for providing email comments on this action is *PR1.0648–XN24@noaa.gov*. Comments sent via email, including all attachments, must not exceed a 10 megabyte file size. A copy of the application and a list of references used in this document may be obtained by writing to this address, by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) and is also available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

The Maritime Administration (MARAD) and U.S. Coast Guard (USCG) Final Environmental Impact Statement (Final EIS) on the Northeast Gateway Energy Bridge LNG Deepwater Port license application is available for viewing at *http://dms.dot.gov* under the docket number 22219.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713 2289, ext 137.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and 101(a)(5)(D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking 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 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 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, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking 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 United States 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 authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On June 14, 2010, NMFS received an application from Excelerate Energy, L.P. (Excelerate) and Tetra Tech EC, Inc., on behalf of Northeast Gateway and Algonquin for an authorization to take 12 species of marine mammals by Level B harassment incidental to operations of an LNG port facility in Massachusetts Bay. Since LNG Port operation and maintenance activities have the potential to take marine mammals, a marine mammal take authorization under the MMPA is warranted. NMFS has already issued a one year incidental harassment authorization for this activity pursuant to section 101(a)(5)(D) of the MMPA (74 FR 45613; September 3, 2009), which expires on August 31, 2010. In order to for Northeast Gateway and Algonquin to continue their operations of the LNG port facility in Massachusetts Bay, both companies are seeking a renewal of their IHA.

Description of the Activity

The Northeast Gateway Port is located in Massachusetts Bay and consists of a submerged buoy system to dock specially designed LNG carriers approximately 13 mi (21 km) offshore of Massachusetts in federal waters approximately 270 to 290 ft (82 to 88 m) in depth. This facility delivers regasified LNG to onshore markets via a 16.06 mi (25.8 km) long, 24 in (61 cm) outside diameter natural gas pipeline lateral (Pipeline Lateral) owned and operated by Algonquin and interconnected to Algonquin's existing offshore natural gas pipeline system in Massachusetts Bay (HubLine).

The Northeast Gateway Port consists of two subsea Submerged Turret Loading™ (STL™) buoys, each with a flexible riser assembly and a manifold connecting the riser assembly, via a steel flowline, to the subsea Pipeline Lateral. Northeast Gateway utilizes vessels from its current fleet of specially designed Energy Bridge Regasification VesselsJ (EBRVs™), each capable of transporting approximately 2.9 billion ft^3 (82 million m^3) of natural gas condensed to 4.9 million $feet^3$ (138,000

m^3) of LNG. Northeast Gateway would also be adding vessels to its fleet that will have a cargo capacity of approximately 151,000 cubic m^3. The mooring system installed at the Northeast Gateway Port is designed to handle both the existing vessels and any of the larger capacity vessels that may come into service in the future. The EBRVs would dock to the STL buoys, which would serve as both the single point mooring system for the vessels and the delivery conduit for natural gas. Each of the STL buoys is secured to the seafloor using a series of suction anchors and a combination of chain/cable anchor lines.

The proposed activity includes Northeast Gateway LNG Port operations and maintenance.

NEG Port Operations

During NEG Port operations, EBRVs servicing the Northeast Gateway Port will utilize the newly configured and International Maritime Organization (IMO) approved Boston Traffic Separation Scheme (TSS) on their approach to and departure from the Northeast Gateway Port at the earliest practicable point of transit. EBRVs will maintain speeds of 12 knots or less while in the TSS, unless transiting the Off Race Point Seasonal Management Area between the dates of March 1 and April 30, or the Great South Channel Seasonal Management Area between the dates of April 1 and July 31, when they will not exceed 10–knots or when there have been active right whale sightings, active acoustic detections, or both, in the vicinity of the transiting EBRV in the TSS or at the Northeast Gateway Port, in which case the vessels also will slow their speeds to 10 knots or less.

As an EBRV makes its final approach to the Northeast Gateway Port, vessel speed will gradually be reduced to 3 knots at 1.86 mi (3 km) out to less than 1 knot at a distance of 1,640 ft (500 m) from the Northeast Gateway Port. When an EBRV arrives at the Northeast Gateway Port, it would retrieve one of the two permanently anchored submerged STL buoys. It would make final connection to the buoy through a series of engine and bow thruster actions. The EBRV would require the use of thrusters for dynamic positioning during docking procedure. Typically, the docking procedure is completed over a 10 to 30 minute period, with the thrusters activated as necessary for short periods of time in second bursts, not a continuous sound source. Once connected to the buoy, the EBRV will begin vaporizing the LNG into its natural gas state using the onboard regasification system. As the LNG is regasified, natural gas will be transferred at pipeline pressures off the EBRV through the STL buoy and flexible riser via a steel flowline leading to the connecting Pipeline Lateral. When the LNG vessel is on the buoy, wind and current effects on the vessel would be allowed to Aweathervane@ on the single point mooring system; therefore, thrusters will not be used to maintain a stationary position.

It is estimated that the NEG Port could receive approximately 65 cargo deliveries a year. During this time period thrusters would be engaged in use for docking at the NEG Port approximately 10 to 30 minutes for each vessel arrival and departure.

NEG Port Maintenance

The specified design life of the NEG Port is about 40 years, with the exception of the anchors, mooring chain/rope, and riser/umbilical assemblies, which are based on a maintenance free design life of 20 years. The buoy pick up system components are considered consumable and would be inspected following each buoy connection, and replaced (from inside the STL compartment during the normal cargo discharge period) as deemed necessary. The underwater components of the NEG Port would be inspected once yearly in accordance with Classification Society Rules (American Bureau of Shipping) using either divers or remotely operated vehicles (ROVs) to inspect and record the condition of the various STL system components. These activities would be conducted using the NEG Port's normal support vessel (125–foot, 99 gross ton, 2,700 horsepower, aluminum mono-hull vessel), and to the extent possible would coincide with planned weekly visits to the NEG Port. Helicopters would not be used for marker line maintenance inspections.

Detailed information on the operations and maintenance activities can be found in the MARAD/USCG Final EIS on the Northeast Gateway Project (see **ADDRESSES** for availability). Detailed information on the LNG facility's operation and maintenance activities, and noise generated from operations was also published in the **Federal Register** for the proposed IHA for Northeast Gateway's LNG Port construction and operations on March 13, 2007 (72 FR 11328).

Description of Marine Mammals in the Area of the Specified Activities

Marine mammal species that potentially occur in the vicinity of the Northeast Gateway facility include several species of cetaceans and pinnipeds:

North Atlantic right whale (*Eubalaena glacialis*),
humpback whale (*Megaptera novaeangliae*),
fin whale (*Balaenoptera physalus*),
minke whale (*B. acutorostrata*),
long-finned pilot whale (*Globicephala melas*),
Atlantic white sided dolphin (*Lagenorhynchus acutus*),
bottlenose dolphin (*Tursiops truncatus*),
common dolphin (*Delphinus delphis*),
killer whale (*Orcinus orca*),
harbor porpoise (*Phocoena phocoena*),
harbor seal (*Phoca vitulina*), and
gray seal (*Halichoerus grypus*).

Information on those species that may be affected by this activity is discussed in detail in the USCG Final EIS on the Northeast Gateway LNG proposal. Please refer to that document for more information on these species and potential impacts from construction and operation of this LNG facility. In addition, general information on these marine mammal species can also be found in W?rsig *et al.* (2000) and in the NMFS Stock Assessment Reports (Waring *et al.*, 2010). This latter document is available at: *http://www.nefsc.noaa.gov/publications/tm/tm213/*. An updated summary on several commonly sighted marine mammal species distribution and abundance in the vicinity of the proposed action area is provided below.

Humpback Whale

The highest abundance for humpback whales is distributed primarily along a relatively narrow corridor following the 100 m (328 ft) isobath across the southern Gulf of Maine from the northwestern slope of Georges Bank, south to the Great South Channel, and northward alongside Cape Cod to Stellwagen Bank and Jeffreys Ledge. The relative abundance of whales increases in the spring with the highest occurrence along the slope waters (between the 40- and 140–m, or 131- and 459-ft, isobaths) off Cape Cod and Davis Bank, Stellwagen Basin and Tillies Basin and between the 50 and 200 m (164– and 656–ft) isobaths along the inner slope of Georges Bank. High abundance is also estimated for the waters around Platts Bank. In the summer months, abundance increases markedly over the shallow waters (<50 m, or <164 ft) of Stellwagen Bank, the waters (100–200 m, or 328–656 ft) between Platts Bank and Jeffreys Ledge, the steep slopes (between the 30 and 160 m isobaths) of Phelps and Davis Bank north of the Great South Channel towards Cape Cod, and between the 50–

and 100–m (164– and 328–ft) isobath for almost the entire length of the steeply sloping northern edge of Georges Bank. This general distribution pattern persists in all seasons except winter, when humpbacks remain at high abundance in only a few locations including Porpoise and Neddick Basins adjacent to Jeffreys Ledge, northern Stellwagen Bank and Tillies Basin, and the Great South Channel.

Fin Whale

Spatial patterns of habitat utilization by fin whales are very similar to those of humpback whales. Spring and summer high use areas follow the 100–m (328 ft) isobath along the northern edge of Georges Bank (between the 50– and 200–m (164 and 656 ft) isobaths), and northward from the Great South Channel (between the 50– and 160–m, or 164– and 525–ft, isobaths). Waters around Cashes Ledge, Platts Bank, and Jeffreys Ledge are all high use areas in the summer months. Stellwagen Bank is a high use area for fin whales in all seasons, with highest abundance occurring over the southern Stellwagen Bank in the summer months. In fact, the southern portion of the Stellwagen Bank National Marine Sanctuary (SBNMS) is used more frequently than the northern portion in all months except winter, when high abundance is recorded over the northern tip of Stellwagen Bank. In addition to Stellwagen Bank, high abundance in winter is estimated for Jeffreys Ledge and the adjacent Porpoise Basin (10– to 160–m, 328– to 656–ft, isobaths), as well as Georges Basin and northern Georges Bank.

Minke Whale

Like other piscivorous baleen whales, highest abundance for minke whale is strongly associated with regions between the 50– and 100–m (164– and 328–ft) isobaths, but with a slightly stronger preference for the shallower waters along the slopes of Davis Bank, Phelps Bank, Great South Channel and Georges Shoals on Georges Bank. Minke whales are sighted in the SBNMS in all seasons, with highest abundance estimated for the shallow waters (approximately 40 m, or 131 ft) over southern Stellwagen Bank in the summer and fall months. Platts Bank, Cashes Ledge, Jeffreys Ledge, and the adjacent basins (Neddick, Porpoise and Scantium) also support high relative abundance. Very low densities of minke whales remain throughout most of the southern Gulf of Maine in winter.

North Atlantic Right Whale

North Atlantic right whales are generally distributed widely across the southern Gulf of Maine in spring with highest abundance locate over the deeper waters (100– to 160–m, or 328– to 525–ft, isobaths) on the northern edge of the Great South Channel and deep waters (100 - 300 m, 328–984 ft) parallel to the 100–m (328–ft) isobath of northern Georges Bank and Georges Basin. High abundance is also found in the shallowest waters (< 30 m, or <98 ft) of Cape Cod Bay, over Platts Bank and around Cashes Ledge. Lower relative abundance is estimated over deep water basins including Wilkinson Basin, Rodgers Basin and Franklin Basin. In the summer months, right whales move almost entirely away from the coast to deep waters over basins in the central Gulf of Maine (Wilkinson Basin, Cashes Basin between the 160– and 200–m, or 525– and 656–ft, isobaths) and north of Georges Bank (Rogers, Crowell and Georges Basins). Highest abundance is found north of the 100–m (328–ft) isobath at the Great South Channel and over the deep slope waters and basins along the northern edge of Georges Bank. The waters between Fippennies Ledge and Cashes Ledge are also estimated as high use areas. In the fall months, right whales are sighted infrequently in the Gulf of Maine, with highest densities over Jeffreys Ledge and over deeper waters near Cashes Ledge and Wilkinson Basin. In winter, Cape Cod Bay, Scantum Basin, Jeffreys Ledge, and Cashes Ledge were the main high use areas. Although SBNMS does not appear to support the highest abundance of right whales, sightings within SBNMS are reported for all four seasons, albeit at low relative abundance. Highest sighting within SBNMS occured along the southern edge of the Bank.

Long-finned Pilot Whale

The long finned pilot whale is more generally found along the edge of the continental shelf (a depth of 330 to 3,300 ft, or 100 to 1,000 m), choosing areas of high relief or submerged banks in cold or temperate shoreline waters. This species is split between two subspecies: the Northern and Southern subspecies. The Southern subspecies is circumpolar with northern limits of Brazil and South Africa. The Northern subspecies, which could be encountered during operation of the NEG Port, ranges from North Carolina to Greenland (Reeves *et al.*, 2002; Wilson and Ruff, 1999). In the western North Atlantic, long-finned pilot whales are pelagic, occurring in especially high densities in winter and spring over the continental slope, then moving inshore and onto the shelf in summer and autumn following squid and mackerel populations (Reeves *et al.*, 2002). They frequently travel into the central and northern Georges Bank, Great South Channel, and Gulf of Maine areas during the summer and early fall (May and October) (NOAA, 1993). According to the species stock report, the population estimate for the Western North Atlantic long finned pilot whale is 26,535 individuals (Waring *et al.*, 2010).

Atlantic White Sided Dolphin

In spring, summer and fall, Atlantic white sided dolphins are widespread throughout the southern Gulf of Maine, with the high use areas widely located either side of the 100–m (328–ft) isobath along the northern edge of Georges Bank, and north from the Great South Channel to Stellwagen Bank, Jeffreys Ledge, Platts Bank and Cashes Ledge. In spring, high use areas exist in the Great South Channel, northern Georges Bank, the steeply sloping edge of Davis Bank and Cape Cod, southern Stellwagen Bank and the waters between Jeffreys Ledge and Platts Bank. In summer, there is a shift and expansion of habitat toward the east and northeast. High use areas are identified along most of the northern edge of Georges Bank between the 50– and 200–m (164– and 656–ft) isobaths and northward from the Great South Channel along the slopes of Davis Bank and Cape Cod. High sightings are also recorded over Truxton Swell, Wilkinson Basin, Cashes Ledge and the bathymetrically complex area northeast of Platts Bank. High sightings of white sided dolphin are recorded within SBNMS in all seasons, with highest density in summer and most widespread distributions in spring locate mainly over the southern end of Stellwagen Bank. In winter, high sightings are recorded at the northern tip of Stellwagen Bank and Tillies Basin.

A comparison of spatial distribution patterns for all baleen whales (Mysticeti) and all porpoises and dolphins combined show that both groups have very similar spatial patterns of high and low use areas. The baleen whales, whether piscivorous or planktivorous, are more concentrated than the dolphins and porpoises. They utilize a corridor that extended broadly along the most linear and steeply sloping edges in the southern Gulf of Maine indicated broadly by the 100 m (328 ft) isobath. Stellwagen Bank and Jeffreys Ledge support a high abundance of baleen whales throughout the year. Species richness maps indicate that high use areas for individual whales and dolphin species co occurr, resulting in similar patterns of species richness primarily along the southern portion of

the 100–m (328–ft) isobath extending northeast and northwest from the Great South Channel. The southern edge of Stellwagen Bank and the waters around the northern tip of Cape Cod are also highlighted as supporting high cetacean species richness. Intermediate to high numbers of species are also calculated for the waters surrounding Jeffreys Ledge, the entire Stellwagen Bank, Platts Bank, Fippennies Ledge and Cashes Ledge.

Killer Whale, Common Dolphin, Bottlenose Dolphin, and Harbor Porpoise

Although these four species are some of the most widely distributed small cetacean species in the world (Jefferson *et al.*, 1993), they are not commonly seen in the vicinity of the proposed project area in Massachusetts Bay (Wiley *et al.*, 1994; NCCOS, 2006; Northeast Gateway Marine Mammal Monitoring Weekly Reports, 2007).

Harbor Seal and Gray Seal

In the U.S. waters of the western North Atlantic, both harbor and gray seals are usually found from the coast of Maine south to southern New England and New York (Warrings *et al.*, 2010).

Along the southern New England and New York coasts, harbor seals occur seasonally from September through late May (Schneider and Payne, 1983). In recent years, their seasonal interval along the southern New England to New Jersey coasts has increased (deHart, 2002). In U.S. waters, harbor seal breeding and pupping normally occur in waters north of the New Hampshire/Maine border, although breeding has occurred as far south as Cape Cod in the early part of the 20th century (Temte *et al.*, 1991; Katona *et al.*, 1993).

Although gray seals are often seen off the coast from New England to Labrador, within the U.S. waters, only small numbers of gray seals have been observed pupping on several isolated islands along the Maine coast and in Nantucket Vineyard Sound, Massachusetts (Katona *et al.*, 1993; Rough, 1995). In the late 1990s, a year round breeding population of approximately over 400 gray seals was documented on outer Cape Cod and Muskeget Island (Warring *et al.*, 2007).

Potential Effects of Noise on Marine Mammals

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 temporary threshold shift (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.

There are three general categories of sounds recognized by NMFS: continuous (such as shipping sounds), intermittent (such as vibratory pile driving sounds), and impulse. No impulse noise activities, such as blasting or standard pile driving, are associated with this project. The noise sources of potential concern are regasification/offloading (which is a continuous sound) and dynamic positioning of vessels using thrusters (an intermittent sound) from EBRVs during docking at the NEG port facility. Based on research by Malme *et al.* (1983; 1984), for both continuous and intermittent sound sources, Level B harassment is presumed to begin at received levels of 120 dB. The detailed description of the noise that would result from the proposed LNG Port operations is provided in the **Federal Register** for the initial construction and operations of the NEG LNG Port facility and Pipeline Lateral in 2007 (72 FR 27077; May 14, 2007).

NEG Port Activities

Underwater noise generated at the NEG Port has the potential to result from two distinct actions, including closed-loop regasification of LNG and/or EBRV maneuvering during coupling and decoupling with STL buoys. To evaluate the potential for these activities to result in underwater noise that could harass marine mammals, Excelerate conducted field sound survey studies during periods of March 21 to 25, 2005 and August 6 to 9, 2006 while the EBRV Excelsior was both maneuvering and moored at the operational Gulf Gateway Port located 116 mi (187 km) offshore in the Gulf of Mexico (the Gulf) (see Appendices B and C of the NEG and Algonquin application). EBRV maneuvering conditions included the use of both stern and bow thrusters required for dynamic positioning during coupling. These data were used to model underwater sound propagation at the NEG Port. The pertinent results of the field survey are provided as underwater sound source pressure levels as follows:

- Sound levels during closed-loop regasification ranged from 104 to 110 decibel linear (dBL). Maximum levels during steady state operations were 108 dBL.
- Sound levels during coupling operations were dominated by the periodic use of the bow and stern thrusters and ranged from 160 to 170 dBL.

Figures 1–1 and 1–2 of the NEG and Algonquin's revised MMPA permit application present the net acoustic impact of one EBRV operating at the NEG Port. Thrusters are operated intermittently and only for relatively short durations of time. The resulting area within the 120 dB isopleth is less than 1 km^2 with the linear distance to the isopleths extending 430 m (1,411 ft). The area within the 180 dB isopleth is very localized and will not extend beyond the immediate area where EBRV coupling operations are occurring.

The potential impacts to marine mammals associated with sound propagation from vessel movements, anchors, chains and LNG regasification/offloading could be the temporary and short term displacement of seals and whales from within the 120 dB zones ensonified by these noise sources. Animals would be expected to re occupy the area once the noise ceases.

Estimates of Take by Harassment

Although Northeast Gateway stated that the ensonified area of 120–dB isopleths by EBRV's decoupling would be less than 1 km^2 as measured in the Gulf of Mexico in 2005, due to the lack of more recent sound source verification and the lack of source measurement in Massachusetts Bay, NMFS uses a more conservative spreading model to calculate the 120 dB isopleth received sound level. This model was also used to establish 120–dB zone of influence (ZOI) for the previous IHAs issued to Northeast Gateway. In the vicinity of the LNG Port, where the water depth is about 80 m (262 ft), the 120 dB radius is estimated to be 2.56 km (1.6 mi) maximum from the sound source during dynamic positioning for the container ship, making a maximum ZOI of 21 km^2 (8.1 mi^2). For shallow water depth (40 m or 131 ft) representative of the northern segment of the Algonquin Pipeline Lateral, the 120–dB radius is estimated to be 3.31 km (2.06 mi), the associated ZOI is 34 km^2 (13.1 mi^2).

The basis for Northeast Gateway and Algonquin's "take" estimate is the number of marine mammals that would be exposed to sound levels in excess of 120 dB. For the NEG port facility operations, the take estimates are determined by multiplying the area of the EBRV's ZOI (21 km^2) by local marine mammal density estimates, corrected to account for 50 percent more marine mammals that may be underwater, and then multiplying by the estimated LNG container ship visits per year. In the case of data gaps, a conservative approach was used to ensure the potential number of takes is not underestimated, as described next.

NMFS recognizes that baleen whale species other than North Atlantic right whales have been sighted in the project area from May to November. However, the occurrence and abundance of fin, humpback, and minke whales is not well documented within the project area. Nonetheless, NMFS uses the data on cetacean distribution within Massachusetts Bay, such as those published by the National Centers for Coastal Ocean Science (NCCOS, 2006), to estimate potential takes of marine mammals species in the vicinity of project area.

The NCCOS study used cetacean sightings from two sources: (1) the North Atlantic Right Whale Consortium (NARWC) sightings database held at the University of Rhode Island (Kenney, 2001); and (2) the Manomet Bird Observatory (MBO) database, held at NMFS Northeast Fisheries Science Center (NEFSC). The NARWC data contained survey efforts and sightings data from ship and aerial surveys and opportunistic sources between 1970 and 2005. The main data contributors included: Cetacean and Turtles Assessment Program (CETAP), Canadian Department of Fisheries and Oceans, PCCS, International Fund for Animal Welfare, NOAA's NEFSC, New England Aquarium, Woods Hole Oceanographic Institution, and the University of Rhode Island. A total of 653,725 km (406,293 mi) of survey track and 34,589 cetacean observations were provisionally selected for the NCCOS study in order to minimize bias from uneven allocation of survey effort in both time and space. The sightings per unit effort (SPUE) was calculated for all cetacean species by month covering the southern Gulf of Maine study area, which also includes the project area (NCCOS, 2006).

The MBO's Cetacean and Seabird Assessment Program (CSAP) was contracted from 1980 to 1988 by NMFS NEFSC to provide an assessment of the relative abundance and distribution of cetaceans, seabirds, and marine turtles in the shelf waters of the northeastern United States (MBO, 1987). The CSAP program was designed to be completely compatible with NMFS NEFSC databases so that marine mammal data could be compared directly with fisheries data throughout the time series during which both types of information were gathered. A total of 5,210 km (8,383 mi) of survey distance and 636 cetacean observations from the MBO data were included in the NCCOS analysis. Combined valid survey effort for the NCCOS studies included 567,955 km (913,840 mi) of survey track for small cetaceans (dolphins and porpoises) and 658,935 km (1,060,226 mi) for large cetaceans (whales) in the southern Gulf of Maine. The NCCOS study then combined these two data sets by extracting cetacean sighting records, updating database field names to match the NARWC database, creating geometry to represent survey tracklines and applying a set of data selection criteria designed to minimize uncertainty and bias in the data used.

Owing to the comprehensiveness and total coverage of the NCCOS cetacean distribution and abundance study, NMFS calculated the estimated take number of marine mammals based on the most recent NCCOS report published in December 2006. A summary of seasonal cetacean distribution and abundance in the project area is provided above, in the Marine Mammals Affected by the Activity section. For a detailed description and calculation of the cetacean abundance data and sighting per unit effort (SPUE), please refer to the NCCOS study (NCCOS, 2006). These data show that the relative abundance of North Atlantic right, fin, humpback, minke, and pilot whales, and Atlantic white sided dolphins for all seasons, as calculated by SPUE in number of animals per square kilometer, is 0.0082, 0.0097, 0.0265, 0.0059, 0.0407, and 0.1314 n/km, respectively.

In calculating the area density of these species from these linear density data, NMFS used 0.4 km (0.25 mi), which is a quarter the distance of the radius for visual monitoring (see Proposed Monitoring, Mitigation, and Reporting section below), as a conservative hypothetical strip width (W). Thus the area density (D) of these species in the project area can be obtained by the following formula:

$$D = SPUE/2W.$$

Based on this calculation method, the estimated take numbers per year for North Atlantic right, fin, humpback, minke, sei, and pilot whales, and Atlantic white sided dolphins by the NEG Port facility operations, which is an average of 65 visits by LNG container ships to the project area per year (or approximately 1.25 visits per week), operating the vessels= thrusters for dynamic positioning before offloading natural gas, corrected for 50 percent underwater, are 21, 25, 68, 15, 11, 104, and 336, respectively. These numbers represent maximum of 6.08, 1.09, 8.01, 0.46, 2.78, 0.39, and 0.53 percent of the populations for these species, respectively. Since it is very likely that individual animals could be Ataken@ by harassment multiple times, these percentages are the upper boundary of the animal population that could be affected. Therefore, the actual number of individual animals being exposed or taken would be far less. There is no danger of injury, death, or hearing impairment from the exposure to these noise levels.

In addition, bottlenose dolphins, common dolphins, killer whales, harbor porpoises, harbor seals, and gray seals could also be taken by Level B harassment as a result of deepwater LNG port operations. The numbers of estimated take of these species are not available because they are rare in the

project area. The population estimates of these marine mammal species and stock in the west North Atlantic basin are 81,588; 120,743; 89,054; 99,340; and 195,000 for bottlenose dolphins, common dolphins, harbor porpoises, and harbor seals, respectively (Waring *et al.*, 2010). No population estimate is available for the North Atlantic stock of killer whales and gray seals, however, their occurrence within the proposed project area is rare. Since the Massachusetts Bay represents only a small fraction of the west North Atlantic basin where these animals occur, and these animals do not congregate in the vicinity of the project area, NMFS believes that only relatively small numbers of these marine mammal species would be potentially affected by the Northeast Gateway LNG deepwater project. From the most conservative estimates of both marine mammal densities in the project area and the size of the 120 dB zone of (noise) influence, the calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population size.

Potential Impact on Habitat

Approximately 4.8 acres of seafloor has been converted from soft substrate to artificial hard substrate. The soft-bottom benthic community may be replaced with organisms associated with naturally occurring hard substrate, such as sponges, hydroids, bryozoans, and associated species. The benthic community in the up to 43 acres (worst case scenario based on severe 100–year storm with EBRVs occupying both STL buoys) of soft bottom that may be swept by the anchor chains while EBRVs are docked will have limited opportunity to recover, so this area will experience a long-term reduction in benthic productivity. In addition, disturbance from anchor chain movement would result in increased turbidity levels in the vicinity of the buoys that could affect prey species for marine mammals; however, as indicated in the final EIS/FEIR, these impacts are expected to be short-term, indirect, and minor.

Daily removal of sea water from EBRV intakes will reduce the food resources available for planktivorous organisms. Water usage would be limited to the standard requirements of NEG's normal support vessel. As with all vessels operating in Massachusetts Bay, sea water uptake and discharge is required to support engine cooling, typically using a once-through system. The rate of seawater uptake varies with the ship's horsepower and activity and therefore will differ between vessels and activity type. For example, the Gateway Endeavor is a 90–foot vessel powered with a 1,200 horsepower diesel engine with a four-pump seawater cooling system. This system requires seawater intake of about 68 gallons per minute (gpm) while idling and up to about 150 gpm at full power. Use of full power is required generally for transit. A conservatively high estimate of vessel activity for the Gateway Endeavor would be operation at idle for 75% of the time and full power for 25% of the time. During the routine activities this would equate to approximately 42,480 gallons of seawater per 8–hour work day. When compared to the engine cooling requirements of an EBRV over an 8–hour period (approximately 17.62 million gallons), the Gateway Endeavour uses about 0.2% of the EBRV requirement. To put this water use into context, the Project's final EIS/EIR concluded that the impacts to fish populations and to marine mammals that feed on fish or plankton resulting from water use by an EBRV during port operations (approximately 39,780,000 gallons over each 8–day regasification period) would be minor. Water use by support vessels during routine port activities would not materially add to the overall impacts evaluated in the final EIS/EIR. Additionally, discharges associated with the Gateway Endeavor and/or other support/maintenance vessels that are 79 feet or greater in length, are now regulated under the Clean Water Act (CWA) and must receive and comply with the United States Environmental Protection Agency (EPA) Vessel General Permit (VGP). The permit incorporates the USCG mandatory ballast water management and exchange standards, and provides technology- and water quality-based effluent limits for other types of discharges, including deck runoff, bilge water, graywater, and other pollutants. It also establishes specific corrective actions, inspection and monitoring requirements, and recordkeeping and reporting requirements for each vessel. Massachusetts Bay circulation will not be altered, however, so plankton will be continuously transported into the NEG Port area. The removal of these species is minor and unlikely to affect in a measurable way the food sources available to marine mammals.

Proposed Monitoring and Mitigation Measures

During the construction and operations of the NEG LNG Port facility in prior years, Northeast Gateway submitted reports on marine mammal sightings in the area. While it is difficult to draw biological conclusions from these reports, NMFS can make some general conclusions. Data gathered by MMOs is generally useful to indicate the presence or absence of marine mammals (often to a species level) within the safety zones (and sometimes without) and to document the implementation of mitigation measures. Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance as a result of Northeast Gateway's activities were observed by the MMOs.

In addition, Northeast Gateway was required to maintain an array of Marine Autonomous Recording Units (MARUs) to monitor calling North Atlantic right whales (humpback, fin, and minke whale calls were also able to be detected). The Bioacoustics Research Program (BRP) of the Cornell University analyzed the data and submitted a report covering the operations of the project between January and December 2008. During the operations period, right whales were detected on only 1,982 of the 136,776 total hours sampled (1.45% of recorded hours). Right whales were detected hourly throughout the year, but were more commonly detected in the late February through June period.

The Cornell's BRP performed acoustic analyses on background noise of all recordings from the MARUs. A comparison of the noise metrics derived from these analyses before, during, and after operations activities revealed increases in noise level during operations. A comparison of noise levels from areas including and near areas of known operations activities with levels from other areas showed increased noise levels for areas that included or were near the known operations activities. These increases in noise levels were evident for each of the three frequency bands utilized by fin, humpback, and right whales, with the greatest increase in the right whale band and the next highest increase in the humpback whale band. However, the BRP report did not provide an interpretation of this overall increase in noise conditions throughout the period when operations activities occurred. Nevertheless, NMFS does not consider that the sporadic exposure of marine mammals to continuous sound received levels above 120 dB by a single EBRV would have acute or chronicle significant affects to these animals in the vicinity of the LNG port facility. These MARUs will remain deployed during the time frame of this proposed IHA in order to obtain information during the operational phase of the Port facility (see below).

For the proposed NEG LNG port operations, NMFS proposes the

following monitoring and mitigation measures.

Marine Mammal Observers

For activities related to the NEG LNG port operations, all individuals onboard the EBRVs responsible for the navigation and lookout duties on the vessel must receive training prior to assuming navigation and lookout duties, a component of which will be training on marine mammal sighting/reporting and vessel strike avoidance measures. Crew training of EBRV personnel will stress individual responsibility for marine mammal awareness and reporting.

If a marine mammal is sighted by a crew member, an immediate notification will be made to the Person in Charge on board the vessel and the Northeast Port Manager, who will ensure that the required vessel strike avoidance measures and reporting procedures are followed.

Vessel Strike Avoidance

(1) All EBRVs approaching or departing the port will comply with the Mandatory Ship Reporting (MSR) system to keep apprised of right whale sightings in the vicinity. Vessel operators will also receive active detections from an existing passive acoustic array prior to and during transit through the northern leg of the Boston TSS where the buoys are installed.

(2) In response to active right whale sightings (detected acoustically or reported through other means such as the MSR or Sighting Advisory System (SAS)), and taking into account safety and weather conditions, EBRVs will take appropriate actions to minimize the risk of striking whales, including reducing speed to 10 knots or less and alerting personnel responsible for navigation and lookout duties to concentrate their efforts.

(3) EBRVs will maintain speeds of 12 knots or less while in the TSS until reaching the vicinity of the buoys (except during the seasons and areas defined below, when speed will be limited to 10 knots or less). At 1.86 mi (3 km) from the NEG port, speed will be reduced to 3 knots, and to less than 1 knot at 1,640 ft (500 m) from the buoy.

(4) EBRVs will reduce transit speed to 10 knots or less over ground from March 1 April 30 in all waters bounded by straight lines connecting the following points in the order stated below. This area is known as the Off Race Point Seasonal Management Area (SMA) and tracks NMFS regulations at 50 CFR 224.105:

42°30'00.0″ N - 069°45'00.0″ W; thence to 42°30'00.0; N - 070°30'00.0″ W; thence to 42°12'00.0″ N - 070°30'00.0″ W; thence to 42°12'00.0″ N - 070°12'00.0″ W; thence to 42°04'56.5″ N - 070o12'00.0″ W; thence along charted mean high water line and inshore limits of COLREGS limit to a latitude of 41°40'00.0″ N; thence due east to 41°41'00.0″ N - 069°45'00.0″ W; thence back to starting point.

(5) EBRVs will reduce transit speed to 10 knots or less over ground from April 1 July 31 in all waters bounded by straight lines connecting the following points in the order stated below. This area is also known as the Great South Channel SMA and tracks NMFS regulations at 50 CFR 224.105:

42°30'00.0″ N–69°45'00.0″ W
41°40'00.0″ N- 69°45'00.0″ W
41°00'00.0″ N- 69°05'00.0″ W
42°09'00.0″ N- 67°08'24.0″ W
42°30'00.0″ N- 67°27'00.0″ W
42°30'00.0″ N- 69°45'00.0″ W

(6) LNGRVs are not expected to transit Cape Cod Bay. However, in the event transit through Cape Cod Bay is required, LNGRVs will reduce transit speed to 10 knots or less over ground from January 1 May 15 in all waters in Cape Cod Bay, extending to all shorelines of Cape Cod Bay, with a northern boundary of 42°12'00.0″ N latitude.

(7) A vessel may operate at a speed necessary to maintain safe maneuvering speed instead of the required ten knots only if justified because the vessel is in an area where oceanographic,

hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board or, when a vessel is not carrying a pilot, the master of the vessel. If a deviation from the ten knot speed limit is necessary, the reasons for the deviation, the speed at which the vessel is operated, the latitude and longitude of the area, and the time and duration of such deviation shall be entered into the logbook of the vessel. The master of the vessel shall attest to the accuracy of the logbook entry by signing and dating it.

Research Passive Acoustic Monitoring (PAM) Program

Northeast Gateway shall monitor the noise environment in Massachusetts Bay in the vicinity of the NEG Port using an array of 19 Marine Autonomous Recording Units (MARUs) that were deployed initially in April 2007 to collect data during the preconstruction and active construction phases of the NEG Port and Algonquin Pipeline Lateral. A description of the MARUs can be found in Appendix A of the NEG and Algonquin application. These 19 MARUs will remain in the same configuration during full operation of the NEG Port. The MARUs collect archival noise data and are not designed to provide real-time or near-real-time information about vocalizing whales. Rather, the acoustic data collected by the MARUs shall be analyzed to document the seasonal occurrences and overall distributions of whales (primarily fin, humpback, and right whales) within approximately 10 nautical miles of the NEG Port, and shall measure and document the noise "budget" of Massachusetts Bay so as to eventually assist in determining whether an overall increase in noise in the Bay associated with the NEG Port might be having a potentially negative impact on marine mammals. The overall intent of this system is to provide better information for both regulators and the general public regarding the acoustic footprint associated with long-term operation of the NEG Port in Massachusetts Bay, and the distribution of vocalizing marine mammals during NEG Port activities. In addition to the 19 MARUs, Northeast Gateway will deploy 10 ABs within the TSS for the operational life of the NEG Port. A description of the ABs is provided in Appendix A of this NEG and Algonquin's application. The purpose of the ABs shall be to detect a calling North Atlantic right whale an average of 5 nm (9.26 km) from each AB (detection ranges will vary based on ambient underwater conditions). The AB system shall be the primary detection mechanism that alerts the EBRV captains to the occurrence of right whales, heightens EBRV awareness, and triggers necessary mitigation actions as described in the Marine Mammal Detection, Monitoring, and Response Plan included as Appendix A of the NEG application.

Northeast Gateway has engaged representatives from Cornell University's Bioacoustics Research Program (BRP) and the Woods Hole Oceanographic Institution (WHOI) as the consultants for developing, implementing, collecting, and analyzing the acoustic data; reporting; and maintaining the acoustic monitoring system.

Further information detailing the deployment and operation of arrays of 19 passive seafloor acoustic recording units (MARUs) centered on the terminal site and the 10 ABs that are to be placed at approximately 5–m (8.0–km) intervals within the recently modified TSS can be found in the Marine Mammal Detection, Monitoring, and Response Plan

included as Appendix A of the NEG and Algonquin application.

Reporting

The Project area is within the Mandatory Ship Reporting Area (MSRA), so all vessels entering and exiting the MSRA will report their activities to WHALESNORTH. During all phases of the Northeast Gateway LNG Port operations, sightings of any injured or dead marine mammals will be reported immediately to the USCG or NMFS, regardless of whether the injury or death is caused by project activities.

An annual report on marine mammal monitoring and mitigation would be submitted to NMFS Office of Protected Resources and NMFS Northeast Regional Office within 90 days after the expiration of an LOA. The annual report shall include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of LNG facility operation. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation activities shall also be included in the annual report.

Negligible Impact and Small Numbers Analysis and Preliminary Determination

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." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) the number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Northeast Gateway's proposed port operation and maintenance activities, and none are proposed to be authorized by NMFS. Additionally, animals in the area are not anticipated to incur any hearing impairment (i.e., TTS or PTS), as the modeling of source levels indicating none of the source received levels exceeds 180 dB (rms).

While some of the species occur in the proposed project area year-round, some species only occur in the area during certain seasons. Sei whales are only anticipated in the area during the spring. Therefore, if shipments and/or maintenance activities occur in other seasons, the likelihood of sei whales being affected is quite low. Humpback and minke whales are not expected in the project area in the winter. During the winter, a large portion of the North Atlantic right whale population occurs in the southeastern U.S. calving grounds (i.e., South Carolina, Georgia, and northern Florida). The fact that certain activities will occur during times when certain species are not commonly found in the area will help reduce the amount of Level B harassment for these species.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24–hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Operational activities are not anticipated to occur at the Port on consecutive days. In addition, Northeast Gateway EBRVs are expected to make 65 port calls throughout the year, with thruster use needed for a couple of hours. Therefore, Northeast Gateway will not be creating increased sound levels in the marine environment for prolonged period of time.

Of the 12 marine mammal species likely to occur in the area, four are listed as endangered under the ESA: North Atlantic right, humpback, fin, and sei whales. All of these species, as well as the northern coastal stock of bottlenose dolphin, are also considered depleted under the MMPA. There is currently no designated critical habitat or known reproductive areas for any of these species in or near the proposed project area. However, there are several well known North Atlantic right whale feeding grounds in the Cape Cod Bay and Great South Channel. No mortality or injury is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

The population estimates for the species that may be taken by harassment from the most recent U.S. Atlantic Stock Assessment Reports were provided earlier in this document. From the most conservative estimates of both marine mammal densities in the project area and the size of the 120–dB ZOI, the maximum calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population sizes (8.01 percent for humpback whales and 6.08 percent for North Atlantic right whales and no more than 2.78 percent of any other species).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that operation, including repair and maintenance activities, of the Northeast Gateway LNG Port will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from Northeast Gateway's proposed activiites will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act

On February 5, 2007, NMFS concluded consultation with MARAD and the USCG, under section 7 of the Endangered Species Act (ESA), on the proposed construction and operation of the Northeast Gateway LNG facility and issued a biological opinion. The finding of that consultation was that the construction and operation of the Northeast Gateway LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green or leatherback sea turtles. An incidental take statement (ITS) was issued following NMFS' issuance of the IHA.

On November 15, 2007, Northeast Gateway and Algonquin submitted a letter to NMFS requesting an extension for the LNG Port construction into December 2007. Upon reviewing Northeast Gateway's weekly marine mammal monitoring reports submitted under the previous IHA, NMFS recognized that the potential take of some marine mammals resulting from the LNG Port and Pipeline Lateral by Level B behavioral harassment likely had exceeded the original take estimates. Therefore, NMFS Northeast Region (NER) reinitiated consultation

with MARAD and USCG on the construction and operation of the Northeast Gateway LNG facility. On November 30, 2007, NMFS NER issued a revised biological opinion, reflecting the revised construction time period and including a revised ITS. This revised biological opinion concluded that the construction and operation of the Northeast Gateway LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales.

NEPA

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the proposed Northeast Gateway Port and Pipeline Lateral. A notice of availability was published by MARAD on October 26, 2006 (71 FR 62657). The Final EIS/EIR provides detailed information on the proposed project facilities, construction methods and analysis of potential impacts on marine mammal.

NMFS was a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the Draft and Final EISs. NMFS has reviewed the Final EIS and has adopted it. Therefore, the preparation of another EIS or EA is not warranted.

Preliminary Determinations

NMFS has preliminarily determined that the impact of operations of the Northeast Gateway LNG Port facility may result, at worst, in a temporary modification in behavior of small numbers of certain species of marine mammals that may be in close proximity to the Northeast Gateway LNG facility during its operations and maintenance. These activities are expected to result in some local short term displacement and will have no more than a negligible impact on the affected species or stocks of marine mammals.

This preliminary determination is supported by proposed mitigation, monitoring, and reporting measures described in this document on this action.

As a result of the described proposed mitigation and monitoring measures, no take by injury or death would be requested, anticipated or authorized, and the potential for temporary or permanent hearing impairment is very unlikely due to the relatively low noise levels (and consequently small zone of impact).

While the number of marine mammals that may be harassed will depend on the distribution and abundance of marine mammals in the vicinity of the LNG Port facility, the estimated numbers of marine mammals to be harassed is small relative to the affected species or stock sizes. Please see Estimate of Take by Harassment section above for the calculation of these take numbers.

Proposed Authorization

NMFS proposes to issue an IHA to Northeast Gateway and Algonquin for conducting LNG Port facility operations and maintenance in Massachusetts Bay, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Information Solicited

NMFS requests interested persons to submit comments and information concerning this proposed IHA and Northeast Gateway and Algonquin's application for incidental take regulations (see **ADDRESSES**). NMFS requests interested persons to submit comments, information, and suggestions concerning both the request and the structure and content of future regulations to allow this taking. NMFS will consider this information in developing proposed regulations to govern the taking.

Dated: July 13, 2010.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–17692 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2010–0052]

Treatment of Letters Stating That the USPTO's Patent Term Adjustment Determination Is Greater Than What the Applicant or Patentee Believes Is Appropriate

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is clarifying its treatment of letters submitted by applicants and patentees stating that the USPTO's patent term adjustment determination indicated on a notice of allowance, issue notification, or patent, is greater than what the applicant or patentee believes is appropriate. The USPTO will place these letters in the file of the application or patent without further review. The USPTO will no longer review these letters or issue certificates of correction on the basis of a review of these letters. If the applicant or patentee wants the USPTO to reconsider its patent term adjustment determination, the applicant or patentee must use the procedures set forth in 37 CFR 1.705 for requesting reconsideration of a patent term adjustment determination. A patentee may also file a terminal disclaimer disclaiming any period considered in excess of the appropriate patent term adjustment. However, the USPTO does not require an applicant or patentee to file either a request for reconsideration under 37 CFR 1.705 or a terminal disclaimer when the patent term adjustment indicated on a notice of allowance, issue notification, or patent is greater than what the applicant or patentee believes is appropriate.

DATES: The clarification set forth in this notice applies to all patent term adjustment letters and requests for a certificate of correction filed at any time that are pending before the USPTO on or after July 20, 2010.

FOR FURTHER INFORMATION CONTACT: Nancy E. Johnson, Office of Petitions: By telephone at 571–272–3219; or by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

SUPPLEMENTARY INFORMATION: The Manual of Patent Examining Procedure (MPEP) was revised in 2004 to indicate that if a notice of allowance indicates a patent term adjustment that is longer than expected, the applicant may wait until the patent issues, and if the patent issues with a value that is incorrect, request a certificate of correction. *See* MPEP § 2733. The MPEP does not specify what action the USPTO will take in response to such a request for a certificate of correction. The USPTO is, in this notice, clarifying when the USPTO will change the patent term adjustment determination indicated on a patent via a certificate of correction under either 35 U.S.C. 254 or 255.

The USPTO, however, has determined that it is not appropriate to provide a patent term adjustment recalculation via a certificate of correction under 35 U.S.C. 254 or 255. A certificate of correction is permissible under 35 U.S.C. 254 only for a mistake in a patent that "is clearly disclosed by the records of the Office." *See* 35 U.S.C. 254. While the applicable patent term adjustment is ascertainable from the records of the USPTO, a revised patent term adjustment determination requires a complex calculation and is not "clearly disclosed" by the records of the USPTO.

In addition, a certificate of correction is permissible under 35 U.S.C. 255 only for "a mistake of a clerical or typographical nature, or of minor character." *See* 35 U.S.C. 255.

Thus, the USPTO has long maintained that a request for a certificate of correction under either 35 U.S.C. 254 or 255 is not an appropriate venue for seeking a change to the patent term adjustment indicated on a patent. *See Revision of Patent Term Extension and Patent Term Adjustment Provisions,* 69 FR 21704, 21707 (Apr. 22, 2004) (final rule) ("Petitions under [37 CFR] 1.182 or 1.183, or requests for a certificate of correction under either 35 U.S.C. 254 and [37 CFR] 1.323 or 35 U.S.C. 255 and [37 CFR] 1.324, are not substitute *fora* to obtain reconsideration of a patent term adjustment determination indicated in a notice of allowance if an applicant fails to submit a request for reconsideration within the time period specified in [37 CFR] 1.705(b), or to obtain reconsideration of a patent term adjustment determination indicated in a patent if a patentee fails to submit a request for reconsideration within the time period specified in [37 CFR] 1.705(d)"). The patent term adjustment provisions of 35 U.S.C. 154(b) provide for the establishment of procedures for patent term adjustment determinations, including providing the applicant one opportunity to request reconsideration of any patent term adjustment determination. *See* 35 U.S.C. 154(b)(3). It would render the provisions of 35 U.S.C. 154(b)(3) superfluous if patent term adjustment determinations could be revised at any time during the life of the patent via a certificate of correction under 35 U.S.C. 254 or 255. In addition, the patent term adjustment provisions of 35 U.S.C. 154(b) are designed to have patent term adjustment issues to be resolved shortly after a patent issues by providing a period of one hundred and eighty days from the grant of the patent for seeking court review of the USPTO's patent term adjustment determination (rather than the six-year statute of limitations otherwise applicable for actions under the Administrative Procedures Act). *See* 35 U.S.C. 154(b)(4). It would negate the purpose of the one hundred and eighty day period in 35 U.S.C. 154(b)(4) to allow patent term adjustment determinations to be revised at any time during the life of the patent via a certificate of correction under 35 U.S.C. 254 or 255. Therefore, it is not appropriate to issue a certificate of correction under 35 U.S.C. 254 or 255 to revise the patent term adjustment indicated in a patent unless it is being revised for consistency with: (1) The patent term adjustment determined via a decision on a request for reconsideration under 37 CFR 1.705; or (2) the total patent term adjustment indicated on the Patent Application Information Retrieval (PAIR) screen that displays the patent term adjustment calculation for the patent.

Accordingly, the USPTO is clarifying that it will treat letters submitted by applicants and patentees stating that the USPTO's patent term adjustment determination indicated on a notice of allowance, issue notification, or patent is greater than what the applicant or patentee believes is appropriate by placing these letters in the file of the application or patent without comment. The USPTO will no longer review these letters or issue certificates of correction under either 35 U.S.C. 254 or 255 on the basis of a review of these letters. In addition, the USPTO will not grant a request for a certificate of correction under either 35 U.S.C. 254 or 255 to revise the patent term adjustment indicated in a patent, except in the two situations discussed previously. If a patentee submits a request for a certificate of correction under either 35 U.S.C. 254 or 255 to revise the patent term adjustment indicated in a patent that includes changes in the patent for which a certificate of correction would be appropriate, the request for a certificate of correction will not be granted unless the patentee submits a new request for a certificate of correction that does not also attempt to revise the patent term adjustment indicated in the patent.

If the applicant or patentee wants the USPTO to reconsider its patent term adjustment determination, the applicant or patentee must use the procedures set forth in 37 CFR 1.705 for requesting reconsideration of a patent term adjustment determination, whether the USPTO's patent term adjustment determination is greater than or less than the adjustment that the applicant or patentee believes to be appropriate. A patentee may also file a terminal disclaimer at any time disclaiming any period considered in excess of the appropriate patent term adjustment. *See* 35 U.S.C. 253 and 37 CFR 1.321. However, the USPTO does not require an applicant or patentee to file either a request for reconsideration under 37 CFR 1.705 or a terminal disclaimer when the patent term adjustment indicated on a notice of allowance, issue notification, or patent is greater than what the applicant or patentee believes is appropriate.

The appropriate sections of the MPEP will be revised in accordance with this notice in due course.

Dated: July 14, 2010.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2010–17667 Filed 7–19–10; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Agricultural Advisory Committee Meeting

AGENCY: Commodity Futures Trading Commission ("CFTC").

ACTION: Notice of Meeting of Agricultural Advisory Committee.

SUMMARY: The CFTC's Agricultural Advisory Committee will hold a public meeting on August 5, 2010, from 9 a.m. to 1 p.m., at the Commission's Washington, DC headquarters. The agenda for the meeting includes (1) the ICE Futures US Cotton Contract, (2) wheat price convergence issues, and (3) price reporting issues in the cattle and hog markets. Members of the public may file written statements with the committee. If time permits, reasonable provision will be made for oral presentations by members of the public of up to five minutes.

DATES: The meeting will be held on August 5, 2010 from 9 a.m. to 1 p.m.. Members of the public who wish to make oral statements should inform Commissioner Michael V. Dunn, who chairs the committee, in writing at least three business days before the meeting.

ADDRESSES: The meeting will take place in the first floor hearing room at the Commission's headquarters, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Written statements and requests to make oral statements should be sent to the attention of Agricultural Advisory Committee, c/o Chairman Michael V. Dunn, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: Nicole McNair at (202) 418–5070.

SUPPLEMENTARY INFORMATION: The meeting will be webcast on the Commission's Web site, *http://www.cftc.gov.* Members of the public also can listen to the meeting by telephone. The public access call-in numbers will be announced at a later date.

Authority: 5 U.S.C. app. 2 § 10(a)(2) .

Dated: July 14, 2010.

By the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–17605 Filed 7–19–10; 8:45 a.m.]

BILLING CODE P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. Sec. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning the locating of respondents for the National Evaluation of Youth Corps. The National Evaluation of Youth Corps is a study to determine the impact of participation in youth corps on members' educational attainment, employment and earnings, workplace and life skills, and avoidance of risk behaviors. The National Evaluation of Youth Corps is based on the hypothesis that participation in youth corps may lead to measurable outcomes for participants. The study uses an experimental design to assess program impacts on program participants. Many of the youth corps programs receive all or part of their funding from the Corporation.

Copies of the information collection requests can be obtained by contacting the office listed in the address section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by September 20, 2010.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Attention: Lillian Dote, Program Officer, Office of Research and Policy Development, Curtis Center, 601 Walnut Street, Suite 876E, Philadelphia, PA, 19106.

(2) By hand delivery or by courier to the street address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) *By fax to:* (215) 597–4933, Attention: Lillian Dote, Program Officer, Office of Research and Policy Development.

(4) Electronically through the Corporation's e-mail address system: *ldote@cns.gov.*

FOR FURTHER INFORMATION CONTACT: Lillian Dote at (215) 597–2715 or by e-mail at *ldote@cns.gov.*

SUPPLEMENTARY INFORMATION:

The Corporation is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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 expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses).

Background

The Corporation is interested in learning about the effects of national service on participants. This study uses an experimental design to assess the outcomes associated with participation in national service. The proposed locating effort will be completed by sample members only, including former corps members and their counterparts in the comparison group.

In an effort to reduce the burden on sample members during this locating effort, the Corporation is simplifying the information collection. A large number of employment, education, civic engagement, and risk behavior questions will be eliminated or simplified, thereby resulting in a reduction in the prior burden estimate. In addition, the Corporation has reduced the sample from 2,267 to 2,043. Study participants who did not respond to the baseline and 18-month follow-up survey have been removed from the sample.

Current Action

The Corporation seeks renewal of its earlier application.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: National Evaluation of Youth Corps.

OMB Number: 3045–0124.

Agency Number: None.

Affected Public: Individuals who have agreed to participate in the National Evaluation of Youth Corps and who have completed a baseline survey.

Total Respondents: 2,043.

Frequency: Periodically.

Average Time per Response: Averages 15 minutes.

Estimated Total Burden Hours: 511 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 13, 2010.

Kevin Cramer,

Acting Director, Office of Research and Policy Development.

[FR Doc. 2010–17586 Filed 7–19–10; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF EDUCATION

The Historically Black College and University Capital Financing Advisory Board

AGENCY: Department of Education. The Historically Black College and University Capital Financing Advisory Board.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming open meeting of the Historically Black College and University Capital Financing Advisory Board (Board). The notice also describes the functions of the Board. 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.

DATES: Friday, July 30, 2010.

TIME: 10 a.m.–1 p.m.

ADDRESSES: U.S. Department of Education, Board Room, 555 New Jersey Avenue, NW., Washington, DC. 20001.

FOR FURTHER INFORMATION CONTACT: Donald E. Watson, Executive Director, Historically Black College and University Capital Financing (HBCU Capital Financing) Advisory Board, 1990 K Street, NW., Room 6071, Washington, DC 20006; telephone: (202) 219–7037; fax: (202) 502–7852; e-mail: *donald.watson@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, Monday through Friday between the hours of 8 a.m. and 8 p.m., Eastern Standard Time.

SUPPLEMENTARY INFORMATION: The Board is authorized by Title III, Part D, Section 347, of the Higher Education Act of 1965, as amended in 1998 (20 U.S.C. 1066f). The Board is established within the Department of Education to provide advice and counsel to the Secretary and the designated bonding authority as to the most effective and efficient means of implementing construction financing on Historically Black College and University (HBCU) campuses and to advise Congress regarding the progress made in implementing the program. Specifically, the Board will provide advice as to the capital needs of HBCUs, how those needs can be met through the program, and what additional steps might be taken to improve the operation and implementation of the construction-financing program.

The purpose of this meeting is to review current program activities, to make administrative and legislative recommendations to the Secretary and the U.S. Congress that address the current capital needs of HBCUs and capital financing issues of HBCUs, and to share additional steps in which the HBCU Capital Financing Program might improve its operation.

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 Donald Watson at 202 219–7037, no later than July 16, 2010. 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.

An opportunity for public comment is available on Friday, July 30, 2010, between 12:30 p.m.–1 p.m. Those members of the public interested in submitting written comments may do so by submitting them to the attention of Donald Watson, 1990 K Street, NW., Room 6071, Washington, DC, by Friday, July 16, 2010.

Records are kept of all Board proceedings and are available for public inspection at the Office of the Historically Black College and University Capital Financing Advisory Board, 1990 K Street, NW., Room 6071, Washington, DC 20006, from the hours of 9 a.m. to 5 p.m., Eastern Standard Time (EST), 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 Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister/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 1–866–512–1800; or, in the Washington, DC area at 202 512–0000.

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.*

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2010–17699 Filed 7–19–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Intent To Prepare an Environmental Impact Statement for the Recapitalization of Infrastructure Supporting Naval Spent Nuclear Fuel Handling and Examination at the Idaho National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement; Notice of Public Meetings.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality regulations for implementing the procedural provisions of NEPA (40 CFR part 1500–1508), and the Department of Energy (DOE) implementing procedures (10 CFR part 1021), the DOE Naval Nuclear Propulsion Program (NNPP) announces its intent to prepare an Environmental Impact Statement (EIS) for the Recapitalization of Naval Spent Nuclear Fuel Handling and Examination Facilities at the Idaho National Laboratory (INL). The NNPP intends to prepare an EIS for the recapitalization of infrastructure at the Expended Core Facility (ECF) at the INL in Idaho. This action supports the receipt, handling, examination, and packaging of naval spent nuclear fuel removed from nuclear-powered aircraft carriers and submarines, as well as from land-based prototype reactors, and the examination of other irradiated materials. Infrastructure recapitalization (*e.g.,* new or improved facilities and equipment) is needed to ensure continued naval nuclear-powered operations and missions for at least the next 40 years. In addition, the recapitalized infrastructure will support the Navy's commitments, as identified in the 1995 Idaho Settlement Agreement (amended in June 2008), among the State of Idaho, the DOE, and the Navy. Three public scoping meetings will be held.

DATES: NNPP invites interested parties to comment on the proposed scope of the EIS. NNPP will consider all comments received by September 3, 2010, and to the extent practical comments received after that date, in the preparation of the EIS.

The public meetings will address the scope of the planned EIS. For dates, times, and locations of public scoping meetings, *see* **SUPPLEMENTARY INFORMATION.**

ADDRESSES: Written comments on the scope of the EIS may be submitted by mailing to: Mr. Gregory F. Holden (08U–Naval Reactors), Naval Sea Systems Command, 1240 Isaac Hull Avenue, SE., Stop 8036, Washington Navy Yard, DC 20376–8036.

Comments provided by E–Mail should be submitted to *ecfrecapitalization@unnpp.gov* and comments provided via phone should be made by calling 1–866–369–4802.

FOR FURTHER INFORMATION CONTACT: For further information about this project, contact Mr. Gregory F. Holden, as described above.

SUPPLEMENTARY INFORMATION: The NNPP is responsible for all aspects of U.S. Navy nuclear power and propulsion. These responsibilities include design, maintenance, and safe operation of nuclear propulsion systems throughout their operational life cycles. A crucial component of this mission, naval spent nuclear fuel handling, occurs at the end of a nuclear propulsion system's useful life. Once a naval nuclear core is depleted, the NNPP is responsible for removal of the spent nuclear fuel

through a defueling or refueling operation. Both operations remove the spent nuclear fuel from a reactor core, but a refueling operation also involves installing new fuel into the reactor core, allowing the nuclear-powered ship to be redeployed into the U.S. Navy fleet. After the naval spent nuclear fuel has been removed from an aircraft carrier or submarine, NNPP spent fuel handling includes the subsequent transfer, preparation, and packaging required for dry storage pending transportation of the fuel to a national geologic repository or interim storage site.

A second component of the mission is to support the design and maintenance of nuclear propulsion systems by providing for the examination of naval spent nuclear fuel and irradiated materials. This examination includes the receipt and unloading of the spent nuclear fuel; preparation of irradiated materials for examination using various visual, microscopic, and metallurgical techniques; and preparation of small fuel and non-fuel test samples for insertion into test reactors, where they are irradiated.

The NNPP ensures that naval spent nuclear fuel handling and examination are performed in a safe and environmentally responsible manner in accordance with 50 U.S.C. 2406, 2511 (codifying Executive Order 12344). Nuclear fuel handling and examination are intricate and intensive processes requiring a complex infrastructure. Naval spent nuclear fuel handling includes the transfer of spent nuclear fuel removed from a reactor to the ECF at the Naval Reactors Facility (NRF) at the INL, where it is received, unloaded, prepared, and packaged for disposal. Currently, naval spent nuclear fuel examination and the examination of some irradiated specimens are performed at the ECF. Examination of spent naval fuel and irradiated materials is essential to the mission of the Navy for three reasons: to provide data on current reactor performance, to validate models used to predict future performance, and to support research to improve reactor design.

The NNPP is proposing to recapitalize the existing ECF infrastructure at the INL. The purpose of the proposed action is to ensure the continued availability of the infrastructure needed to support the transfer, handling, examination, and packaging of naval spent nuclear fuel removed from nuclear-powered aircraft carriers and submarines, as well as from land-based prototype reactors, and the examination of other irradiated materials, for at least the next 40 years. This action is needed because, although the ECF at the NRF, where this work is currently supported, continues to be maintained and operated in a safe and environmentally responsible manner, a significant portion of the ECF infrastructure has been in service for over 50 years. Deterioration of the ECF infrastructure could immediately and profoundly impact the NNPP mission, including the NNPP's ability to support refueling and defueling of nuclear powered submarines and aircraft carriers. The ECF capabilities to transfer, prepare, examine, and package naval spent nuclear fuel, and other irradiated materials are vital to the NNPP's mission of maintaining the reliable operation of the naval nuclear-powered fleet and developing militarily effective nuclear propulsion plants.

Consistent with the Record of Decision for the April 1995 *DOE Programmatic EIS for Spent Nuclear Fuel Management (DOE/EIS–0203–F),* naval spent nuclear fuel is shipped by rail from shipyards and prototype facilities to NRF for examination and processing. After processing, naval spent nuclear fuel is transferred into dry storage containers and placed into temporary storage at NRF, prior to off-site transfer consistent with the Record of Decision for the November 1996 *Navy EIS for a Container System for Management of Naval Spent Nuclear Fuel (DOE/EIS–0251).* Ongoing efforts to sustain the infrastructure needed to transfer, prepare, examine, and package naval spent nuclear fuel will preserve these essential capabilities and ensure that the NNPP high standards for protecting the public and the environment continue to be met. Facility age, however, is expected to cause a growing maintenance burden and increase the likelihood of unacceptable workflow interruptions that could adversely impact the fleet.

The NNPP proposes to recapitalize the infrastructure for transferring, preparing, examining, and packaging naval spent nuclear fuel and other irradiated materials, to ensure these capabilities are maintained for the vital NNPP mission of supporting the naval nuclear-powered fleet. The recapitalization is expected to be carried out as two projects. The first project will be the Spent Fuel Handling Recapitalization Project; the second project will be the Examination Recapitalization Project. The Spent Fuel Handling Recapitalization Project will ensure that interfaces and exchanges between handling and examination are factored into detailed designs, to ensure that both projects can be carried out in an environmentally responsible and cost-effective manner.

The proposed EIS will consider the environmental effects related to siting and construction of new facilities for both of the Recapitalization Projects. The NNPP proposes to evaluate three siting combinations, along with a No-Action Alternative.

Alternative 1—Locate the Spent Fuel Handling Recapitalization Project and the Examination Recapitalization Project at the NRF at the INL.

Alternative 2—Locate the Spent Fuel Handling Recapitalization Project at the NRF and the Examination Recapitalization Project at the Advanced Test Reactor Complex at the INL.

Alternative 3—Locate the Spent Fuel Handling Recapitalization Project at the NRF and the Examination Recapitalization Project at the Materials and Fuels Complex at the INL.

No-Action Alternative—Overhaul the ECF. Overhauling includes continuing to repair, maintain, refurbish, and upgrade the ECF as necessary to provide the needed long-term capabilities for transferring, examining, preparing, and packaging naval spent nuclear fuel.

Within each of these alternative sites, there are a number of practical locations for facility placement. These location options will also be addressed in the EIS. NNPP proposes to address the issues listed below when considering the potential impacts of the proposed alternatives in the EIS. This list is presented to facilitate public comment during the scoping period and is not intended to be comprehensive, or to imply any predetermination of impacts. Issues include:

- Potential impacts of emissions on air and water quality.
- Potential impacts on plants, animals, and their habitats, including species that are listed by either State or Federal government as threatened, endangered, or of special concern.
- Potential impacts from postulated accidents, as well as potential impacts from acts of terrorism or sabotage.
- Potential effects on the public health from exposure to hazardous materials or radiological releases under routine operations.
- Potential safety and health impacts to workers.
- Impacts on cultural resources, such as historic, archeological, and Native American culturally important sites.
- Socioeconomic impacts to the potentially affected communities.
- Compliance with applicable Federal and state regulations.
- Potential disproportionately high and adverse effects on low-income and minority populations (environmental justice).
- Cumulative impacts.

NEPA implementing regulations require an early and open process for determining the scope of an EIS and for identifying the significant issues related to the proposed action. Accordingly, NNPP invites Federal agencies; Tribal, State, and local governments; and the general public to comment on the scope of the planned EIS including identification of reasonable alternatives and specific issues that should be addressed. NNPP will hold three public scoping meetings to provide information on the Spent Nuclear Fuel Handling and Examination Recapitalization Projects and to solicit public concerns and comments. Dates, times, and locations for these meetings are as follows:

August 24, 2010

6 p.m.–9 p.m.

Shilo Inn, 780 Lindsay Blvd., Idaho Falls, ID 83404.

August 25, 2010

6 p.m.–9 p.m.

Red Lion, 1555 Pocatello Creek Road, Pocatello, ID 83201.

August 26, 2010

6 p.m.–9 p.m.

Canyon Springs Red Lion, 1357 Blue Lakes Blvd. North, Twin Falls, ID 83301.

Persons unable to attend these meetings may view meeting information by visiting the NNPP Web site *http://www.ecfrecapitalization.us*. NNPP will provide additional notification of the meeting times and locations through newspaper advertisements and other appropriate media.

At each scoping meeting, NNPP plans to hold an open house for the first hour prior to beginning the formal portion of the meeting to allow participants to register to provide oral comments and view informational materials. The registration table will have an oral comment registration form as well as a sign-up sheet for those who do not wish to give oral comments but who would like to be included on the mailing list to receive either printed or electronic information about the project in the future. The public may provide written and/or oral comments at the scoping meetings.

All public comments received during the scoping meetings, as well as those submitted as described above, will be considered during the development of the EIS.

Issued in Washington, DC, on July 12, 2010.

John M. McKenzie,

Director, Regulatory Affairs, Naval Nuclear Propulsion Program.

[FR Doc. 2010–17523 Filed 7–19–10; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[Regional Docket Nos. V–2009–1, FRL–9176–5]

Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for JP Pulliam Power Plant

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final order on petition to object to Clean Air Act (Act) operating permit.

SUMMARY: This document announces that the EPA Administrator has granted a petition from the Sierra Club asking EPA to object to a Title V operating permit for the Wisconsin Public Service Corporation's, JP Pulliam Power Plant (JP Pulliam) issued by the Wisconsin Department of Natural Resources (WDNR).

Sections 307(b) and 505(b)(2) of the Act provide that a petitioner may ask for judicial review of those portions of the petition which EPA denies in the United States Court of Appeals for the appropriate circuit. Any petition for review shall be filed within 60 days from the date this notice appears in the **Federal Register**, pursuant to section 307 of the Act. However, EPA did not deny any portion of the petition that is the subject of the response announced today.

ADDRESSES: You may review copies of the final order, the petition, and other supporting information at the EPA Region 5 Office, 77 West Jackson Boulevard, Chicago, Illinois 60604. If you wish to examine these documents, you should make an appointment at least 24 hours before visiting day. Additionally, the final order for the JP Pulliam Power Plant petition is available electronically at: *http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb.htm.*

FOR FURTHER INFORMATION CONTACT: Pamela Blakley, Chief, Air Permits Section, Air Programs Branch, Air and Radiation Division, EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, telephone (312) 886–4447.

SUPPLEMENTARY INFORMATION: The Act affords EPA a 45-day period to review, and object, as appropriate, to Title V operating permits proposed by state permitting authorities. Section 505(b)(2) of the Act authorizes any person to petition the EPA Administrator within 60 days after the expiration of the EPA review period to object to a Title V operating permit if EPA has not done so. A petition must be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the state, unless the petitioner demonstrates that it was impracticable to raise issues during the comment period, or the grounds for the issues arose after this period.

On June 25, 2009, EPA received a petition from the Sierra Club requesting that EPA object to the Title V operating permit for JP Pulliam. The Petitioner alleged that the permit is not in compliance with the requirements of the Act. Specifically, the Petitioner alleged that: (1) The permit omits more stringent applicable particulate matter (PM) emission limits for certain boilers because the units are: (a) Subject to the lower limits established in a preconstruction permit issued on October 15, 2008, and/or (b) subject to a State Implementation Plan provision providing for a lower PM limit for units modified after April 1972 because these units were modified in the late 1980s; (2) the permit omits the maximum hourly heat input limits that are applicable because they were contained in a preconstruction permit application submitted by the permittee and relied upon by WDNR to issue a New Source Review synthetic minor permit; and (3) the permit's PM monitoring for the boilers and PM and visible emissions monitoring for certain material handling sources are deficient.

On June 28, 2010, the Administrator issued an order granting the JP Pulliam petition. The Order explains the reasons behind EPA's conclusion.

Date: July 9, 2010.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2010–17678 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9176–8]

Workshop To Review Initial Health Effects Draft Materials for the Ozone (O_3) Integrated Science Assessment (ISA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of workshop.

SUMMARY: As part of the review of the air quality criteria and National Ambient Air Quality Standard (NAAQS) for Ozone (O_3), EPA is announcing that a workshop to evaluate initial draft materials for the health effects sections of the O_3 Integrated Science Assessment (ISA) is being organized by EPA's National Center for Environmental Assessment (NCEA) within the Office of Research and Development (ORD). The workshop will be held on August 6, 2010, in Research Triangle Park, NC, and will be open to attendance by interested public observers on a first-come, first-served basis up to the limits of available space.

DATES: The workshop will be held on August 6, 2010.

ADDRESSES: The workshop will be held in the auditorium of EPA's main campus, 109 T.W. Alexander Drive, Research Triangle Park, NC. An EPA contractor, Versar, is providing logistical support for the workshop.

FOR FURTHER INFORMATION CONTACT: Questions regarding information, registration, and logistics for the workshop should be directed to Bethzaida Colon, Versar, Inc., Conference Coordinator, 6850 Versar Center, Springfield, VA 22151, telephone: 703–642–6727; facsimile: 703–642–6809; e-mail: *BColon@versar.com.* Questions regarding the scientific and technical aspects of the workshop should be directed to Dr. James Brown, telephone: 919–541–0765; facsimile: 919–541–1818; e-mail: *brown.james@epa.gov* or Dr. Lisa Vinikoor, telephone: 919–541–2931; facsimile: 919–541–5078; e-mail: *vinikoor.lisa@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of Information About the Workshop

Section 109(d) of the Clean Air Act requires the U.S. Environmental Protection Agency (EPA) to conduct periodic reviews of the air quality criteria for each air pollutant listed under section 108 of the Act. Based on such review, EPA is to retain or revise the NAAQS for a given pollutant as appropriate. As part of these reviews, NCEA assesses newly available scientific information and develops ISA documents (formerly known as Criteria Documents) that provide the scientific basis for the reviews of the NAAQS for O_3, particulate matter, carbon monoxide, nitrogen oxides, sulfur oxides, and lead. Based on the information in the ISA, EPA's Office of Air Quality Planning and Standards (OAQPS) typically conducts quantitative and qualitative risk and exposure assessments. The ISA and the risk/exposure assessments are used to prepare a policy assessment that informs subsequent rulemaking actions.

NCEA–RTP is holding this workshop to inform the Agency's evaluation of the scientific evidence for the review of the NAAQS for O_3. The purpose of the workshop is to obtain a review of the scientific content of initial draft materials or sections for the draft ISA. Workshop sessions will include a review and discussion of initial draft sections on the health effects evidence from in vivo and in vitro animal toxicology, human clinical, and epidemiology studies. In addition, roundtable discussions will help identify key studies or concepts within each discipline to assist EPA in integrating within and across disciplines. This workshop is planned to help ensure that the ISA is up-to-date and focuses on the key evidence to inform the scientific understanding for the review of the NAAQS for O_3. EPA is planning to release the first external review draft ISA for O_3 for review by the Clean Air Scientific Advisory Committee (CASAC) and the public in November 2010.

II. Workshop Information

Members of the public may attend the workshop as observers. Space is limited, and reservations will be accepted on a first-come, first-served basis.

Dated: July 14, 2010.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2010–17684 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9176–9]

Proposed Settlement Agreements, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Settlement Agreements; Request for Public Comment

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended ("CAA" or the "Act"), 42 U.S.C. 7413(g), notice is hereby given of six proposed settlement agreements to address lawsuits filed by the American Chemistry Council, the American Public Gas Association, the American Petroleum Institute, et al., the Energy Recovery Council, the Fertilizer Institute, and the Utility Air Regulatory Group (collectively "Petitioners") in the United States Court of Appeals for the District of Columbia: *American Chemistry Council* v. *EPA,* No. 09–1325 (D.C. Cir.) and consolidated cases. Petitioners filed petitions for review of EPA's final rule entitled "Mandatory Reporting of Greenhouse Gases", published at 75 FR 56,260 (October 30, 2009). Under the terms of the proposed settlement agreements, Petitioners would dismiss their claims if EPA proposes and, after notice and comment, takes final action on certain revisions to the final rule.

DATES: Written comments on the proposed settlement agreements must be received by *August 19, 2010.*

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2010–0575, online at *http://www.regulations.gov* (EPA's preferred method); by e-mail to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Carol Holmes, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: (202) 564–8709; fax number (202) 564–5603; email address:*holmes.carol@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreements

On September 22, 2009, EPA finalized the first comprehensive reporting

program for greenhouse gases ("GHGs") under the Clean Air Act ("CAA" or "the Act"). 75 FR 56,260 (October 30, 2009) ("2009 Final GHG Reporting Rule"). The 2009 Final GHG Reporting Rule requires reporting of greenhouse gas emissions from large sources and suppliers in the United States, and is intended to collect accurate and timely emissions data to inform future policy decisions. Under the rule, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions are required to submit annual reports to EPA. The rule became effective December 29, 2009.

Eight petitions for review were filed in the DC Circuit challenging the 2009 Final GHG Reporting Rule: American Chemistry Council (09–1325); Energy Recovery Council (09–1326); American Petroleum Institute and National Petroleum Refiners Association (09–1328); The Fertilizer Institute (09–1329); American Public Gas Association (09–1331); Kinder Morgan CO2 Co., LP (09–1332); Utility Air Regulatory Group (09–1333); and Environmental Defense Fund (09–1334). Five petitioners or groups of petitioners also filed petitions for reconsideration of the 2009 Final GHG Reporting Rule (American Public Gas Association; American Petroleum Institute, *et al.;* the Energy Recovery Council; the Utility Air Regulatory Group; and the Environmental Defense Fund). Both the petitions for review in the DC Circuit, and the petitions for reconsideration, raise issues with the final requirements of the 2009 Final GHG Reporting Rule. Upon EPA's motion, on February 22, 2010, the court issued an order holding the consolidated cases in abeyance pending EPA's consideration of the petitions for reconsideration and the parties' settlement discussions.

Under the proposed settlement agreements being noticed today, five petitions for review would be dismissed in their entirety, and one dismissed in part, if EPA proposes and finalizes certain revisions to the 2009 Final GHG Reporting Rule. The administrative petitions filed by the settling parties also would be deemed withdrawn under the terms of the proposed settlement agreements. Two petitions for review—that of the Environmental Defense Fund and that of Kinder Morgan CO2 Co., LP—would not be settled at this time. Rather, these petitions would continue to be held in abeyance, pending further settlement discussions or action by EPA that renders the petition(s) moot.

Pursuant to the proposed settlement agreements, EPA would be proposing and taking final action on four primary categories of changes to the 2009 Final GHG Reporting Rule: (1) Revising the applicability threshold for one source category; (2) revising the threshold for more stringent monitoring for one type of combustion source; (3) providing an option to request the continued use of best available monitoring methods until 2015 if, at a complex facility, a shutdown or hot tap is required to install measurement equipment; and (4) generally revising monitoring, recordkeeping and reporting requirements in various subparts.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed settlement agreements from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreements if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines, based on any comment submitted, that consent to these settlement agreements should be withdrawn, the terms of the agreements will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreements

A. How can I get a copy of the settlement agreements?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2010–0575) contains copies of the proposed settlement agreements. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov.* You may use *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select "search".

It is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing online at *http://www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

Use of the *http://www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, e-mail address,

or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov,* your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: July 14, 2010.

Richard B. Ossias,

Associate General Counsel.

[FR Doc. 2010–17700 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9176–3]

Science Advisory Board Staff Office; Request for Nominations of Experts for the SAB Hydraulic Fracturing Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office is requesting public nominations for technical experts to form an SAB *Ad Hoc* Panel to review EPA's draft Hydraulic Fracturing Study Plan to investigate the potential public health and environmental protection research issues that may be associated with hydraulic fracturing.

DATES: Nominations should be submitted by August 10, 2010 per instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Mr. Edward Hanlon, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2134, by fax at (202) 565–2098, or via e-mail at *hanlon.edward@epa.gov*. General information concerning the EPA Science Advisory Board can be found at the EPA SAB Web site at: *http://www.epa.gov/sab*. Any inquiry regarding EPA's planned research approaches to study the potential public health and environmental protection issues that may be associated with hydraulic fracturing should be directed to Robert Puls, EPA Office of Research and Development (ORD), at *Puls.Robert@epa.gov* or (580) 436–8543. Media inquiries regarding EPA's draft Hydraulic Fracturing Study Plan should be directed to Enesta Jones, EPA Office of Public Affairs (OPA), at *jones.enesta@epa.gov* or (202) 564–7873.

SUPPLEMENTARY INFORMATION:

Background

The SAB (42 U.S.C. 4365) is a chartered Federal Advisory Committee that provides independent scientific and technical peer review, advice, consultation, and recommendations to the EPA Administrator on the technical basis for EPA actions. As a Federal Advisory Committee, the SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Hydraulic fracturing (or hydrofracking) generates vertical and horizontal fractures in underground geologic formations to facilitate extraction of gas (or oil) from the subsurface. While each formation has unique characteristics and features, the general process involves drilling a vertical well, extending the well bore horizontally into the formation, removing water, injecting hydrofracking fluids and then extracting the natural gas along with separation and management of fluids. Over the past few years, the use of hydraulic fracturing has increased. At the same time, concern has been expressed by the public regarding the potential environmental impacts of hydraulic fracturing. In the Congressional Appropriations Conference Report for Fiscal Year 2010, the conferees

> urge[d] the Agency to carry out a study on the relationship between hydraulic fracturing and drinking water, using a credible approach that relies on the best available science, as well as independent sources of information. The conferees expect the study to be conducted through a transparent, peer-reviewed process that will ensure the validity and accuracy of the data. The Agency shall consult with other Federal agencies as well as appropriate State and interstate regulatory agencies in carrying out the study, which should be prepared in accordance with the Agency's quality assurance principles.

To respond to concerns that have been voiced by the public, and to meet the Congressional request, EPA is initiating a study on the potential environmental and human health implications of HF with special emphasis on the relationship between hydraulic fracturing and drinking water resources. At a public face-to-face meeting of the SAB Environmental Engineering Committee (EEC) on April 7–8, 2010, the SAB EEC augmented with other SAB members evaluated and commented on EPA's proposed scope of study and key research questions regarding the potential public health and environmental protection issues that may be associated with hydraulic fracturing [**Federal Register** Notice dated March 18, 2010 (75 FR 13125)]. On June 24, 2010 the SAB provided the EPA Administrator with an advisory report that included recommendations of the EEC, *Advisory on EPA's Research Scoping Document Related to Hydraulic Fracturing,* EPA–SAB–10–009.

EPA's next step is to develop a draft Study Plan for its hydraulic fracturing research. EPA has requested that the SAB review its draft Study Plan. The SAB Staff Office will form a new expert Panel to review EPA's draft Study Plan and review the Study results if SAB is requested to do so by ORD. The new, ad hoc panel is being formed to include expertise focused on the specific directions of the ORD research.

Request for Nominations

The SAB Staff Office is seeking nominations of nationally and internationally recognized scientists and engineers having experience and expertise in the following areas: petroleum (including natural gas) engineering and petroleum geology, particularly with experience in hydraulic fracturing and well testing mechanical integrity; hydrology and hydrogeology; geophysics; water quality; chemistry and geochemistry, particularly with experience in chemical fate and transport, oxidation-reduction reactions, gas-liquid exchange, and solubility; analytical chemistry, particularly regarding trace organics and environmental monitoring; statistics, particularly regarding experimental design of field studies; human health effects and risk assessment; civil and environmental engineering; chemical engineering; drinking water treatment systems; wastewater treatment systems; and social, behavioral, and decision sciences.

Process and Deadline for Submitting Nominations

Any interested person or organization may nominate qualified individuals in the areas of expertise described above for possible service on this expert *ad hoc* Panel. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed" provided on the SAB Web site. The instructions can be accessed through the "Nomination of

Experts" link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/sab*. To receive full consideration, nominations should include all of the information requested.

EPA's SAB Staff Office requests: contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vita; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Mr. Edward Hanlon, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than August 10, 2010. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and biosketches of qualified nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff, will be posted in a List of Candidates on the SAB Web site at *http://www.epa.gov/sab*. Public comments on this List of Candidates will be accepted for 21 calendar days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a balanced subcommittee or review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In forming this expert *ad hoc* Hydraulic Fracturing Review Panel, the SAB Staff Office will consider public comments on the List of candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for Panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; and (e) skills working in committees, subcommittees and advisory panels; and, for the Panel as a whole, (f) diversity of expertise and viewpoints. EPA values and welcomes diversity. In an effort to increase diversity, we seek nominations of women and men of all racial and ethnic groups.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address *http://www.epa.gov/sab/pdf/epaform3110–48.pdf*.

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (EPA–SAB–EC–02–010), which is posted on the SAB Web site at *http://www.epa.gov/sab/pdf/ec02010.pdf*.

Dated: July 13, 2010.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–17682 Filed 7–19–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

[Notice 2010–13]

Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission

AGENCY: Federal Election Commission.

ACTION: Policy statement.

SUMMARY: The Federal Election Commission ("Commission") is adopting a new pilot program for a procedure to provide a means for persons and entities to have a legal question considered by the Commission earlier in both the report review process and the audit process.

DATES: Effective July 20, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Lawrence Calvert, Jr., Associate General Counsel, or Lorenzo Holloway, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is adopting a new procedure to provide a means for persons and entities to have a legal question considered by the Commission earlier in both the report review process and the audit process. Specifically, when the Office of Compliance ("OC") (which includes the Report Analysis Division and the Audit Division) requests that a person or entity take corrective action during the report review or audit process, if the person or entity disagrees with the request based upon a material dispute on a question of law, the person or entity may seek Commission consideration of the issue pursuant to this procedure.

I. Procedures

Within 15 days of a determination by the Reports Analysis Division or Audit Division that a person or entity remains obligated to take corrective action to resolve an issue that has arisen during the report review or audit process, the person or entity may seek Commission consideration if a material dispute on a question of law exists with respect to the recommended corrective action.[1]

Any request for consideration by a committee during the report review process or the audit process shall be limited to questions of law on material issues, when: (1) The legal issue is novel, complex, or pertains to an unsettled question of law; (2) there has been intervening legislation, rulemaking, or litigation since the Commission last considered the issue; or (3) the request is contrary to or otherwise inconsistent with prior Commission matters dealing with the same issue. The request must specify the question of law at issue and why it is subject to Commission consideration. It should discuss, when appropriate, prior Commission matters raising the same issue, relevant court decisions, and any other analysis of the issue that may assist the Commission in its decision-making. The Commission will not consider factual disputes under this procedure, and any requests for consideration other than on questions of law on material issues will not be granted.

[1] Many disputes involving corrective action requests hinge on questions of fact rather than questions of law, and thus are not appropriate for this procedure.

All requests should be directed to the Commission Secretary, Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Upon receipt of such a request, the Commission Secretary shall forward a copy to each Commissioner, the General Counsel, and the Staff Director. Within five business days of notification to the Commissioners, if two or more Commissioners agree that the Commission should consider the issue, the Office of General Counsel ("OGC") will prepare a recommendation and, within 15 business days thereafter, circulate the recommendation in accordance with all applicable Commission directives. After the recommendation is circulated for a Commission vote, in the event of an objection, the matter shall be automatically placed on the next meeting agenda consistent with the Sunshine Act, 5 U.S.C. 552b(g), and applicable Commission regulations, 11 CFR part 2. However, if within 60 business days of the filing of a request for consideration, the Commission has not resolved the issue or provided guidance on how to proceed with the matter by the affirmative vote of four or more Commissioners, the OC may proceed with the matter.

This procedure is not intended to circumvent or supplant the Advisory Opinion process provided under 2 U.S.C. 437f and 11 CFR part 112. Accordingly, any legal issues that qualify for consideration under the Advisory Opinion process are not appropriate for consideration under this new procedure. Additionally, this policy statement does not supersede the procedures regarding eligibility and entitlement to public funds set forth in Commission Directive 24 and 11 CFR 9005.1, 9033.4, 9033.6, or 9033.10.

II. Pilot Program

This agency procedure is being established as a pilot program. The pilot program will last one year from the time that this policy is approved. After one year, a vote will be scheduled on whether the program should continue. Four affirmative votes will be required to extend or make permanent the program. The program will be terminated after that vote if there are not four affirmative votes to make the program permanent or to extend it for some time period. The Commission may terminate or modify this pilot program through additional policy statements prior to the twelfth month of the pilot program by an affirmative vote of four of its members.

Dated: July 15, 2010.

On behalf of the Commission.

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2010–17646 Filed 7–19–10; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: *Background.* On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for Comment on Information Collection Proposal

The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. 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;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before September 20, 2010.

ADDRESSES: You may submit comments, identified by *Regulation F,* 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 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 electronically or in 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.

Additionally, commenters should send a copy of their comments to the OMB Desk Officer by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503 or by fax to 202–395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public Web site at: *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm* or may be requested from the agency clearance officer, whose name appears below.

Michelle Shore, Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202–263–4869), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal To Approve Under OMB Delegated Authority the Implementation of the Following Information Collection

Report title: Recordkeeping Requirements Associated with Limitations on Interbank Liabilities.

Agency form number: Regulation F.

OMB control number: 7100–NEW.

Frequency: On occasion.

Reporters: State member banks and insured domestic branches of foreign banks.

Estimated annual reporting hours: 6,808 hours.

Estimated average hours per response: 8 hours.

Number of respondents: 851.

General description of report: This information collection is mandatory pursuant to section 23 of the Federal Reserve Act, as added by section 308 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (12 U.S.C. 371b–2). Because the Federal Reserve does not collect any information, no issue of confidentiality normally arises. However, if a compliance program becomes a Board record during an examination, the information may be protected from disclosure under exemptions (b)(4) and (b)(8) of the Freedom of Information Act (5 U.S.C. 552(b)(4) and (b)(8)).

Abstract: Pursuant to FDICIA, the Federal Reserve is required to prescribe standards to limit the risks posed by exposure of insured depository institutions to the depository institutions with which they do business (correspondents). Regulation F generally requires banks to develop and implement internal prudential policies and procedures to evaluate and control exposure to correspondents. Section 206.3 of Regulation F stipulates that a bank shall establish and maintain written policies and procedures to prevent excessive exposure to any individual correspondent in relation to the condition of the correspondent. In these policies and procedures, a bank should take into account credit and liquidity risks, including operational risks, in selecting correspondents and terminating those relationships. The policies and procedures should be reviewed and approved by the bank's board of directors at least annually.

Board of Governors of the Federal Reserve System, July 15, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–17614 Filed 7–19–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. 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 the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 4, 2010.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Bank of Choice Holding Company, Greeley, Colorado; to engage *de novo* in lending activities, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, July 15, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–17626 Filed 7–19–10; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Standards Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Standards Committee.

General Function of the Committee: To provide recommendations to the National Coordinator on standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption, consistent with the implementation of the Federal Health IT Strategic Plan, and in accordance with policies developed by the HIT Policy Committee.

Date and Time: The meeting will be held on July 28, 2010, from 9 a.m. to 3 p.m./Eastern Time.

Location: The Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC. The hotel telephone number is 202–234–0700.

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov.* Please call the contact person 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.

Agenda: The committee will hear reports from its workgroups, including the Clinical Operations, Clinical Quality, Privacy & Security Tiger Team, and Enrollment Workgroups. ONC intends to make background material available to the public no later than two (2) business days prior to the meeting. If ONC is unable to post the background material on its Web site prior to the meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after the meeting, at *http://healthit.hhs.gov.*

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 July 22, 2010. Oral comments from the public will be scheduled between approximately 2 and 3 p.m. e.t. Time allotted for each presentation will be limited to three minutes each. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public hearing session, ONC will take written comments after the meeting until close of business.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 USC. App. 2).

Dated: July 6, 2010.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2010–16950 Filed 7–19–10; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Policy Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Policy Committee.

General Function of the Committee: To provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The meeting will be held on July 21, 2010, from 9:30 a.m. to 4 p.m. e.t.

Location: The Renaissance Washington, DC, Dupont Circle Hotel, 1143 New Hampshire Avenue, NW., Washington, DC, phone: 202–775–0800.

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, *fax:* 202–690–6079, *e-mail: judy.sparrow@hhs.gov*. Please call the contact person 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.

Agenda: The committee will hear reports from its workgroups, including the Meaningful Use Workgroup, the Certification/Adoption Workgroup, the Enrollment Workgroup, and the Privacy & Security Tiger Team. ONC intends to make background material available to the public no later than two (2) business days prior to the meeting. If ONC is unable to post the background material on its Web site prior to the meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posed on ONC's Web site after the meeting, at *http://healthit.hhs.gov.*

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 July 16, 2010. Oral comments from the public will be scheduled between approximately 3 p.m. to 4 p.m. Time allotted for each presentation is limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public hearing session, ONC will take written comments after the meeting until close of business.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Judy Sparrow at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site *at http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: July 6, 2010.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2010–16945 Filed 7–19–10; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day–10–0639]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an email to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Special Exposure Cohort Petitions, (OMB Control Number 0920–0639, Expiration Date 07/31/2010)—Extension—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

On October 30, 2000, the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384–7385 [1994, supp. 2001] was enacted. It established

a compensation program to provide a lump sum payment of $150,000 and medical benefits as compensation to covered employees suffering from designated illnesses incurred as a result of their exposure to radiation, beryllium, or silica while in the performance of duty for the Department of Energy and certain of its vendors, contractors and subcontractors. This legislation also provided for payment of compensation for certain survivors of these covered employees. There is no change to the information collection. This program has been mandated to be in effect until Congress ends the funding.

EEOICPA instructed the President to designate one or more Federal Agencies to carry out the compensation program. Accordingly, the President issued Executive Order 13179 ("Providing Compensation to America's Nuclear Weapons Workers") on December 7, 2000 (65 FR 77487), assigning primary responsibility for administration of the compensation program to the Department of Labor (DOL). The executive order directed the Department of Health and Human Services (HHS) to perform several technical and policymaking roles in support of the DOL program.

Among other duties, the executive order directed HHS to establish and implement procedures for considering petitions by classes of nuclear weapons workers to be added to the "Special Exposure Cohort" (the "Cohort"), various groups of workers whose claims for cancer under EEOICPA can be adjudicated without demonstrating that their cancer was "at least as likely as not" caused by radiation doses they incurred in the performance of duty. In brief, EEOICPA authorizes HHS to designate such classes of employees for addition to the Cohort when NIOSH lacks sufficient information to estimate with sufficient accuracy the radiation doses of the employees, if HHS also finds that the health of members of the class may have been endangered by the radiation dose the class potentially incurred. HHS must also obtain the advice of the Advisory Board on Radiation and Worker Health (the Board) in establishing such findings. On March 7, 2003, HHS proposed procedures for adding such classes to the Cohort in a notice of proposed rulemaking at 42 CFR Part 83.

The HHS procedures authorize a variety of individuals and entities to submit petitions, as specified under § 83.7. Petitioners are required to provide the information specified in § 83.9 to qualify their petitions for a complete evaluation by HHS and the Board. HHS has developed two petition forms to assist the petitioners in providing this required information efficiently and completely, and an Authorization Form to permit a respondent to authorize another party to submit a petition on their behalf, as specified in § 83.7. Petition Form A is a one-page form to be used by EEOICPA claimants for whom NIOSH will have attempted to conduct dose reconstructions and will have determined that available information is not sufficient to complete the dose reconstruction. The form addresses the informational requirements specified under § 83.9(a) and (b). Petition Form B, accompanied by separate instructions, is intended for all other petitioners. The form addresses the informational requirements specified under § 83.9(a) and (c). Forms A and B can be submitted electronically as well as in hard copy. Petitioners should be aware that HHS is not requiring petitioners to use the forms. Petitioners can choose to submit petitions as letters or in other formats, but petitions must meet the informational requirements referenced above. NIOSH expects, however, that all petitioners for whom Form A would be appropriate will actually use the form, since NIOSH will provide it to them upon determining that their dose reconstruction cannot be completed and encourage them to submit the petition. NIOSH expects the large majority of petitioners for whom Form B would be appropriate will also use the form, since it provides a simple, organized format for addressing the informational requirements of a petition.

NIOSH will use the information obtained through the petition for the following purposes: (a) Identify the petitioner(s), obtain their contact information, and establish that the petitioner(s) is qualified and intends to petition HHS; (b) establish an initial definition of the class of employees being proposed to be considered for addition to the Cohort; (c) determine whether there is justification to require HHS to evaluate whether or not to designate the proposed class as an addition to the Cohort (such an evaluation involves potentially extensive data collection, analysis, and related deliberations by NIOSH, the Board, and HHS); and, (d) target an evaluation by HHS to examine relevant potential limitations of radiation monitoring and/or dosimetry-relevant records and to examine the potential for related radiation exposures that might have endangered the health of members of the class.

Finally, under § 83.18, petitioners may contest the proposed decision of the Secretary to add or deny adding classes of employees to the cohort by submitting evidence that the proposed decision relies on a record of either factual or procedural errors in the implementation of these procedures. NIOSH estimates that the time to prepare and submit such a challenge is 45 minutes. Because of the uniqueness of this submission, NIOSH is not providing a form.

There are no costs to petitioners unless a petitioner chooses to purchase the services of a expert in dose reconstruction, an option provided for under 42 CFR 83.9(c)(2)(iii). The petitioner would assume the financial burden of purchasing such services at their option. In such cases, HHS estimates a report by such an expert may cost between $640 and $6,400, depending on the scope of the petition and access to relevant information. This is based on an estimate of costs of $80 per hour for contractual services by a health physicist, who NIOSH estimates would be employed within a range of eight to eighty hours to conduct and prepare a report on the required assessment.

The total estimated annual burden hours are 238.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Form name & number (CFR reference)	Respondents	No. of respondents	No. of responses per respondent	Average burden per respondent (in hours)
Form A 42 CFR 83.9	Petitioners using Form A	30	1	3/60
Form B 42 CFR 83.9	Petitioners using Form B	40	1	5
42 CFR 83.9	Petitioners not using Form B	5	1	6
42 CFR 83.18	Petitioners Appealing proposed decisions	5	1	45/60

ESTIMATE OF ANNUALIZED BURDEN HOURS—Continued

Form name & number (CFR reference)	Respondents	No. of respondents	No. of responses per respondent	Average burden per respondent (in hours)
Authorization Form 42 CFR 83.7	Person authorizing a party to submit a petition on his/her behalf.	20	1	3/60

Dated: July 13, 2010.

Carol Walker,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–17685 Filed 7–19–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0367]

Agency Information Collection Activities; Proposed Collection; Comment Request; Information Request Regarding Menthol in Cigarettes

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on an information request regarding the use of menthol in cigarettes.

DATES: Submit either electronic or written comments on the collection of information by September 20, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr. PI50–400B, Rockville, MD 20850, 301–796–3794, *Jonnalynn.Capezzuto@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Information Request Regarding Menthol in Cigarettes—(OMB Control Number 0910–0662)—Extension

On June 22, 2009, the President signed the Family Smoking Prevention and Tobacco Control Act (the Tobacco Control Act) (Public Law 111–31) into law. The Tobacco Control Act amended the Federal Food, Drug, and Cosmetic Act by adding a new chapter granting FDA important new authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors.

Section 917 of the Tobacco Control Act requires the Secretary of Health and Human Services (the Secretary) to establish a Tobacco Products Scientific Advisory Committee (TPSAC). Section 907(e) of the Tobacco Control Act requires the TPSAC to submit a report and recommendations to the Secretary on the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities. To ensure a comprehensive review of this issue, the Center for Tobacco Products is requesting tobacco industry data and information to support the work of TPSAC. Under section 907(e) of the Tobacco Control Act, TPSAC must submit its report and recommendations to the Secretary within 1 year of its formation, or March 23, 2011.

In order to provide TPSAC with the information it needs to carry out its statutory obligation, FDA is requesting that tobacco companies submit information under section 904(b) of the Tobacco Control Act. OMB granted emergency processing and approved the information collection on May 12, 2010. In a letter dated May 26, 2010, FDA asked tobacco manufacturers to submit documents containing scientific, marketing, and health-related information pertaining to the use of menthol in cigarettes.

FDA has requested that tobacco manufacturers submit all documents and underlying scientific information relating to research activities, and research findings, conducted, supported, or possessed by the manufacturer (or agents thereof) on a specified set of topics. "Research activities" may include, but are not limited to, focus groups, surveys, experimental clinical studies, toxicological and biochemical assays, taste panels, and assessments of the effectiveness of product marketing practices. Scientific and health-related information FDA has requested include

dose-response relationships for physiologic effects and chemosensory effects of mentholated tobacco smoke. FDA also requested information on the impact of menthol on the neurobiology of tobacco dependence and information on dose-related interactions between menthol and nicotine, including on the uptake and metabolism of nicotine and on various consumer perceptions of the product.

FDA has also requested tobacco companies to submit consumer research data and marketing information pertaining to menthol cigarettes. FDA requested consumer research data pertaining to use, cessation, and consumer perception of menthol cigarettes. FDA's request for documents and underlying scientific information related to marketing information includes data and information on marketing strategies for each brand or subbrand of menthol cigarettes, including strategies targeted to particular demographic groups, strategies aimed at tobacco-naïve consumers, and strategies aimed at recruitment of former tobacco users.

FDA estimates the burden of this collection of information as follows:

Activity	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours	Total Capital Costs
Submission of Menthol Documents	116	1	116	140	16,240	$1,940

The capital costs associated with this collection pertain to the postage for mailing documents in electronic format. Estimating these costs is problematic because the costs would vary depending on the size of the document production (e.g. one binder of documents vs. numerous boxes of paper) and the media type (e.g., compact disk (CD) or digital video disk (DVD)) chosen to submit documents. Currently, we cannot identify how many documents will be submitted per response.

Some sample postage costs are shown for different types of packages:

- 10 CDs in a flat envelope weighing 30 ounces: Approximately $8 using first class business mail,
- Five-pound parcel containing paper documents: Approximately $12 using business parcel post mail and delivering to the furthest delivery zone,
- Ten-pound parcel containing paper documents: Approximately $17 using business parcel mail and delivering to the furthest delivery zone, and
- Fifty-pound parcel containing paper documents: Approximately $52 using business parcel post mail and delivering to the furthest delivery zone.

This estimate is based upon: (1) Ninety three submissions (80% of 116 submissions) being submitted by mailing an average of 10 CDs per envelope (93 x $8 = $744) and (2) Twenty three submissions (20% of the 116 submissions) being submitted by mailing a package of paper documents weighing an average of 50 pounds (23 x $52 = $1,196.) Therefore, we estimate the total capital costs associated with this document submission to be $1,940.

Dated: July 13, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–17607 Filed 7–19–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0356]

Agency Information Collection Activities; Proposed Collection; Comment Request; Designated New Animal Drugs for Minor Use and Minor Species

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the paperwork associated with designation under the Minor Use and Minor Species (MUMS) Animal Health Act of 2004.

DATES: Submit either electronic or written comments on the collection of information by September 20, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques,

when appropriate, and other forms of information technology.

Designated New Animal Drugs for Minor Use and Minor Species—21 CFR Part 516 (OMB Control No. 0910–0605)—Extension

The Minor Use and Minor Species (MUMS) Animal Health Act of 2004 amended the Federal Food, Drug, and Cosmetic Act (the act) to authorize FDA to establish new regulatory procedures intended to make more medications legally available to veterinarians and animal owners for the treatment of minor animal species as well as uncommon diseases in major animal species. This legislation provides incentives designed to help pharmaceutical companies overcome the financial burdens they face in providing limited-demand animal drugs. These incentives are only available to sponsors whose drugs are "MUMS-designated" by FDA. Minor use drugs are drugs for use in major species (cattle, horses, swine, chickens, turkeys, dogs, and cats) that are needed for diseases that occur in only a small number of animals either because they occur infrequently or in limited geographic areas. Minor species are all animals other than the major species, for example, zoo animals, ornamental fish, parrots, ferrets, and guinea pigs. Some animals of agricultural importance are also minor species. These include animals such as sheep, goats, catfish, and honeybees. Participation in the MUMS program is completely optional for drug sponsors so the associated paperwork only applies to those sponsors who request and are subsequently granted "MUMS designation." The rule specifies the criteria and procedures for requesting MUMS designation as well as the annual reporting requirements for MUMS designees.

Under part 516 (21 CFR part 516), § 516.20 provides requirements on the content and format of a request for MUMS-drug designation, § 516.26 provides requirements for amending MUMS-drug designation, § 516.27 provides provisions for change in sponsorship of MUMS-drug designation, § 516.29 provides provisions for termination of MUMS-drug designation, § 516.30 provides requirements for annual reports from sponsor(s) of MUMS-designated drugs, and § 516.36 provides provisions for insufficient quantities of MUMS-designated drugs. Respondents are pharmaceutical companies that sponsor new animal drugs.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
516.20	15	5	75	16	1,200
516.26	3	1	3	2	6
516.27	1	1	1	1	1
516.29	2	1	2	1	2
516.30	15	5	75	2	150
516.36	1	1	1	3	3
Total					1,362

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden estimate for this reporting requirement was derived in FDA's Office of Minor Use and Minor Species Animal Drug Development by extrapolating the current investigational new animal drug (INAD) and new animal drug (NAD) reporting requirements for similar actions by this same segment of the regulated industry and from previous interactions with the minor use/minor species community.

Dated: July 13, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–17609 Filed 7–19–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0374]

Agency Information Collection Activities; Proposed Collection; Comment Request; Petition to Request an Exemption From 100 Percent Identity Testing of Dietary Ingredients: Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on reporting requirements contained in existing FDA regulations governing petitions to request an exemption from 100 percent identity testing of dietary ingredients.

DATES: Submit either electronic or written comments on the collection of information by September 20, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug

Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Petition to Request an Exemption From 100 Percent Identity Testing of Dietary Ingredients: Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements—21 CFR 111.75(a)(1)(ii) (OMB Control Number 0910–0608)—Extension

On October 25, 1994, the Dietary Supplement Health and Education Act (DSHEA) (Public Law 103–417) was signed into law. DSHEA, among other things, amended the Federal Food, Drug, and Cosmetic Act (the act) by adding section 402(g) of the act (21 U.S.C. 342(g)). Section 402(g)(2) of the act provides, in part, that the Secretary of Health and Human Services (the Secretary) may, by regulation, prescribe good manufacturing practices for dietary supplements. Section 402(g)(1) of the act states that a dietary supplement is adulterated if "it has been prepared, packed, or held under conditions that do not meet current good manufacturing practice regulations." Under section 701(a) of the act (21 U.S.C. 371(a)), FDA may issue regulations necessary for the efficient enforcement of the act.

FDA published a final rule on June 25, 2007 (72 FR 34752) (the final rule), that established, in part 111 (21 CFR part 111), the minimum Current Good Manufacturing Practice (CGMP) necessary for activities related to manufacturing, packaging, labeling, or holding dietary supplements to ensure the quality of the dietary supplement. On June 25, 2007 (72 FR 34959), FDA also published an Interim Final Rule (the IFR) establishing a procedure for a petition to request an exemption from 100 percent identity testing of dietary ingredients. The IFR redesignated § 111.75(a)(1) of the CGMP final rule as § 111.75(a)(1)(i) and set forth a procedure for submission of a petition to FDA in a new § 111.75(a)(1)(ii), under which manufacturers may request an exemption from the requirements set forth in § 111.75(a)(1)(i) when the dietary ingredient is obtained from one or more suppliers identified in the petition. The regulation clarifies that FDA is willing to consider, on a case-by-case basis, a manufacturer's conclusion, supported by appropriate data and information in the petition submission, that it has developed a system that it would implement as a sound, consistent means of establishing, with no material diminution of assurance compared to the assurance provided by 100 percent identity testing, the identity of the dietary ingredient before use.

Section 111.75(a)(1) of the CGMP final rule reflects FDA's determination that manufacturers that test or examine 100 percent of the incoming dietary ingredients for identity can be assured of the identity of the ingredient. However, FDA recognizes that it may be possible for a manufacturer to demonstrate, through various methods and processes in use over time for its particular operation, that a system of less than 100 percent identity testing would result in no material diminution of assurance of the identity of the dietary ingredient as compared to the assurance provided by 100 percent identity testing. To provide an opportunity for a manufacturer to make such a showing and reduce the frequency of identity testing of components that are dietary ingredients from 100 percent to some lower frequency, FDA added to § 111.75(a)(1), an exemption from the requirement of 100 percent identity testing when a manufacturer petitions the agency for such an exemption to 100 percent identity testing under § 10.30 and the agency grants such exemption. Such a procedure would be consistent with FDA's stated goal, as described in the CGMP final rule, of providing flexibility in the CGMP requirements. Section 111.75(a)(1)(ii) sets forth the information a manufacturer is required to submit in such a petition. The regulation also contains a requirement to ensure that the manufacturer keeps FDA's response to a petition submitted under § 111.75(a)(1)(ii) as a record under § 111.95. The collection of information in § 111.95 has been approved under OMB control number 0910–0606.

Description of Respondents: The respondents to this collection of information are firms in the dietary supplement industry, including dietary supplement manufacturers, packagers and re-packagers, holders, labelers and re-labelers, distributors, warehouses, exporters, importers, large businesses, and small businesses.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	Number of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
111.75(a)(1)(ii)	1	1	1	8	8

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

In the last 3 years, FDA has not received any new petitions to request an exemption from 100 percent identity testing of dietary ingredients; therefore, the agency estimates that one or fewer petitions will be submitted annually. Although FDA has not received any new petitions to request an exemption from 100 percent identity testing of dietary ingredients in the last 3 years, it believes that these information collection provisions should be extended to provide for the potential future need of a firm in the dietary supplement industry to petition for an exemption from 100 percent identity testing of dietary ingredients. Based on our experience with petition processes, we estimate that the assembly of information in support of the petition required by § 111.75(a)(1)(ii) will take 8 hours.

Dated: July 13, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–17608 Filed 7–19–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; NIH Office of Intramural Training and Education Application

Summary

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of Intramural Training & Education/OIR/OD, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection

Title: NIH Office of Intramural Training & Education Application. *Type of Information Collection Request:* Revision. *Form Number:* 0925–0299. *Expiration Date:* September 30, 2012. *Need and Use of Information Collection:* The Office of Intramural Training & Education (OITE) administers a variety of programs and initiatives to recruit pre-college through post-doctoral educational level individuals into the National Institutes of Health Intramural Research Program (NIH–IRP) to facilitate develop into future biomedical scientists. The proposed information collection is necessary in order to determine the eligibility and quality of potential awardees for traineeships in these programs. The applications for admission consideration include key areas such as: Personal information, eligibility criteria, contact information, student identification number, training program selection, scientific discipline interests, educational history, standardized examination scores, reference information, resume components, employment history, employment interests, dissertation research details, letters of recommendation, financial aid history, sensitive data, future networking contact, travel information, as well as feedback questions about interviews and application submission experiences. Sensitive data collected on the applicants, race, gender, ethnicity and recruitment method, are made available only to OITE staff members or in aggregate form to select NIH offices and are not used by the admission committee for admission consideration; optional to submit.

Over the last several years the OITE has used three OMB Clearance Numbers for the collection of applications for the training programs. To improve announcement of all training programs and lessen the burden of applicants, the OITE proposes to merge the following:

- 0925–0299—NIH Intramural Research Training Award, Program Application.
- 0925–0438—Undergraduate Scholarship Program (UGSP).
- 0925–0501—Graduate Student Training Program Application.

Renewing 0925–0299 OMB Clearance Number with the new name "Office of Intramural Training & Education Application".

Frequency of Response: On occasion. *Affected Public:* Individuals seeking intramural training opportunities and references for these individuals. *Type of Respondents:* students, post-baccalaureates, technicians, graduate students, and post-doctorates. There are no capital costs, operating costs, and/or maintenance costs to report.

The annual reporting burden is displayed in the following table:

ESTIMATES OF HOUR BURDEN

Program	Estimated number of respondents	Estimated number of responses annually per respondent	Average burden hours per response	Estimated total annual burden hours
Summer Internship Program in Biomedical Research (SIP)	8,500	1	0.75	6,375.0
Biomedical Engineering Summer Internship Program (BESIP)	100	1	0.75	75.0
Post-baccalaureate Intramural Research Training Award	2,300	1	0.75	1,725.0
NIH Academy	550	1	0.75	412.5
Community College Summer Enrichment Program (CCSEP)	125	1	0.75	93.8
Technical Intramural Research Training Award	140	1	0.75	105.0
Graduate Partnerships Program (GPP)	600	1	0.75	450.0
Post-Doctorate Fellowship Program	2,050	1	0.75	1,537.5
National Graduate Student Research Festival (NGSRF)	825	1	0.75	618.8
Undergraduate Scholarship Program (UGSP)	300	1	0.75	225.0
Alumni Database	1,900	1	0.75	1,425.0

ESTIMATES OF HOUR BURDEN—Continued

Program	Estimated number of respondents	Estimated number of responses annually per respondent	Average burden hours per response	Estimated total annual burden hours
Recommendations for All Programs	35,705	1	0.25	8,926.3
Supplemental Documents for Application	14,540	1	0.75	10,905.0
Feedback Questions	53,095	1	0.25	13,273.8
Totals	120,730			46,147.5

Request for Comments

Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function 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, 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Patricia Wagner, Director of Admissions & Registrar, Office of Intramural Training & Education, National Institutes of Health, 2 Center Drive, Building 2/Room 2E06, Bethesda, Maryland 20892–0234, or call 240–476–3619 or e-mail your request, including your address to: *wagnerpa@od.nih.gov.*

DATES: *Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Date: July 15, 2010.

Michael M. Gottesman,

Deputy Director for Intramural Research, National Institutes of Health.

[FR Doc. 2010–17669 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0327]

International Conference on Harmonisation; Draft Recommendation for the Revision of the Permitted Daily Exposure for the Solvent Cumene According to the Maintenance Procedures for the Guidance Q3C Impurities: Residual Solvents; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft recommendation for the revision of the permitted daily exposure (PDE) for the solvent cumene according to the maintenance procedures for the guidance for industry entitled "Q3C: Impurities: Residual Solvents." The draft recommendation was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft recommendation before it begins work on the final recommendation, submit either electronic or written comments on the document by September 20, 2010.

ADDRESSES: Submit written requests for single copies of the draft recommendation to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002, or the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft recommendation may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft recommendation.

Submit electronic comments on the draft recommendation to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Regarding the guidance: David Jacobson-Kram, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–0175.

Regarding the ICH: Michelle Limoli, Office of International Programs (HFG–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4480.

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with

harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission; the European Federation of Pharmaceutical Industries Associations; the Japanese Ministry of Health, Labour, and Welfare; the Japanese Pharmaceutical Manufacturers Association; the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA; and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, Health Canada, and the European Free Trade Area.

In the **Federal Register** of December 24, 1997 (62 FR 67377), FDA published the ICH guidance for industry entitled "Q3C Impurities: Residual Solvents." The guidance makes recommendations as to what amounts of residual solvents are considered safe in pharmaceuticals. The guidance recommends use of less toxic solvents and describes levels considered to be toxicologically acceptable for some residual solvents. Upon issuance in 1997, the text and appendix 1 of the guidance contained several tables and a list of solvents categorizing residual solvents by toxicity, classes 1 through 3, with class 1 being the most toxic. The ICH Quality Expert Working Group (EWG) agreed that the PDE could be modified if reliable and more relevant toxicity data were brought to the attention of the group and the modified PDE could result in a revision of the tables and list.

In 1999, ICH instituted a Q3C maintenance agreement and formed a maintenance EWG (Q3C EWG). The agreement provided for the revisitation of solvent PDEs and allowed for minor changes to the tables and list that include the existing PDEs. The agreement also provided that new solvents and PDEs could be added to the tables and list based on adequate toxicity data. In the **Federal Register** of February 12, 2002 (67 FR 6542), FDA briefly described the process for proposing future revisions to the PDE. In the same notice, the agency announced its decision to delink the tables and list from the Q3C guidance and create a stand alone document entitled "Q3C: Tables and List" to facilitate making changes recommended by ICH.

II. Draft Recommendation to Revise the PDE for Cumene

In March 2010, the ICH Steering Committee agreed that a draft recommendation to revise the PDE for the solvent cumene should be made available for public comment. The draft recommendation is the product of the Q3C EWG of the ICH. Comments about this draft will be considered by FDA and the Q3C EWG.

The draft recommendation addresses the safety classification of cumene. When the Q3C guidance was published in 1997, cumene was listed as a class 3 solvent (i.e., a solvent with low toxicity). The Q3C EWG has reviewed new toxicity data derived from a carcinogenicity study performed by the National Toxicology Program. The new data suggest a positive systemic carcinogenic effect, and this observation raises the toxicity associated with this solvent. In March 2010, the ICH Steering Committee was briefed on the results of the Q3C EWG's analysis. The recommendation was to move cumene from class 3 into class 2. The analysis and draft recommendation are available for review on the Internet (see section IV of this document).

This draft recommendation is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft recommendation for the solvent cumene, when finalized, will represent the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. The draft recommendation and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access to Documents and the Maintenance Procedures

Persons with access to the Internet may obtain the Q3C guidance documents at *http://www.regulations.gov*, *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*, or *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*. Information on the Q3C maintenance process as well as proposals, data analysis, and draft and final recommendations for revisions to the tables and list are available at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm125820.htm*.

Dated: July 9, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–17618 Filed 7–19–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel Assays of Biological Specimens for Division of Epidemiology, Statistical and Prevention Research.

Date: August 10, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Sathasiva B. Kandasamy, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892–9304. 301–435–6680. *skandasa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research;

93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17703 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Drug Abuse.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

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 Advisory Council on Drug Abuse.

Date: September 14–15, 2010.

Closed: September 14, 2010, 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Rooms C & D, Rockville, MD 20852.

Open: September 15, 2010, 8:30 a.m. to 1 p.m.

Agenda: This portion of the meeting will be open to the public for announcements and reports of administrative, legislative and program developments in the drug abuse field.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Rooms C & D, Rockville, MD 20852.

Contact Person: Teresa Levitin, PhD, Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 443–2755.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.drugabuse.gov/NACDA/NACDAHome.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17683 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

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 Heart, Lung, and Blood Advisory Council.

Date: September 1, 2010.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, C-Wing, Room 10, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Stephen C. Mockrin, PhD, Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7100, Bethesda, MD 20892, (301) 435–0260, *mockrins@nhlbi.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://www.nhlbi.nih.gov/meetings/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: July 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17681 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center on Minority and Health Disparities; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center on Minority Health and Health Disparities Special Emphasis Panel, NCMHD Social Determinants of Health (R01) Panel.

Date: July 26–28, 2010.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Prabha L. Atreya, PhD, Chief, Office of Scientific Review, National Center on Minority Health and Health Disparities, 6707 Democracy Boulevard, Suite 800, Bethesda, MD 20892, (301) 594–8696, *atreyapr@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Dated: July 13, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17679 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of meetings of the Board of Regents of the National Library of Medicine.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

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 materials, 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: Board of Regents of the National Library of Medicine Subcommittee on Outreach and Public Information.

Date: September 14, 2010.

Time: 7:30 a.m. to 8:45 a.m.

Agenda: Outreach Activities.

Place: National Library of Medicine, Building 38, 2nd Floor, Conference Room B, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, 301–496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine.

Date: September 14–15, 2010.

Open: September 14, 2010, 9 a.m. to 4:30 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: September 14, 2010, 4:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: September 15, 2010, 9 a.m. to 12 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, 301–496–6221, *lindberg@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nlm.nih.gov/od/bor/bor.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: July 13, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17677 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Board of Scientific Counselors, Lister Hill Center for Biomedical Communications.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the National Library of Medicine, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, Lister Hill Center for Biomedical Communications.

Date: September 2–3, 2010.

Open: September 2, 2010, 9 a.m. to 12 p.m.

Agenda: Review of research and development programs and preparation of reports of the Lister Hill Center for Biomedical Communications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: September 2, 2010, 12 p.m. to 4:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: September 3, 2010, 10 a.m. to 11:30 a.m.

Agenda: Review of research and development programs and preparation of reports of the Lister Hill Center for Biomedical Communications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Karen Steely, Program Assistant, Lister Hill Center for Biomedical Communications, National Library of Medicine, Building 38A, Room 7S709, Bethesda, MD 20892, 301–435–3137, *ksteely@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library

Assistance, National Institutes of Health, HHS).

Dated: July 13, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17675 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; 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 a meeting of the Biomedical Library and Informatics Review Committee.

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 materials, 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: Biomedical Library and Informatics Review Committee.

Date: November 4–5, 2010.

Time: November 4, 2010, 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Time: November 5, 2010, 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Contact Person: Arthur A. Petrosian, PhD, Chief Scientific Review Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968. 301–496–4253. *petrosia@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: July 13, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17673 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Board of Scientific Counselors, National Center for Biotechnology Information.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the National Library of Medicine, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Center for Biotechnology Technology.

Date: November 9, 2010.

Open: 8:30 a.m. to 12 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: 12 p.m. to 2 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: 2 p.m. to 3 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: David J. Lipman, MD, Director, National Center of Biotechnology Information, National Library of Medicine, Department of Health and Human Services, Building 38A, Room 8N805, Bethesda, MD 20892, 301–435–5985, *dlipman@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: July 13, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17671 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Research Dissemination (1143).

Date: August 17–18, 2010.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401. (301) 435–1439, *lf33c.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17672 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0364]

Advancing the Development of Medical Products Used In the Prevention, Diagnosis, and Treatment of Neglected Tropical Diseases; Public Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public hearing; request for comment.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public hearing to solicit general views and information from interested persons on issues related to advancing the development of medical products (drugs, biological products, and medical devices) used in the prevention, diagnosis, and treatment of neglected tropical diseases. In particular, FDA is seeking these views and information from interested persons on preclinical studies, trial design, regulatory approaches, and optimal solutions as they relate to the prevention, diagnosis, and treatment of neglected tropical diseases. To help solicit such views and information, FDA is seeking comments on specific issues (see section IV of this document).

DATES: *Public Hearing*: The public hearing will be held on September 22, 2010, from 9 a.m. to 5 p.m. However, depending on the level of public participation, the meeting may extend later or end early.

Registration: Interested parties are encouraged to register early. Registration is free. Seating will be available on a first-come, first-served basis. To register, e-mail your name, title, firm name, address, and telephone numbers to *NeglectedDiseasesMtg@fda.hhs.gov* or call Ann Staten at 301–796–8504 by September 17, 2010.

Registration on the day of the public hearing will be provided on a space-available basis beginning at 7:30 a.m. To allow sufficient time for parking and clearance through security, we recommend arriving early. See section I of the **SUPPLEMENTARY INFORMATION** section for information on how to participate in the meeting. If you need special accommodations due to a disability, please contact Ann Staten (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance.

Notice of Participation and Comments: Submit written or electronic notices of participation and comments by September 1, 2010. The administrative record of the hearing will remain open to receive additional comments until October 20, 2010.

ADDRESSES: *Public Hearing*: The public hearing will be held at 10903 New Hampshire Ave., Bldg. 31, rm. 1503 (the Great Room), Silver Spring, MD 20993. You must enter through Bldg. 1 and the security check-point to reach Bldg. 31. Additional information on parking may be accessed at *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/default.htm*.

Notice of Participation and Comments: Submit notices of participation and comments, identifying the agency and Docket No. FDA–2010–N–0364, by any of the following methods:

Electronic Submissions

Submit electronic notices of participation and comments in the following way:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for making submissions.

Written Submissions

Submit written notices of participation and comments in the following ways:

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

FOR FURTHER INFORMATION CONTACT: Ann M. Staten, Office of Critical Path Programs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg., 32, rm. 4106, Silver Spring, MD 20993–0002, 301–796–8504, *Ann.Staten@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. How to Participate in the Meeting

The procedures governing the hearing are set forth in part 15 (21 CFR part 15) of FDA's regulations. If you wish to make an oral presentation during the hearing, you must submit a written notice of participation (see **ADDRESSES**) by September 1, 2010. In the written notice, submit your name, title, business affiliation, address, telephone number, and e-mail address. You should also submit a written statement for each issue in section IV of this document that you intend to address, and other pertinent information related to the topic in your presentation, the names and addresses of all individuals who plan to participate, and the approximate time requested for your presentation. We encourage individuals and organizations with common interests to consolidate or coordinate their presentations to allow adequate time for each request for presentation. Participants should submit to the docket a copy of each presentation.

We will file the hearing schedule indicating the order of presentation and the time allotted to each person to the docket. We will also e-mail or telephone the schedule to each participant before the hearing. In anticipation of the hearing presentations moving ahead of schedule, participants are encouraged to arrive early to ensure their designated order of presentation. Participants who are not present when called risk forfeiting their scheduled time.

II. Background

Approximately one billion people worldwide suffer from neglected tropical diseases, e.g., malaria, tuberculosis, and schistosomiasis. Developing medical products to prevent, diagnose, and treat neglected tropical diseases has not met global public health needs due to an array of challenges. To encourage the development of these much needed medical products, section 740 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 2010 (Public Law 111–80) directs FDA to establish a review group to recommend to the Commissioner of Food and Drugs (the Commissioner) appropriate preclinical studies, trial design, regulatory approaches, and optimal solutions to encourage the development of medical products to prevent, diagnose, and treat neglected tropical diseases of the developing world.

III. Purpose and Scope of the Hearing

The purpose of this public hearing is to provide advocates for patients with neglected tropical diseases, academics, health care providers, the pharmaceutical and medical device industries, and other interested parties an opportunity to address specific topics (see section IV of this document) and present to FDA their views, recommendations, and any other pertinent information related to the scope of this public hearing. This information will assist the FDA review group in making recommendations to the Commissioner regarding appropriate preclinical studies, trial design,

regulatory approaches, and optimal solutions to prevent, diagnose, and treat neglected tropical diseases.

The scope of this public hearing includes the issues described in sections IV.A and IV.B of this document. In addressing these issues, we ask that your comments focus particularly on preclinical studies, trial design, regulatory approaches, and optimal solutions as they relate to the prevention, diagnosis, and treatment of neglected tropical diseases. We are also providing a few examples of discussion items that would apply to each issue. However, we encourage you to comment on any subject related to the headings of sections IV.A and IV.B of this document.

IV. Issues for Discussion

A. What are the challenges to developing drugs, biological products, and medical devices used to prevent, diagnose, and treat neglected tropical diseases? What are the specific areas and diseases where progress is needed?

At a minimum, consider the following:

- Preclinical testing
- Trial design
- Regulatory approaches

B. What can be done to advance the development of products used to prevent, diagnose, and treat neglected tropical diseases in the developing world?

At a minimum, consider the following:

- The perceived challenges in obtaining FDA approval or clearance of a premarket submission for a product used to prevent, diagnose, or treat a neglected tropical disease
- The perceived benefit or non-benefit of:
  - orphan status designation
  - the priority review voucher program under section 524 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 360n)
  - the humanitarian use device (HUD) and the humanitarian device exemption (HDE) program
  - other potential incentives
- Novel approaches to advance the development of products for neglected tropical diseases and regulatory approaches
- New strategies for international cooperation, consultation, and collaboration in the review and approval of these products
- Training or guidance necessary to support the development of products for neglected tropical diseases

V. Notice of Hearing Under Part 15

The Commissioner is announcing that the public hearing will be held in accordance with part 15. The hearing will be conducted by a presiding officer, who will be accompanied by FDA senior management from the Office of the Commissioner, the Economics Staff, the Center for Drug Evaluation and Research, the Center for Biologics Evaluation and Research, the Center for Devices and Radiological Health, and the Office of the Chief Counsel.

Persons who wish to participate in the part 15 hearing must file a written or electronic notice of participation with the Division of Dockets Management (see **ADDRESSES** and **DATES**). Requests to make a presentation should contain the potential presenter's name and title; address; telephone number; e-mail address; affiliation, if any; the sponsor of the presentation (e.g., the organization paying travel expenses or fees), if any; and a brief summary of the presentation, including the discussion topic(s) that will be addressed.

Under § 15.30(f), the hearing is informal, and the rules of evidence do not apply. No participant may interrupt the presentation of another participant. Only the presiding officer and panel members may question any person during or at the conclusion of each presentation.

Public hearings under part 15 are subject to FDA's policy and procedures for electronic media coverage of FDA's public administrative proceedings (part 10, subpart C (21 CFR part 10, subpart C)). Under § 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

To the extent that the conditions for the hearing, as described in this document, conflict with any provisions set out in part 15, this document acts as a waiver of those provisions as specified in § 15.30(h).

VI. Requests for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written notices of participation and comments for consideration at the hearing. To permit time for all interested persons to submit data, information, or views on this subject, the administrative record of the hearing will remain open until October 20, 2010. You should annotate and organize your comments to identify the specific issues to which they refer (see section IV of this document). It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify submissions with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

VII. Transcripts

The hearing will be transcribed as stipulated in § 15.30(b). Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov*. It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, Rm. 6–30, Rockville, MD 20857.

Dated: July 14, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–17619 Filed 7–19–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel Systems Biology, HIV/AIDS, and Substance Abuse (R01).

Date: July 27, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sofitel Washington DC Lafayette Square, 806 15th Street, NW., Washington, DC 20005.

Contact Person: Eliane Lazar-Wesley, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–451–4530, *elazarwe@nida.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel 2010 NIDA Translational Avant-Garde Award Interviews (DP1).

Date: July 27, 2010.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Westin Grand, 2350 M Street, NW., Washington, DC 20037.

Contact Person: Scott Chen, PhD, Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6101 Executive Boulevard, Room 220, MSC 8401, Bethesda, MD 20892, 301–443–9511, *chensc@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–17670 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0004] [FDA–225–10–0015]

Memorandum of Understanding: Food and Drug Administration and the National Institutes of Health, National Institutes of Environmental Health Sciences, National Toxicology Program; and the National Institutes of Health, National Human Genome Research Institute, National Institutes of Health, Chemical Genomics Center; and the Environmental Protection Agency, Office of Research and Development

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and the National Institutes of Health (NIH), National Institutes of Environmental Health Sciences (NIEHS), National Toxicology Program (NTP); and the NIH, National Human Genome Research Institute (NHGRI), NIH Chemical Genomics Center (NCGC); and the Environmental Protection Agency, Office of Research and Development.

This four-party Memorandum of Understanding (MOU) sets in place mechanisms to strengthen the existing collaborations that utilize the complementary expertise and capabilities of the NIEHS/NTP, the NCGC of the NHGRI, the Office of Research and Development (ORD) of the EPA, and the FDA in the research, development, validation, and translation of new and innovative test methods that characterize key steps in toxicity pathways. This MOU amends and supersedes an MOU between the first three named parties for the same purposes. A central component of this MOU is the exploration of high throughput screening (HTS) assays and tests using phylogenetically lower animal species (e.g., fish, worms), as well as high throughput whole genome analytical methods, to evaluate mechanisms of toxicity. Ultimately, the data generated by these new tools is to be provided to risk assessors to use in the protection of human health and the environment. The goals of this MOU are to investigate the use of these new tools to: (1) Identify mechanisms of chemically induced biological activity, (2) prioritize chemicals for more extensive toxicological evaluation, and (3) develop more predictive models of in vivo biological response. Success in achieving these goals is expected to result in test methods for toxicity testing that are more scientifically and economically efficient and models for risk assessment that are more biologically based. As a consequence, a reduction or replacement of animals in regulatory testing is anticipated to occur in parallel with an increased ability to evaluate the large numbers of chemicals that currently lack adequate toxicological evaluation.

DATES: The agreement became effective June 4, 2010.

FOR FURTHER INFORMATION CONTACT: David Jacobson-Kram, Center for Drug Evaluation and Research, 10903 New Hampshire Ave., Bldg. 22, rm. 6488, Food and Drug Administration, Silver Spring, MD 20993, 301–796–0175, *david.jacobsonkram@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: July 14, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

BILLING CODE 4160–01–S

MOU 225-10-0015

MEMORANDUM OF UNDERSTANDING

ON

High Throughput Screening, Toxicity Pathway Profiling, and Biological Interpretation of Findings

BETWEEN THE

U.S. DEPARMENT OF HEALTH AND HUMAN SERVICES (HHS)
NATIONAL INSTITUTES OF HEALTH (NIH)
National Institutes of Environmental Health Sciences (NIEHS)/
National Toxicology Program (NTP)

AND THE

U.S. DEPARMENT OF HEALTH AND HUMAN SERVICES (HHS)
NATIONAL INSTITUTES OF HEALTH (NIH)
National Human Genome Research Institute (NHGRI)
NIH Chemical Genomics Center (NCGC)

AND THE

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)
Office of Research and Development

AND THE

U.S. DEPARMENT OF HEALTH AND HUMAN SERVICES (HHS)
U.S. Food and Drug Administration (FDA)

I. PURPOSE/OBJECTIVES/GOALS

This four-party Memorandum of Understanding (MOU) sets in place mechanisms to strengthen the existing collaborations that utilize the complementary expertise and capabilities of the NIEHS/NTP, the NCGC of the NHGRI, the Office of Research and Development (ORD) of the EPA, and the FDA in the research, development, validation, and translation of new and innovative test methods that characterize key steps in toxicity pathways. This MOU amends and supersedes an MOU between the first three named parties for the same purposes. A central component of this MOU is the exploration of high throughput screening (HTS) assays and tests using phylogenetically lower animal species (e.g., fish, worms), as well as high throughput whole genome analytical methods, to evaluate mechanisms of toxicity. Ultimately, the data

generated by these new tools is to be provided to risk assessors to use in the protection of human health and the environment. The goals of this MOU are to investigate the use of these new tools to (1) identify mechanisms of chemically induced biological activity, (2) prioritize chemicals for more extensive toxicological evaluation, and (3) develop more predictive models of *in vivo* biological response. Success in achieving these goals is expected to result in test methods for toxicity testing that are more scientifically and economically efficient and models for risk assessment that are more biologically based. As a consequence, a reduction or replacement of animals in regulatory testing is anticipated to occur in parallel with an increased ability to evaluate the large numbers of chemicals that currently lack adequate toxicological evaluation.

II. BACKGROUND

For several years, EPA and NIEHS have recognized the need to modify the scientific basis for hazard identification and risk assessment by working toward partially or fully replacing current test methods with higher throughput, mechanism-based test methods. This recognition led both organizations to initiate programs to evaluate using *in vitro* biochemical- and cell-based assays and non-rodent animal models for toxicological testing. In 2004, the NTP released its Vision and Roadmap for the 21st Century (http://ntp.niehs.nih.gov/go/vision), which established an HTS initiative to focus on integrating HTS and non-rodent screening assays into its testing program. In 2005, the EPA established the National Center for Computational Toxicology (NCCT) within ORD to bring innovative molecular biological and computational tools to the evaluation of hazards and risks of environmental chemicals. To accomplish its mission, the NCCT works closely with ORD's National Health and Environmental Effects Research Laboratory (NHEERL), which conducts related laboratory, clinical, and epidemiological research. The NTP Vision for the 21st Century and the goal of the ORD are to support the evolution of toxicology from a predominantly observational science at the level of disease-specific models to a predominantly predictive science focused upon a broad inclusion of target-specific, mechanism-based, biological observations. The NCGC, one of the centers of the Molecular Libraries Screening Centers Network (MLSCN) within the NIH Roadmap for Medical Research Molecular Libraries Initiative, has been a key collaborator with both the NTP and EPA in this process. The NIH established the NCGC in 2004 as a national resource for chemical probe development and compound profiling using industrial-scale HTS assays, informatics, and chemistry.

In 2005, the EPA with support from the NTP funded a project at the National Research Council (NRC) to develop a long-range vision for toxicity testing and a strategic plan for implementing the vision. The impetus for this project was a strong commitment by both agencies that future toxicity testing and assessment paradigms meet evolving regulatory needs (e.g., that the paradigms readily accommodate the increasingly large numbers of substances that need to be tested); incorporate the recent advances in molecular toxicology, computational sciences, and information technology; and offer increased efficiency in design, costs, and animal usage. In response, the NRC Committee on Toxicity Testing and Assessment of Environmental Agents released in 2007 a vision and implementation strategy titled A Vision for Toxicity Testing in the Twenty-first Century (NRC 2007). This report is a powerful catalyst for a focused and collaborative effort across the research community to: (1) develop a more robust scientific basis

for assessing potential adverse health effects of environmental agents; (2) provide broad coverage of chemicals, chemical mixtures, outcomes, and life stages; (3) use population-based and human exposure data to inform decisions regarding chemical selection and environmentally relevant testing conditions; (4) reduce the cost and time of toxicity testing; and (5) use laboratory animals in targeted testing where essential data are needed and cannot be appropriately obtained *in vitro* or using phylogenetically lower animal species.

The FDA has a continuing interest in the development of new methods to evaluate the toxicity of the substances it regulates. Those substances include drugs, biologics, and foods, and components of drugs, biologics, and foods and of medical devices and cosmetics.

The convergence of science, technology, regulatory need, and public opinion has produced an historic opportunity to transform toxicology and risk assessment into more accurate, rapid, and cost-effective sciences. In recognition of the need for a long-term, multiple Federal agency commitment, this MOU is being established to guide the construction and governance of a detailed research strategy to make the NRC Committee's vision a reality. This MOU builds on a number of separate and joint efforts among our three organizations that are very much aligned with the NRC Committee's vision. Building on the strengths of the individual organizations is intended to facilitate the advancements necessary to move toxicology to a more predictive science based on the most relevant and meaningful tools of modern molecular biology and chemistry.

III. AUTHORITIES

EPA enters into this MOU pursuant to Section 103 of the Clean Air Act [42 U.S.C. §7403 (a) and (b)]; Section 104 of the Clean Water Act; [33 U.S.C. § 1254 (a) and (b)]; Section 300 j-l of the Safe Drinking Water Act (42 U.S.C. §1442); Section 10 of the Toxic Substances Control Act [15 U.S.C. § 2609 (a)]; and Section 20 of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. § 136r (a)].

NIEHS enters into this MOU pursuant to Sections 301, 401, and 463 of the Public Health Service Act [42 U.S.C., §§ 241, 281, and 285l].

NHGRI enters into this MOU pursuant to Section 301 of the Public Health Service Act [42 U.S.C. § 241].

FDA enters this MOU pursuant to Section 301 of the Public Health Service Act [42 U.S.C. § 241].

IV. ROLES AND RESPONSIBILITIES

Each participant intends to implement the following provisions of this MOU, under the responsibility of the Assistant Administrator for ORD, the Directors of the NTP and the NCGC, and the Commissioner of Food and Drugs.

A. Toxicity Pathways: A shared focus of all participants is to identify and/or develop HTS assays that investigate "toxicity" pathways. To this end, the member organizations agree to collaborate to identify toxicity pathways that contribute to a variety of adverse health outcomes (e.g., from acute oral toxicity to long-term effects like cancer) and assays that provide information on key steps in those pathways. All participants agree that this aim will best be accomplished through joint meetings, by seeking advice from acknowledged experts in different disciplines in the international scientific community, and through specialized workshops. The member organizations agree to identify data gaps where research and development are needed to modify existing assays (e.g., incorporation of metabolic competency) and/or to develop new assays designed to allow a more comprehensive evaluation of how compounds interact with key steps in critical toxicity pathways.

***B. Chemical Selection*:** The member organizations agree that large numbers of compounds with existing toxicological data need to be identified and tested in the identified HTS assays and alternative animal models. The NTP and the EPA have databases of toxicological information on a large number of compounds. FDA also holds a significant amount of toxicological information, some of which is the confidential or trade secret information of entities regulated by FDA but some of which is publicly available. The EPA also has models and databases for determining whether exposures are likely to occur, at what level, and by what route. The member organizations agree, where appropriate, to collaborate on identifying compounds for testing and to share toxicity and exposure information on compounds selected for testing. The member organizations also plan to make appropriate efforts to ensure, as a means for evaluating endpoint reproducibility, appropriate levels of redundancy within and between the chemical libraries under study. The FDA agrees to share toxicological information that may be useful to the joint effort but that is not confidential or trade secret. The member organizations agree to jointly determine appropriate quality assurance/quality control procedures for the compounds chosen for testing.

C. Analysis and Bioinformatics: Analysis of individual HTS assay results (i.e., identifying active and inactive compounds for a particular assay) and bioinformatics (i.e., evaluating sets of data from multiple *in vitro* and *in vivo* assays while taking into account chemico-physical properties for significant relationships) are critical to the success of the joint initiative. As a result, the member organizations agree to: collaborate on the development of the most appropriate tools for the analysis of HTS data, share nonconfidential data (both HTS as well as that generated using traditional test methods), employ computational approaches to evaluate the information from HTS studies, and work to make all the data publicly accessible. The NTP, NHEERL, and FDA agree to undertake targeted *in vivo* follow-up studies when appropriate. The member organizations also agree to consider the use of extramural mechanisms to support these activities. Proof-of-concept studies will be important to demonstrate the feasibility of the new approach and their undertaking will require a critical level of effort across the institutions. It is envisioned that these efforts will evolve towards a systems-biology approach as a foundation for constructing and using biologically based dose-response models in risk assessment. Regulatory acceptance of these new approaches will take considerable thought and effort. Therefore, an important consideration will be the translation of the results of this joint research program into testing strategies that provide data useful to risk assessors.

D. Outreach: Effective and open communication about this research program, its findings and their use will be important to its acceptance and ultimate success. The member organizations agree to conduct joint outreach activities related to the development and use of HTS and other innovative approaches for assessing toxicity. Such activities might include activities:

- Sponsoring relevant workshops (e.g., to identify the key toxicity pathways for various organ systems or to develop best practices for analysis of the new data streams).
- Organizing symposia that focus on advances in the area of HTS for toxicity testing and systems-biology models for integration and interpretation of the data.
- Co-sponsoring a seminar series that addresses key advancements in HTS or translation of HTS data into phenotypic outcomes that would form the basis for more mechanistically based risk assessment practices.
- Contributing via presentations and posters to national and international meetings.
- Co-authoring articles to keep the scientific community informed of progress and advances in this research program.
- Continuing to interact via joint meetings of the EPA Chemical Prioritization Community of Practice (CPCP), the NCGC, the NTP, and the FDA.
- Promoting the regulatory acceptance of alternative approaches when deemed scientifically defensible.

E. Governance: The activities identified in this MOU are to be managed by a Governance Board (GB) composed of the Director of the NCGC, the Director of the EPA/ORD National Center for Computational Toxicology, the Chief of the NTP Biomolecular Screening Branch, and the Associate Director for Pharmacology and Toxicology in FDA's Center for Drug Evaluation and Research's Office of New Drugs. The members of the GB, with advice from their management, are to be responsible for developing and implementing a cross-organizational research strategy, promoting cross-organization interactions, identifying and recommending actions to overcome barriers to success, ensuring minimal redundancy of activities, serving as spokespersons for the tripartite effort within and outside their respective organizations, and reporting on the overall progress of the program to their respective organizations at periodic intervals. The GB is expected to meet by teleconference or in person at least once every two months.

F. Scientific Review: The activities carried out by the member organizations in support of this MOU will be reviewed at regular intervals by their respective review panels. For the NCGC, this is the NCGC Working Group, which reports to the NHGRI Board of Scientific Counselors. For the NTP and the EPA, this is their respective Boards of Scientific Counselors. For the FDA, this is FDA's Pharmacology and Toxicology Coordinating Committee along with ad hoc experts from the National Center for Toxicological Research and other FDA centers.

V. LIMITATIONS

All commitments made in this MOU are subject to the availability of appropriated funds and each party's research priorities. Nothing in this MOU, in and of itself, obligates any participant

to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or other financial obligation.

This MOU is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the participants to this MOU will be handled in accordance with applicable laws, regulations, and procedures and will be subject to separate subsidiary agreements that will be effected in writing by representatives of the participants.

Except as provided in this Section (Section V, LIMITATION) and Section VII, INTELLECTUAL PROPERTY, this MOU is not legally binding and does not create any right or benefit, substantive or procedural, enforceable by law or equity against the NIH/ NIEHS/NTP, the NIH/NHGRI/NCGC, the EPA, or the FDA.

VI. PROPRIETY INFORMATION

Not applicable as all participants are Federal agencies. Note, however, that no sharing by FDA with other parties to this MOU of information that is confidential or trade secret is contemplated by this MOU.

VII. INTELLECTUAL PROPERTY

The parties agree that inventorship of any patentable matter, created by any of the participants pursuant to the terms of this MOU, will be determined in accordance with U.S. patent laws. Ownership will follow inventorship and vest in the inventors or their employers as determined by contract or law.

The participants agree to notify each other when joint-authoring a journal article that includes a non-government employee as a co-author. In such cases, the participants should ensure that all necessary rights under copyright are acquired to the satisfaction of all parties.

VIII. CONFIDENTIAL INFORMATION

FDA is the custodian of information, including toxicological information that is owned by entities that FDA regulates. FDA will not, as part of the activities covered by this MOU, share with other parties to the MOU any information that is confidential or trade secret.

IX. POINTS OF CONTACT

The following individuals are designated points of contact for the MOU:

NIEHS/NTP:

Raymond Tice, Ph.D.

Chief, Biomolecular Screening Branch
National Toxicology Program
National Institute of Environmental Health Sciences
Mail Code K2-17
P.O. Box 12233
Research Triangle Park, NC 27709
Tel. 919-541-4482
Fax. 919-541-0947
Email: tice@niehs.nih.gov

NCGC:

Christopher P. Austin, M.D.
Director, NIH Chemical Genomics Center
National Human Genome Research Institute
National Institutes of Health
9800 Medical Center Drive, MSC 3370
Bethesda, MD 20892-3370
Tel: 301-217-5733
Fax: 301-217-5736
Email: austinc@mail.nih.gov

EPA/ORD:

Robert J. Kavlock, Ph.D.
Director, National Center for Computational Toxicology
ORD
US EPA
Research Triangle Park, NC 27711
Tel: 919-541-2326
Fax: 919-541-1194
Email: kavlock.robert@epa.gov

FDA:

David Jacobson-Kram, Ph.D., DABT
Associate Director for Pharmacology and Toxicology
Office of New Drugs, Center for Drug Evaluation and Research
U.S. Food and Drug Administration
Silver Spring, MD 20993
Tel: 301-796-0175
Email: david.jacobsonkram@fda.hhs.gov

X. MODIFICATION/DURATION/TERMINATION

This MOU is to take effect upon signature of all participants and remain in effect for a period of five years, unless the participants decide otherwise in writing. This MOU may be amended at any time by the mutual written consent of the participants. Additionally, the participants agree to

participants at least thirty (30) days in advance of the desired termination date.

The participants anticipate that other parties may seek to join this effort in the future. If that occurs, a new MOU may be prepared and will, when signed by each of the parties to this MOU, supersede this MOU.

XI. APPROVAL

National Toxicology Program

Linda S. Birnbaum, Ph.D., DABT, ATS — Date: 5·25·10
Director
National Institute of Environmental Health Sciences
National Institutes of Health

NIH Chemical Genomics Center

Eric D. Green, M.D., Ph.D. — Date: 6/3/10
Director
National Human Genome Research Institute
National Institutes of Health

U.S. Environmental Protection Agency

for Paul T. Anastas, Ph.D. — Date: 4 June 2010
Assistant Administrator
Office of Research and Development

Food and Drug Administration

Janet Woodcock, MD — Date: 5/24/10
Director
Center for Drug Evaluation and Research

[FR Doc. 2010–17634 Filed 7–19–10; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Biotechnology Activities; Recombinant DNA Research: Proposed Action Under the NIH Guidelines for Research Involving Recombinant DNA Molecules (NIH Guidelines)

AGENCY: National Institutes of Health (NIH), PHS, DHHS.

ACTION: Notice of proposed action under the *NIH Guidelines.*

SUMMARY: Under the *NIH Guidelines,* experiments involving the generation of transgenic rodents by recombinant DNA technology must be registered with the Institutional Biosafety Committee (IBC). Specifically, Section III–E–3 of the *NIH Guidelines* addresses the generation of transgenic rodents that may be housed under biosafety level (BL) 1 conditions and allows the work to proceed simultaneously with registration of the experiment with the IBC. The IBC must then review and approve the experiment. The *NIH Guidelines* address two pathways for "generation of a transgenic rodent": altering the animal's genome using recombinant DNA technology or breeding one or more transgenic rodents to create a new transgenic rodent (*i.e.,* breeding of two different transgenic rodents or the breeding of a transgenic rodent and a non-transgenic rodent).

The NIH Office of Biotechnology Activities (OBA) received a request that the breeding of well-characterized transgenic rodents that can be maintained under BL1 conditions be exempt from the *NIH Guidelines.* The rationale is that these experiments pose little if any biosafety risk and therefore the requirement for registration with the IBC may impose an administrative burden without enhancing the safe conduct of this research. In response to this request, OBA brought a proposal to amend the *NIH Guidelines* to the Recombinant DNA Advisory Committee (RAC) for consideration. The initial proposal was discussed at the March 11, 2010 RAC meeting and a revised proposal was discussed at the June 16, 2010 RAC meeting (Webcasts of these discussions are available at *http://oba.od.nih.gov/rdna_rac/rac_meetings.html*). The RAC endorsed a proposal that would exempt from the *NIH Guidelines* the breeding of almost all transgenic rodents that can be housed at BL1, with the exception of rodents that contain a gene encoding more than fifty percent of an exogenous eukaryotic virus and transgenic rodents in which the transgene is under the control of a gammaretroviral promoter. This notice seeks public comment on this proposal.

DATES: The public is encouraged to submit written comments on these proposed changes. Comments may be submitted to the OBA in paper or electronic form at the OBA mailing, fax, and e-mail addresses shown below under the heading **FOR FURTHER INFORMATION CONTACT**. All comments received by September 1, 2010 will be considered. All written comments received in response to this notice will be available for public inspection in the NIH OBA office, 6705 Rockledge Drive, Suite 750, MSC 7985, Bethesda, MD 20892–7985, (Phone: 301–496–9838) weekdays between the hours of 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions, or require additional information about these proposed changes, please contact OBA by e-mail at *oba@od.nih.gov,* or telephone at 301–496–9838. Comments can be submitted to the same email address or by fax to 301–496–9839 or mail to the Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Suite 750, MSC 7985, Bethesda, Maryland 20892–7985.

Background: Section III–E of the *NIH Guidelines* addresses experiments for which IBC notification is required at the time the research is initiated. Experiments covered in this section of the *NIH Guidelines* are considered to be of low biosafety risk and therefore although IBC review and approval is still required, such approval need not be obtained prior to initiating research. This is in contrast to all other covered experiments described in the *NIH Guidelines* for which IBC review and approval is required prior to initiation of the experiment.

Under the *NIH Guidelines,* certain experiments can be exempted from the *NIH Guidelines* if they do not present a significant risk to public health or the environment (Section III–F–6). These exemptions are delineated in Appendix C of the *NIH Guidelines.* OBA was recently approached regarding the Section III–E–3 requirement to register the breeding of transgenic rodents and whether such experiments met the criteria for exemption under Section III–F–6. OBA sought the advice of the RAC on this issue.

Currently, the purchase or transfer of transgenic rodents that require BL1 containment are exempt from the *NIH Guidelines.* This proposal would extend that exemption to almost all experiments that involve the generation of transgenic rodents by breeding, as long as the transgenic rodents are appropriate to be maintained under BL1 conditions. The rationale is that three decades of experience working with and breeding transgenic rodents has demonstrated that the overwhelming majority of experiments involving breeding of transgenic rodents that can be housed under BL1 conditions result in a rodent that can be appropriately housed under BL1 conditions. These breeding experiments do not pose an appreciable risk to human health or to the environment. In addition, while the registration with the IBC is not a significant burden, the total number of registrations required constitutes a significant collective administrative burden on the IBC and researchers that does not appear to be commensurate with the very low biosafety risk.

There are still some breeding experiments for which IBC registration would be required in order to ensure that a risk assessment is conducted and that the resulting rodent is disposed of appropriately. The proposed exemption would retain the requirement to register with the IBC when the genome of one of the parental transgenic rodents contains more than 50 percent of the genome of an exogenous, eukaryotic virus from a single family or if the transgenic rodent's transgene is under the control of a gammaretroviral long terminal repeat (LTR). The restriction regarding exogenous eukaryotic viruses is designed to prevent inadvertent reconstitution of an exogenous virus in the resultant transgenic mouse. The restriction regarding transgenes under control of a gammaretroviral long terminal repeat addresses the small risk of recombination with endogenous retroviruses which could potentially result in mobilization of the transgene via a replication-competent mouse retrovirus. As the risk of recombination and possible transmission to humans is more likely with gammaretroviral LTRs (e.g., MLV, XMRV, FeLV), the requirement for registration is limited to rodents containing a transgene under control of these LTRs.

Specifically, the following changes are proposed to Appendix C of the *NIH Guidelines:*

Appendix C–VII. Generation of BL1 Transgenic Rodents via Breeding

The breeding of two different transgenic rodents or the breeding of a transgenic rodent with a non-transgenic rodent with the intent of creating a new strain of transgenic rodent that can be housed at BL1 containment will be exempt from the *NIH Guidelines* if:

Both parental rodents can be housed under BL1 containment, and neither parental transgenic rodent contains the following genetic modifications:

(a) More than one-half of the genome of an exogenous virus from a single Family of viruses; or

(b) A transgene that is under the control of a gammaretroviral long terminal repeat (LTR); and

It is anticipated that the transgenic rodent that results from this breeding:

(a) Will contain no more than one-half of an exogenous viral genome from a single Family of viruses.

The current Appendix C–VII and Appendices C–VII–A through C–VII–E would be renumbered to Appendix C–VIII and Appendices C–VIII–A though C–VIII–E, respectively.

For clarity the following will be added to Section III–E–3.

Section III–E–3–a. Experiments involving the breeding of certain BL1 transgenic rodents are exempt under Section III–F, *Exempt Experiments* (*See* Appendix C–VII, *Generation of BL1 Transgenic Rodents via Breeding*).

Dated: July 9, 2010.

Jacqueline Corrigan-Curay,

Acting Director, Office of Biotechnology Activities, National Institutes of Health.

[FR Doc. 2010–17668 Filed 7–19–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Camin Cargo Control, Inc., as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of Camin Cargo Control, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Camin Cargo Control, Inc., 230 Marion Ave., Linden, NJ 07036, has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/xp/cgov/import/operations_support/labs_scientific_svcs/commercial_gaugers/.*

DATES: The accreditation and approval of Camin Cargo Control, Inc., as commercial gauger and laboratory became effective on April 29, 2010. The next triennial inspection date will be scheduled for April 2013.

FOR FURTHER INFORMATION CONTACT: Anthony Malana, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: July 9, 2010.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. 2010–17597 Filed 7–19–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Passenger and Crew Manifest

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0088.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, U.S. Customs and Border (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Passenger and Crew Manifest (Advance Passenger Information System-APIS). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before September 20, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn.: Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs and Border Protection, Attn.: Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Passenger and Crew Manifest (Advance Passenger Information System-APIS).

OMB Number: 1651–0088.

Form Number: None.

Abstract: The Advance Passenger Information System (APIS) is an automated method in which U.S. Customs and Border Protection (CBP) receives information on passengers and crew onboard inbound and outbound international flights before their arrival in or departure from the United States. APIS data includes biographical information for international air passengers arriving in or departing from the United States, allowing the data to be checked against CBP databases.

The information is submitted for both commercial and private aircraft flights. Specific data elements required for each passenger and crew member include: full name; date of birth; gender; citizenship; document type; passport number, country of issuance and expiration date; and alien registration number where applicable.

APIS is authorized under the Aviation and Transportation Security Act, Public Law 107–71. Under this statute, the transmission of passenger and crew manifest information is required even for flights where the passengers and

crew have already been pre-screened or pre-cleared at the foreign location for admission to the United States. APIS is required under 19 CFR 122.49a, 122.49b, 122.49c, 122.75a, 122.75b, and 122.22.

Respondents submit their electronic manifest either through a direct interface with CBP, or using eAPIS which is a Web-based system that can be accessed at *https://eapis.cbp.dhs.gov/*.

Current Actions: This submission is being made to request an extension, and revise the burden hours as a result of revised estimates by CBP. There are no changes to this information collection.

Type of Review: Extension with a change to the burden hours.

Affected Public: Businesses, Individuals.

Commercial Airlines

Estimated Number of Respondents: 1,130.

Estimated Number of Total Annual Responses: 1,850,878.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 307,245.

Estimated Costs: $68,361,719.

Commercial Airline Passengers (3rd Party)

Estimated Number of Respondents: 184,050,663.

Estimated Number of Total Annual Responses: 184,050,663.

Estimated Time per Response: 1 minute.

Estimated Total Annual Burden Hours: 3,128,861.

Private Aircraft Pilots

Estimated Number of Respondents: 460,000.

Estimated Number of Total Annual Responses: 460,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 115,000.

Dated: July 14, 2010.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2010–17598 Filed 7–19–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1907–DR; Docket ID FEMA–2010–0002]

North Dakota; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Dakota (FEMA–1907–DR), dated April 30, 2010, and related determinations.

DATES: *Effective Date:* July 13, 2010.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Dakota 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 April 30, 2010.

Bottineau, Kidder, McHenry, Renville, and Ward Counties for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2010–17616 Filed 7–19–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

National Park Service

60-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: Department of the Interior, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 and 5 CFR part 1320, Reporting and Record Keeping Requirements, the National Park Service (NPS) invites public comments on renewal of an information collection approved under Office of Management and Budget (OMB) #1024–0216.

DATES: Public comments on this Information Collection Request (ICR) will be accepted on or before September 20, 2010.

ADDRESSES: Send comments to: Jennifer Hoger Russell, Park Studies Unit, College of Natural Resources, University of Idaho, P.O. Box 441139, Moscow, ID 83844–1139; Phone: (208) 885–4806; Fax: (208) 885–4216; e-mail: *jhoger@uidaho.edu.* Also, you may send comments to Cartina Miller, NPS Information Collection Clearance Officer, 1201 "Eye" St., NW., Washington, DC 20005, or by e-mail to *Cartina_Miller@nps.gov.* All responses to this notice will be summarized and included in the request for the Office of Management and Budget (OMB) approval. All comments will become a matter of public record. *To Request a Draft of Proposed Collection of Information Contact:* Jennifer Hoger Russell, Park Studies Unit, College of Natural Resources, University of Idaho, P.O. Box 441139, Moscow, ID 83844–1139; Phone: (208) 885–4806; Fax: (208) 885–4216; e-mail: *jhoger@uidaho.edu.*

FOR FURTHER INFORMATION CONTACT: Dr. Bruce Peacock, NPS Social Science Division,1201 Oakridge Drive, Fort Collins, CO 80525; or via phone at 970–267–2106; or via e-mail at *Bruce_Peacock@nps.gov.* You are entitled to a copy of the entire ICR package free of charge.

SUPPLEMENTARY INFORMATION:

Title: National Park Service Visitor Survey Card.

Bureau Form Number: None.

OMB Number: 1024–0216.

Expiration Date: To be requested.

Type of Request: Renewal of an existing information collection approval.

Description of Need: The National Park Service Act of 1916, 38 Stat 535,

16 U.S.C. 1, *et seq.,* requires that the NPS preserve national parks for the use and enjoyment of present and future generations. At the field level, this means resource preservation, public education, facility maintenance and operation, and physical developments as are necessary for public use, health, and safety. Other Federal mandates (National Environmental Policy Act and NPS Management Policies) require visitor use data in the impact assessment of development on users and resources as part of each park's general management plan. The Government Performance and Results Act (GPRA) of 1993 (Pub. L. 103–62) requires that the NPS develop goals to improve program effectiveness and public accountability and to measure performance related to these goals. The Visitor Survey Card (VSC) project measures performance toward those goals through a short visitor survey card. The project is an element of the NPS Strategic Plan and the Department of the Interior (DOI) Strategic Plan.

The NPS has used the VSC to conduct surveys at approximately 330 National Park Service units annually since 1998. The purpose of the VSC is to measure visitors' opinions about park facilities, services, and recreational opportunities in each park unit and System-wide. This effort is required by GPRA and other NPS and DOI strategic planning efforts. Data from the proposed survey is needed to assess performance regarding NPS GPRA goals IIa1A and IIb1. The relevant NPS GPRA goals are:

IIa1A: Percent of visitors satisfied with appropriate facilities, services and recreational opportunities.

IIb1: Visitor understanding and appreciation of the significance of the park they are visiting.

In addition, the survey collects data to support the DOI Strategic Plan goal on visitor satisfaction with the value for entrance fees paid to access public lands managed by the DOI. NPS performance on all goals measured in this study will contribute to DOI Department-wide performance reports. Results of the VSC will also be used by park managers to improve visitor services at the approximately 330 units of the National Park System where the survey is administered.

The VSC is a component of the Visitor Services Project, which is funded by the NPS through a cooperative agreement with the Park Studies Unit at the University of Idaho, and has been in use since 1998. The NPS received clearance for the VSC from OMB under the original clearance number (OMB# 1024–0216). That clearance will expire on November 30, 2010. This request is for OMB approval for another three years.

Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. 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.

Automated data collection: This information will be collected via mail and locked, on-site collection boxes. No automated data collection will occur.

Description of respondents: Visitors to approximately 330 NPS units.

Estimated average number of respondents: 132,000 visitors who accept the survey card (92,400 non-respondents and 39,600 respondents) and 1,188 visitors who refuse to take the survey card but are willing to answer the two demographic questions and the overall satisfaction question.

Estimated average burden hours per response: 1 minute for non-respondents, 3 minutes for respondents, and 2 minutes for visitors who refuse to take the survey card but are willing to answer the two demographic questions and the overall satisfaction question.

Frequency of Response: 1 time per respondent.

Estimated annual reporting burden: 3,560 hours.

Dated: July 7, 2010.

Cartina Miller,

NPS, Information Collection Clearance Officer.

[FR Doc. 2010–17585 Filed 7–19–10; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2010–N144] [96200–1672–0005–7E]

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018–0144; Wildlife Without Borders—Amphibians in Decline Grant Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on September 30, 2010. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must send comments on or before August 19, 2010.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or OIRA_DOCKET@OMB.eop.gov (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail) or hope_grey@fws.gov (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey by mail or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0144.

Title: Wildlife Without Borders—Amphibians in Decline Grant Program.

Service Form Number(s): 3–2338B.

Type of Request: Extension of a currently approved collection.

Affected Public: Domestic and nondomestic Federal, State, and local governments; nonprofit, nongovernmental organizations; public and private institutions of higher education; and any other organization or individual with demonstrated experience deemed necessary to carry out the proposed project.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of annual respondents	Number of annual responses	Completion time per response	Annual burden hours
Applications	40	40	12 hours	480
Reports	10	20	30 hours	600
Totals	50	60		1,080

Abstract: Section 8 of the Endangered Species Act (16 U.S.C. 1531–43) authorizes the establishment of the Wildlife Without Borders—Amphibians in Decline grant program to fund projects that conserve the world's rapidly declining amphibian species. This program will support activities that address threats to frogs, toads, salamanders, newts, and caecilians that face an unprecedented threat of extinction. Funding will be made available for conservation of species with native ranges in countries with the greatest need for conservation funding.

Applicants submit proposals for funding in response to a Notice of Funding Availability that we publish on Grants.gov and the program web page. Applications consist of:

(1) Cover page with basic project details (FWS Form 3–2338B).

(2) Project summary and narrative.

(3) Letter of appropriate government endorsement.

(4) Brief curricula vitae for key project personnel.

(5) Complete Standard Forms 424 and 424b (non-domestic applicants do not submit the standard forms).

Applications may also include, as appropriate, a copy of the organization's Negotiated Indirect Cost Rate Agreement (NIRCA) and any additional documentation supporting the proposed project.

All assistance awards under this program have a maximum reporting requirement of a:

(1) Mid-term report (performance report and a financial status report) due within 30 days of the conclusion of the first half of the project period, and

(2) Final report (performance and financial status report and copies of all deliverables, photographic documentation of the project and products resulting from the project) due within 90 days of the end of the performance period.

Comments: On April 14, 2010, we published in the **Federal Register** (75 FR 19420) a notice of our intent to request that OMB renew this information collection. In that notice, we solicited comments for 60 days, ending on June 14, 2010. We received three comments in response to that notice.

One commenter voiced opposition to spending tax dollars for this program. Another commenter supported the program and expressed interest in applying for a grant. The third commenter also expressed interest in applying for a grant. None of the commenters addressed the information collection requirements, and we did not make any changes to our collection. We sent a copy of the NOFA to each individual interested in applying.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: July 14, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 2010–17632 Filed 7–19–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R7-FHC-2010-N145] [71490-1351-0000-L5]

Proposed Information Collection; OMB Control Number 1018-0070; Incidental Take of Marine Mammals During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on November 30, 2010. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by September 20, 2010.

ADDRESSES: Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey by mail or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

I. Abstract

This revised IC combines the information collection requirements associated with specified marine mammal activities in the Beaufort Sea and Chukchi Sea and the adjacent coast of Alaska. The Office of Management and Budget approved the information collection requirements associated with

oil and gas exploration activities in the Chukchi Sea and assigned OMB Control No. 1018-0139, which expires June 30, 2011. If OMB approves this combined request, we will discontinue OMB Control No. 1018-0139.

The Marine Mammal Protection Act (MMPA) of 1972, as amended (16 U.S.C. 1361 et seq.) imposed, with certain exceptions, a moratorium on the taking of marine mammals. Section 101(a)(5)(A) of the MMPA directs the Secretary of the Interior to allow, upon request by citizens of the United States, the taking of small numbers of marine mammals incidental to specified activities (other than commercial fishing) if the Secretary makes certain findings and prescribes specific regulations that, among other things, establish permissible methods of taking.

Applicants seeking to conduct activities must request a Letter of Authorization (LOA) for the specific activity and submit onsite monitoring reports and a final report of the activity to the Secretary. This is a nonform collection. Regulations at 50 CFR 18.27 outline the procedures and requirements for submitting a request. Specific regulations governing authorized activities in the Beaufort Sea are in 50 CFR 18, subpart J. Regulations governing authorized activities in the Chukchi Sea are in 50 CFR 18, subpart I. These regulations provide the applicant with a detailed description of information that we need to evaluate the proposed activity and determine whether or not to issue specific regulations and, subsequently, LOAs.

We use the information to verify the finding required to issue incidental take regulations, to decide if we should issue an LOA, and, if issued, what conditions should be in the LOA. In addition, we will analyze the information to determine impacts to the marine mammals and the availability of those marine mammals for subsistence purposes of Alaska Natives.

II. Data

OMB Control Number: 1018-0070.

Title: Incidental Take of Marine Mammals During Specified Activities, 50 CFR 18.27 and 50 CFR 18, Subparts I and J.

Service Form Numbers: None.

Type of Request: Revision of currently approved collection.

Affected Public: Oil and gas industry companies.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Number of Respondents: 25 or less.

Activity	Number of annual responses	Completion time per response	Annual burden hours
One-time application for procedural regulations	2	300 hours	600
LOA requests	25	24 hours	600
Onsite monitoring and observation reports	150	1.5 hours	225
Final monitoring report	25	8 hours	200
Totals	202		1,625

III. Request for Comments

We invite comments concerning this IC on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: July 13, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 2010–17631 Filed 7–19–10; 8:45am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: High Desert Museum, Bend, OR

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the High Desert Museum, Bend, OR, that meet the definition of "unassociated funerary objects" or "sacred objects" under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In 1990, Native American cultural items were donated to the High Desert Museum by the Roger J. Bounds Foundation, in the form of the Doris Swayze Bounds Collection. Between the 1950s and 1970s, Doris Bounds collected the majority of the items through purchases and gifts. There are seven objects that meet the definition of "unassociated funerary objects" or "sacred objects." The three unassociated funerary objects are one pair of moccasins, one single moccasin, and one beaded necklace. The four sacred objects are one beaded fetish lizard-shaped object, one whistle with feathered adornment, one headdress, and one scalp lock.

Upon the initial accession of the objects into the High Desert Museum's collection in 1990, a number of scholars and Native American representatives from Columbia Plateau, Great Basin, and Plains tribes, identified the seven objects as being culturally sensitive or specific grave items of the Sioux or Assiniboine. Since 2004, the High Desert Museum has consulted with the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana. During consultation, the NAGPRA representative of the Assiniboine and Sioux Tribes of the Fort Peck Indian

Reservation, Montana, identified the objects as being either funerary or sacred objects, and culturally affiliated to the tribe. The High Desert Museum's collection records confirm that the objects are from the Poplar, MT, region and culturally affiliated specifically to the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana.

Officials of the High Desert Museum have determined that, pursuant to 25 U.S.C. 3001(3)(B), the three cultural items described above (unassociated funerary objects) are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the High Desert Museum also have determined that, pursuant to 25 U.S.C. 3001(3)(C), the four cultural items described above (sacred objects) are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Lastly, officials of the High Desert Museum have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and sacred objects and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects and/or sacred objects should contact Tracy Johnson, Curator of Collections and Exhibits, High Desert Museum, 59800 South Highway 97, Bend, OR 97702, telephone (541) 382–4754, before August 19, 2010. Repatriation of the unassociated funerary objects and sacred objects to the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, may proceed after that date if no additional claimants come forward.

The High Desert Museum is responsible for notifying the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, that this notice has been published.

Dated: July 9, 2010.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 2010–17478 Filed 7–19–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC and Wisconsin Historical Society, Museum Division, Madison, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act, (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the possession of the Wisconsin Historical Society, (aka State Historical Society of Wisconsin), Museum Division, Madison, WI. The human remains and associated funerary objects were removed from the Menominee Reservation, Menominee County (formerly Shawano County), WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Wisconsin Historical Society, Museum Division, staff in consultation with representatives of the Menominee Indian Tribe of Wisconsin.

In 1928, human remains representing a minimum of one individual were removed from a mound located within the boundaries of the Menominee Indian Tribe Reservation, Menominee County (formerly Shawano County), WI, by Arthur P. Kannenberg and John V. Satterlee. The exact location is not known. In 1950, the museum obtained the human remains, associated funerary objects, and unassociated funerary objects from the wife of Arthur P. Kannenberg. No known individual was identified. The three associated funerary objects are earrings.

The human remains, associated funerary objects, and unassociated funerary objects removed by Arthur P. Kannenberg and John V. Satterlee were from at least two mounds. The 91 unassociated funerary objects are described in a companion *Notice of Intent to Repatriate Cultural Items.*

The Menominee Indian Reservation falls within the ancestral and historic territory of the Menominee people. Archeological investigation has uncovered additional historic burials in this area. Additionally, archeological research shows that copper ornaments and earrings, similar to the objects mentioned above, are commonly found within historic Indian burials throughout the Great Lakes region. Furthermore, Menominee oral history states that the origin of the Menominee people began at the mouth of the Menominee River, which is approximately 60 miles from the present-day Menominee Reservation.

Officials of the Bureau of Indian Affairs and Wisconsin Historical Society, Museum Division, have determined that, pursuant to 25 U.S.C. 3001(9), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Bureau of Indian Affairs and Wisconsin Historical Society, Museum Division, also have determined that, pursuant to 25 U.S.C. 3001(3)(A), the three objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Bureau of Indian Affairs and Wisconsin Historical Society, Museum Division, have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Menominee Indian Tribe of Wisconsin.

Representatives of any other Indian Tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Jennifer L. Kolb, Wisconsin Historical Museum, 30 N. Carroll St., Madison, WI 53703, telephone (608) 261–2461, before August 19, 2010. Repatriation of the human remains and associated funerary objects to the Menominee Indian Tribe of Wisconsin may proceed after that date if no additional claimants come forward.

The Wisconsin Historical Society, Museum Division, is responsible for notifying the Menominee Indian Tribe of Wisconsin that this notice has been published.

Dated: July 9, 2010.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 2010–17477 Filed 7–19–10; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–FHC–2010–N136; 81440–1351–8SSO–L5–FY10]

Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application and proposed incidental harassment authorization; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from the National Oceanic and Atmospheric Administration Restoration Center, Southwest Region, for authorization to take small numbers of marine mammals by harassment incidental to construction of the Parson's Slough Project, a tidal wetlands restoration project on the Elkhorn Slough National Estuarine Research Reserve in northern Monterey County, California. In accordance with provisions of the Marine Mammal Protection Act of 1972 (MMPA), as amended, we request comments on our proposed authorization for the applicant to incidentally take, by harassment, small numbers of southern sea otters for a period of 6 months beginning on September 1, 2010, and ending on March 1, 2011. We anticipate no take by injury or death and include none in this proposed authorization, which would be for take by harassment only.

DATES: Comments and information must be received by August 19, 2010.

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

1. *By U.S. mail or hand-delivery to:* Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.
2. *By fax to:* 805–644–3958, attention to Diane Noda, Field Supervisor.
3. *By electronic mail (e-mail) to: R8_SSO-IHA_Comment@FWS.gov.* Please include your name and return address in your message.

FOR FURTHER INFORMATION CONTACT: To request copies of the application, the list of references used in this notice, and other supporting materials, contact Lilian Carswell at the address in **ADDRESSES**, or by e-mail at *Lilian_Carswell@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA, as amended (16 U.S.C. 1371 (a)(5)(A) and (D)), authorize the Secretary of the Interior 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, provided that we make certain findings and either issue regulations or, if the taking is limited to harassment, provide a notice of a proposed authorization to the public for review and comment.

We may grant authorization to incidentally take marine mammals if we find that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. As part of the authorization process, we prescribe permissible methods of taking and other means of affecting the least practicable impact on the species or stock and its habitat, and requirements pertaining to the monitoring and reporting of such takings.

The term "take," as defined by the MMPA, means to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill, any marine mammal. Harassment, as defined by the MMPA, means "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [the MMPA calls this 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 [the MMPA calls this Level B harassment]."

The terms "small numbers," "negligible impact," and "unmitigable adverse impact" are defined in 50 CFR 18.27, the Service's regulations governing take of small numbers of marine mammals incidental to specified activities. "Small numbers" is defined as "a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock." "Negligible impact" is defined 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." "Unmitigable adverse impact" is defined 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." The subsistence provision does not apply to southern sea otters.

Section 101(a)(5)(D) of the MMPA established an expedited process by which U.S. citizens can apply for an authorization to incidentally take small numbers of marine mammals where the take will be limited to harassment. Section 101(a)(5)(D)(iii) establishes a 45-day time limit for Service review of an application, followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, we must either issue or deny issuance of the authorization. We refer to these authorizations as Incidental Harassment Authorizations (IHAs).

Summary of Request

On April 27, 2010, we received a request from the National Oceanic and Atmospheric Administration Restoration Center, Southwest Region (Applicant) for MMPA authorization to take by harassment southern sea otters (*Enhydra lutris nereis*) incidental to construction activities associated with the Parson's Slough Project. The Parson's Slough Project is a tidal wetlands restoration project on the Elkhorn Slough National Estuarine Research Reserve in northern Monterey County, California.

Under the proposed action, the Applicant would construct a partially submerged tidal barrier (a sill) at the mouth of Parson's Slough Channel. The Parson's Slough Channel leads to the Parson's Slough study area, which consists of the 254-acre (1-square-kilometer) Parson's Slough Complex and the 161-acre (0.7-square-kilometer) South Marsh Area. The sill would be a fixed structure, consisting of steel sheet piles extending 270 feet (82 meters) across the mouth of the channel. A span of 100 feet (30 meters) at the center of the structure would remain submerged more than 99 percent of the time, allowing for the exchange of water between Parson's Slough and Elkhorn Slough. Within this span, a notch 25 feet (7.6 meters) wide would permit the passage of water at all tide levels and allow for the movement of fish and wildlife between Parson's Slough and Elkhorn Slough. The top elevation of the notch would be −5 feet (−1.5 meters) North American Vertical Datum

(NAVD), whereas the remainder of the central span would have a top elevation of −2 feet (−0.6 meters) NAVD.

The purpose of the proposed action is to reduce tidal scour within the Elkhorn Slough action area in general and the Parson's Slough study area in particular. Conversion of wetlands to pasture during the 1900s by means of diking and draining caused the subsidence of land to an elevation too low to support marsh vegetation (Elkhorn Slough Tidal Wetland Project Team 2007). Since the mid-20th century, tidal erosion and the inundation of interior marsh areas have caused a reversal of the proportion of salt marsh habitat to mudflat habitat within Elkhorn Slough. The Parson's Slough Complex, historically characterized by tidal marsh and tidal creeks, now consists primarily of mudflats intersected by subtidal channels. The average land elevation in the Parson's Slough Complex is now approximately 2.4 feet (0.7 meters) below the level that can support tidal marsh vegetation. Without intervention, excessive erosion will continue to widen tidal channels and convert salt marsh to mudflat, resulting in a significant loss of habitat function and a decrease in estuarine biodiversity.

A detailed description of the proposed action is contained in a Biological Assessment prepared by Vinnedge Environmental Consulting for the Elkhorn Slough National Estuarine Research Reserve and the Applicant (Vinnedge 2010a). The general impacts associated with the design and construction phases of the Parson's Slough Project are described in the Community-Based Restoration Program (CRP) Programmatic Environmental Assessment (PEA) and the Supplemental Programmatic Environmental Assessment (SPEA). The Applicant will complete a Targeted Supplemental Environmental Assessment (TSEA) to include all project-specific impacts not described in the CRP PEA/SPEA. The Applicant has requested formal consultation with the Service under the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*).

Description of the Activity

Parson's Slough Project, Monterey County, California

a. Timing of Construction

Construction of the sill would commence as early as September 1, 2010, and continue approximately 12–17 weeks.

b. Geographic Location of Action

The site of construction is the mouth of the Parson's Slough Channel, in the vicinity of the Union Pacific Railroad bridge (railroad bridge), milepost 103.27, Coast Subdivision. Parson's Slough is located on the southeast side of the Elkhorn Slough Estuary, which is situated 90 miles (145 kilometers) south of San Francisco and 20 miles (32 kilometers) north of Monterey, in Monterey County, California.

Description of Habitat and Marine Mammals Affected by the Activity

Approximately 100 sea otters currently use Elkhorn Slough for foraging, resting, and other activities. In recent years, sea otters have increasingly utilized protected side channels of the slough and the Parson's Slough Complex. Detailed pre-project monitoring of marine mammal use of the Parson's Slough area was conducted by Okeanis researchers under contract to the Elkhorn Slough National Estuarine Research Reserve from October, 2009, to January, 2010. In the course of 19 daytime counts and 6 nighttime monitoring sessions, during which the number of sea otters entering and exiting the Parson's Slough Complex was counted, researchers observed sea otters using 3 main areas near the site of the proposed sill. One of these areas (used by up to 20 animals) was located within the Parson's Slough Complex. The two other areas (used by approximately 10 animals each) were located on Yampah Island, outside but adjacent to the Parson's Slough Complex. These areas appeared to be centered on three male territories. At least some of the associated females used multiple male territories and the Seal Bend area in the main channel of Elkhorn Slough (Maldini et al. 2010).

Sea otters using the Parson's Slough Complex regularly transited into and out of the complex via the channel below the railroad bridge to forage in the main channel of Elkhorn Slough. At least two other male sea otters were detected accessing the Parson's Slough Complex via land and using the channel to the northeast of the railroad bridge. Hourly scans of the complex during daylight hours revealed that sea otters using the complex spent most of their time resting in water (62 percent) and the remainder of their time resting on land (10 percent), foraging (15 percent), grooming (3 percent), traveling into and out of the complex (7 percent), and interacting with other sea otters (3 percent). Sea otters using the Yampah Island area tended to access it via land from the main channel of Elkhorn Slough and spent a large proportion of time hauled out on pickleweed (*Salicornia virginica*) during low tides, dispersing into Elkhorn Slough at high tides (Maldini et al. 2010). A detailed description of the habitat, status, and distribution of southern sea otters in Elkhorn Slough in general and Parson's Slough in particular is included in Vinnedge (2010a) and Maldini *et al.* (2010).

Status and Distribution of Affected Species

Southern sea otters are listed as threatened under the ESA (42 FR 2965; January 14, 1977) and, because of their threatened status, are automatically considered "depleted" under the MMPA. The State of California also recognizes the southern sea otter as a fully protected mammal (Fish and Game Code section 4700) and as a protected marine mammal (Fish and Game Code section 4500). All members of the southern sea otter population are descendants of a small group that survived the fur trade near Big Sur, California. Historically ranging from at least as far north as Oregon (Valentine *et al.* 2008) to Punta Abreojos, Baja California, Mexico in the south, southern sea otters currently occur in only two areas of California. The mainland population ranges from San Mateo County to Santa Barbara County and numbers approximately 2,800 animals (the 3-year running average for spring 2009 is 2,813) (*http://www.werc.usgs.gov/Project.aspx?ProjectID=91*). A small, translocated population occurs at San Nicolas Island, numbering 39 animals as of 2009 (USGS unpublished data). Data from recent years suggest that southern sea otter population numbers are stable or slightly declining.

Potential Impacts of Sill Construction on Sea Otters

The proposed activities have the potential to disturb resting, foraging, and other activities of sea otters in the vicinity of construction activities. Disturbance would be due primarily to construction noise and activity. Construction of the sill would entail driving 2 rows of 7 end-bearing piles to an elevation of approximately −80 feet (−24 meters) and a single row of sheetpile (between the end-bearing piles) using a vibratory hammer and, if necessary, an impact hammer to complete the driving. An additional 14 temporary end-bearing sheet piles would be installed in the main channel of Elkhorn Slough at a staging site near Kirby Park, where sea otter presence has historically been minimal (1 or

occasionally 2 animals) and limited to foraging activity (D. Maldini, Okeanis, pers. comm.).

Little is known regarding the effects of sound on sea otters. Sea otters have not been reported as particularly sensitive to sound disturbance, especially in comparison to other marine mammals such as pinnipeds (Riedman 1983; Riedman 1984; Efroymson and Suter 2001). However, observed sea otter responses to disturbance are highly variable, probably reflecting the level of noise and activity to which they have been exposed and become acclimated over time and the particular location and social or behavioral state of that individual (G. Bentall, Monterey Bay Aquarium Sea Otter Research and Conservation Program, pers. comm.). Ambient sound levels within the action area are generally low, with the notable exception of the Union Pacific Railroad tracks, which are located within the project footprint and accommodate approximately 15–10 trains per day (Vinnedge 2010b). Noise and disturbance associated with construction will likely cause sea otters utilizing the Parson's Slough Complex and Yampah Island area to disperse into the main channel of Elkhorn Slough, and may discourage the use of areas near the construction site even when construction activities are not under way. The temporary displacement of sea otters due to construction activity is not expected to result in effects on individual fitness because of the general availability in Elkhorn Slough of suitable habitat for resting, foraging, and other activities.

Other potential impacts on sea otters include disturbance due to light during periods of nighttime construction and the risk of oiling/ingesting oil in the event of a spill of petroleum hydrocarbon products used in construction equipment. Disturbance due to artificial light is not expected to cause additional effects beyond those caused by construction noise and activity. The risk of accidental release of construction-related fluids will be minimized by means of measures outlined in "Mitigation Measures" below.

Potential Effects on Habitat

Construction of the Parson's Slough Project would entail the placement of approximately 2,000 cubic yards (1,529 cubic meters) of rock and sheetpile and would result in the loss of approximately 0.75 acres (4047 square meters) of subtidal habitat within the project footprint. However, operation of the proposed sill is expected to result in the conversion of approximately 11 acres (0.045 square kilometers) of intertidal mudflat habitat to subtidal habitat. The increase in soft sediments within the Parson's Slough Complex resulting from reduced tidal scour would likely result in a beneficial effect on sea otters by increasing the availability of soft sediment habitat for burrowing prey. However, muted tidal flows could also result in a small (5-percent) increase in hypoxic (lack of oxygen) conditions, which may decrease habitat suitability for benthic (bottom-dwelling) invertebrates.

Other potential effects on habitat include the introduction of a barrier to movement into and out of the Parson's Slough Complex (either by direct physical means or by means of increased water velocities flowing over the sill during ebb and flood tides) and changes in concentrations of pathogens and contaminants. Noise and activity may deter animals from entering the Parson's Slough Complex during sill construction, but in the long term the sill would not likely present a physical barrier to sea otter movement, because a central span of 100 feet (30 meters) would remain submerged more than 99 percent of the time, within which a notch of 25 feet (7.6 meters) would remain submerged at all times. Water flows across the sill would not prevent access to the Parson's Slough Complex, because the modeled peak tidal velocities across the sill—7–12 feet/second (2.1–3.7 meters/second) (Ducks Unlimited et al. 2010)—are much slower than average wave velocities in the turbulent waters regularly negotiated by sea otters, and because most sea otter movements into and out of the complex occur during slack tides (Maldini *et al.* 2010), during which flows across the sill would remain unchanged from current conditions.

Effects of the proposed sill on levels of pathogens or contaminants in Parson's Slough or Elkhorn Slough are unclear because their sources and transport are not well understood. If pathogens or contaminants are entering the Elkhorn Slough system by means of Parson's Slough, then the sill would tend to concentrate them by means of decreased flushing in the upper slough. However, if they are entering Elkhorn Slough by means of the Gabilan/Tembladero watershed or the Old Salinas River channel, then construction of the sill would lead to lower concentrations of pathogens and contaminants within the Parson's Slough Complex (McCarthy 2009). Levels of exposure of sea otters to pathogens and contaminants may not be appreciably different under either scenario, because animals using the Parson's Slough Complex also regularly enter and utilize Elkhorn Slough proper.

Potential Impacts on Subsistence Needs

The subsistence provision of the MMPA does not apply to southern sea otters.

Mitigation Measures

As described in Vinnedge (2010) and in correspondence between the Applicant and the Service, the following measures would be implemented to avoid, minimize, and mitigate the effects of the proposed action on southern sea otters:

a. Timing of Construction Must Avoid the Birth Peak for Sea Otters in Elkhorn Slough

Construction activities will be timed to avoid peak pupping periods for marine mammals. A birth peak generally occurs in California from late February to early April, although sea otters may reproduce at any time of year (Siniff and Ralls 1991), and the birth peak may not be synchronous in all parts of California (Riedman et al. 1994). In Elkhorn Slough, the birth peak appears to occur in March and April (Maldini 2010). Construction activities will begin as early as September 1, 2010, and cease on or before March 1, 2011.

b. Elkhorn Slough National Estuarine Research Reserve Must Provide Construction Awareness Training Specific to Marine Mammals for All Personnel

Before the onset of construction activities, a qualified biologist will conduct an education program for all construction personnel. At a minimum the training will include a description of southern sea otters and their habitat, the occurrence of the species within the project action area, an explanation of the status of the species and its protection under the ESA and MMPA, the measures that are being implemented to minimize disturbance to sea otters and their habitat as they relate to the construction, and the authority given to the biological monitor to stop construction at any point. A fact sheet conveying this information will be prepared for distribution to the construction personnel and other project personnel who may enter the project area. Upon completion of the program, personnel will sign a form stating that they attended the program and understand all the avoidance and minimization measures and requirements of the ESA and MMPA.

c. Construction Activities Causing Noise-Related Disturbance Must Be Conducted at High Tide to the Maximum Extent Practicable

The occurrence of hauled-out sea otters near the proposed construction site is lowest at high tide (Maldini et al. 2010). Construction activities causing noise-related disturbance, such as pile-driving, will be conducted at high tide to the maximum extent practicable.

d. Ramp-Up Procedures Must Be Used

In order to avoid startling animals with sudden loud noises, noise-producing construction activities will begin gradually. Biological monitors will be present 30 minutes before construction begins and will have the authority to halt operations if animals appear unduly harassed or in danger of injury.

e. Fuel Storage and All Fueling and Equipment Maintenance Activities Must Be Conducted at Least 100 Feet (30 Meters) From Subtidal and Intertidal Habitat

Sea otters are susceptible to the adverse effects of oiling due to fuel spills because they depend on the insulation of their dense fur to keep warm. They may also ingest oil during grooming and feeding. Fuel storage and all fueling and equipment maintenance activities will be conducted at least 100 feet (30 meters) from subtidal and intertidal habitat. Implementation of the proposed action will require approval and implementation or a site-specific Storm Water Pollution Prevention Plan, which will include a hazardous spill prevention plan.

Findings

We propose the following findings regarding this action:

Small Numbers Determination and Estimated Take by Incidental Harassment

For small take analysis, the statute and legislative history do not expressly require a specific type of numbers analysis, leaving the determination of "small" to the agency's discretion. Factors considered in our small numbers determination include the following:

(1) *The number of southern sea otters utilizing the affected area is small relative to the size of the southern sea otter population.* The mainland southern sea otter population numbers approximately 2,800 animals. The number of southern sea otters that could potentially be taken by harassment in association with the proposed project, approximately 40 animals, is less than 1.5 percent of the estimated population size.

(2) *Monitoring requirements and mitigation measures are expected to limit the number of incidental takes.* Biological monitors would be present 30 minutes before and during all construction activity and would have the authority to stop construction if sea otters appeared to be unduly harassed or in danger of injury. Conducting noise-producing construction activities at high tide, to the maximum extent practicable, would further reduce the number of sea otters that may be harassed.

Negligible Impact

The Service finds that any incidental take by harassment that is reasonably likely to result from the proposed project would not adversely affect the southern sea otter through effects on rates of recruitment or survival, and would, therefore, have no more than a negligible impact on the stock. In making this finding, we considered the best available scientific information, including: (1) The biological and behavioral characteristics of the species; (2) the most recent information on distribution and abundance of sea otters within the area of the proposed activity; (3) the potential sources of disturbance during the proposed activity; and (4) the potential response of southern sea otters to disturbance.

The mitigation measures outlined above are intended to minimize the number of sea otters that may be disturbed by the proposed activity. Any impacts to individuals are expected to be limited to Level B harassment of short-term duration. Response of sea otters to disturbance would most likely be common behaviors such as diving and/or swimming away from the source of the disturbance. No take by injury or death is anticipated. We find that the anticipated harassment caused by the proposed activities is not expected to adversely affect the species or stock through effects on annual rate of recruitment or survival.

Our finding of negligible impact applies to incidental take associated with the proposed activity as mitigated through this authorization process. This authorization establishes monitoring and reporting requirements to evaluate the potential impacts of the authorized activities, as well as mitigation measures designed to minimize interactions with, and impacts to, southern sea otters.

Impact on Subsistence

The subsistence provision of the MMPA does not apply to southern sea otters.

Marine Mammal Monitoring

The Applicant would be required to conduct marine mammal monitoring during construction of the Parson's Slough Project in order to implement the mitigation measures that require real-time monitoring and to satisfy monitoring required under the MMPA. Project personnel would be required to record information regarding location and behavior of all sea otters observed during operations. When conditions permit, information regarding age (pup, adult) and any tagged animals would also be required to be recorded.

Monitoring and Reporting

The Applicant must implement the following monitoring and reporting program to increase knowledge regarding the species, and to assess the level of take caused by the proposed action:

a. Pre-Construction Monitoring

Pre-construction monitoring will begin up to 2 weeks before construction activities begin, and end no sooner than 24 hours before construction activities begin. The purpose of pre-construction monitoring is to document sea otter numbers and distribution in the surrounding areas shortly before the onset of disturbance. Observation methods will be approved by the Service.

b. Construction Monitoring

A biological monitor will be present daily. Monitoring will begin 30 minutes before construction activity begins and continue until construction personnel have left the site. The biological monitor will maintain a log that documents numbers of marine mammals present before, during, and at the conclusion of daily activities. The monitor will record basic weather conditions and marine mammal behavior and will have the authority to stop construction if sea otters appear to be unduly harassed or in danger of injury.

c. Post-Construction Monitoring

Post-construction monitoring will consist of surveys during peak occupational time and tidal cycles for 4 weeks following completion of sill construction. If sea otters demonstrate the ability to move freely across the sill and resume normal behavior, monitoring may end before 4 weeks with concurrence of the Service.

d. Reporting

The applicant will submit a report to the Service within 30 days of the conclusion of monitoring efforts. The report will include a summary of the

daily log maintained by the biological monitor during construction and information from pre- and post-construction monitoring.

Endangered Species Act

The proposed activity will occur within the range of the southern sea otter, which is presently listed as threatened under the ESA. The Applicant has initiated consultation under section 7 of the ESA with the Service's Ventura Fish and Wildlife Office. We will complete intra-Service section 7 consultation prior to finalization of the IHA.

National Environmental Policy Act (NEPA)

The design and construction phases of the Parson's Slough Project are described in the CRP PEA and/or SPEA prepared by the Applicant. The Applicant is currently preparing a TSEA to include all project elements not described in the CRP PEA/SPEA. If we find it to be adequate and appropriate, we will adopt the TSEA as the foundation of the Service's Environmental Assessment (EA) of whether issuance of the IHA will have a significant effect on the human environment. These analyses will be completed prior to issuance or denial of the IHA and will be available at *http://www.fws.gov/ventura/speciesinfo/so_sea_otter/*. To obtain a copy of the CRP PEA or SPEA, contact the individual identified in the **FOR FURTHER INFORMATION CONTACT** section.

Government-to-Government Relations With Native American Tribal Governments

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, Secretarial Order 3225, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with Federally recognized Tribes on a Government-to-Government basis. We have evaluated possible effects on Federally recognized Indian Tribes and have determined that there are no effects.

Proposed Authorization

The Service proposes to issue an IHA for small numbers of southern sea otters harassed incidentally by the Applicant while the applicant is constructing the Parson's Slough Project, beginning September 1, 2010, and ending March 1, 2011. Authorization for incidental take beyond this period would require a request for renewal.

The final IHA will incorporate the mitigation, monitoring, and reporting requirements discussed in this proposal. The Applicant will be responsible for following those requirements. These authorizations will not allow the intentional taking of southern sea otters.

If the level of activity exceeds that described by the Applicant, or the level or nature of take exceeds those projected here, the Service will reevaluate its findings. The Secretary may modify, suspend, or revoke an authorization if the findings are not accurate or the conditions described in this notice are not being met.

Request for Public Comments

The Service requests interested persons to submit comments and information concerning this proposed IHA. Consistent with section 101(a)(5)(D)(iii) of the MMPA, we are opening the comment period on this proposed authorization for 30 days (*see* **DATES**).

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: July 14, 2010.

Ren Lohoefener,

Regional Director, Pacific Southwest Region.

[FR Doc. 2010–17674 Filed 7–19–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTC 00900.L16100000.DP0000]

Notice of Public Meeting, Dakotas Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Dakotas Resource Advisory Council (RAC) will meet as indicated below.

DATES: The next regular meeting of the Dakotas Resource Advisory Council will be held on September 2, 2010, in Dickinson, North Dakota. The meeting will start at 8 a.m. and adjourn at approximately 3:30 p.m. When determined, the meeting location will be announced in a news release.

FOR FURTHER INFORMATION CONTACT: Mark Jacobsen, Public Affairs Specialist, BLM Eastern Montana/Dakotas District, 111 Garryowen Road, Miles City, Montana 59301, telephone (406) 233–2831.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior through the Bureau of Land Management on a variety of planning and management issues associated with public land management in the Dakotas. At these meetings, topics will include: North Dakota and South Dakota Field Office manager updates, subcommittee briefings, work sessions, and other issues that the council may raise. All meetings are open to the public and the public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation, or other reasonable accommodations should contact the BLM as provided above.

Michael D. Nedd,

Acting State Director.

[FR Doc. 2010–17687 Filed 7–19–10; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTC 00900.L16100000.DP0000]

Notice of Public Meeting, Eastern Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Eastern Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The next regular meeting of the Eastern Montana Resource Advisory Council will be held on August 26,

2010, in Miles City, Montana. The meeting will start at 8 a.m. and adjourn at approximately 3:30 p.m. When determined, the meeting location will be announced in a news release.

FOR FURTHER INFORMATION CONTACT: Mark Jacobsen, Public Affairs Specialist, BLM Eastern Montana/Dakotas District, 111 Garryowen Road, Miles City, Montana 59301, telephone (406) 233–2831.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior through the Bureau of Land Management on a variety of planning and management issues associated with public land management in Montana. At these meetings, topics will include: Miles City and Billings Field Office manager updates, subcommittee briefings, work sessions, and other issues that the council may raise. All meetings are open to the public and the public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation, or other reasonable accommodations should contact the BLM as provided above.

Michael D. Nedd,

Acting State Director.

[FR Doc. 2010–17686 Filed 7–19–10; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of September 13, 2010 Meeting for Acadia National Park Advisory Commission

AGENCY: National Park Service, Department of Interior.

ACTION: Notice of September 13, 2010 Meeting for Acadia National Park Advisory Commission.

SUMMARY: This notice sets the date of September 13, 2010, meeting of the Acadia National Park Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on Monday, September 13, 2010, at 1 p.m. (EASTERN).

Location: The meeting will be held at Park Headquarters, Bar Harbor, Maine 04609.

Agenda

The September 13, 2010, Commission meeting will consist of the following:

1. Committee reports:

—Land Conservation.
—Park Use.
—Science and Education.
—Historic.

2. Old Business.
3. Superintendent's Report.
4. Chairman's Report.
5. Public Comments.

FOR FURTHER INFORMATION CONTACT: Further information concerning this meeting may be obtained from the Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, Maine 04609, telephone (207) 288–3338.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days prior to the meeting. 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: July 7, 2010.

Sheridan Steele,

Superintendent, Acadia National Park.

[FR Doc. 2010–17587 Filed 7–19–10; 8:45 am]

BILLING CODE 4310–2N–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–NEW]

Office on Violence Against Women

Agency Information Collection Activities: New Collection

ACTION: 30-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for Grantees from the Service to Advocate for and Respond to Youth Program.

The Department of Justice, Office on Violence Against Women (OVW), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 95, page 27820–27821, on May 19, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 19, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(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, 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

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Services to Advocate for and Respond to Youth Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–XXXX. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 45 grantees of the Services to Advocate for and Respond to Youth Program. This is the first Federal funding stream solely dedicated to the provision of direct intervention and related assistance for youth victims of sexual assault, domestic violence, dating violence and stalking. Overall, the purpose of the Youth Services Program is to provide direct counseling, advocacy, legal advocacy, and mental health services for youth victims of sexual assault, domestic violence, dating violence, and stalking, as well as linguistically, culturally, or community relevant services for underserved populations.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 45 respondents (grantees from the Services to Advocate for and Respond to Youth Program) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Services to Advocate for and Respond to Youth Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 90 hours, that is 45 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: July 15, 2010.

Lynn Bryant,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2010–17698 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–NEW]

Office on Violence Against Women: Agency Information Collection Activities: New Collection

ACTION: 30-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for Grantees from the Tribal Sexual Assault Services Program.

The Department of Justice, Office on Violence Against Women (OVW), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 95, page 27819, on May 18, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 19, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(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, 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

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Tribal Sexual Assault Services Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–XXXX. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 15 grantees of the Tribal Sexual Assault Services Program. The Sexual Assault Services Program (SASP), created by the Violence Against Women Act of 2005 (VAWA 2005), is the first federal funding stream solely dedicated to the provision of direct intervention and related assistance for victims of sexual assault. The SASP encompasses four different funding streams for States and Territories, Tribes, State Sexual Assault Coalitions, Tribal Coalitions, and culturally specific organizations. Overall, the purpose of SASP is to provide intervention, advocacy, accompaniment, support services, and related assistance for adult, youth, and child victims of sexual assault, family and household members of victims, and those collaterally affected by the sexual assault.

The Tribal SASP supports efforts to help survivors heal from sexual assault trauma through direct intervention and related assistance from social service organizations such as rape crisis centers through 24-hour sexual assault hotlines, crisis intervention, and medical and criminal justice accompaniment. The Tribal SASP will support such services through the establishment, maintenance, and expansion of rape crisis centers and other programs and projects to assist those victimized by sexual assault.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 15 respondents (grantees from the Tribal Sexual Assault Services Program) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Tribal SASP

grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 30 hours, that is 15 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–17697 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0017]

Office on Violence Against Women; Agency Information Collection Activities: Extension of a Currently Approved Collection

ACTION: 30-Day Notice of Information Collection under Review: Semi-annual Progress Report for the Technical Assistance Program.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 99, page 28818–28819 on May 24, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 19, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to: The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(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, 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

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-annual Progress Report for Technical Assistance Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0017. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the 100 programs providing technical assistance as recipients under the Technical Assistance Program.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 100 respondents (Technical Assistance providers) approximately one hour to complete a semi-annual progress report twice a year. The semi-annual progress report for the Technical Assistance Program is divided into sections that pertain to the different types of activities in which Technical Assistance Providers are engaged. The primary purpose of the OVW Technical Assistance Program is to provide direct assistance to grantees and their subgrantees to enhance the success of local projects they are implementing with VAWA grant funds. In addition, OVW is focused on building the capacity of criminal justice and victim services organizations to respond effectively to sexual assault, domestic violence, dating violence, and stalking and to foster partnerships between organizations that have not traditionally worked together to address violence against women, such as faith- and community-based organizations.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the semi-annual progress report form is 200 hours. It will take approximately one hour for the grantees to complete the form twice a year.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–17691 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–NEW]

Office on Violence Against Women: Agency Information Collection Activities: New Collection

ACTION: 30-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for Grantees from the Engaging Men and Youth Program.

The Department of Justice, Office on Violence Against Women (OVW), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 95, page 27818–27819, on May 18, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 19, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(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, 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

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Engaging Men and Youth Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–XXXX. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 35 grantees of the Engaging Men and Youth Program. The grant program is designed to support projects fund projects that develop or enhance new or existing efforts to engage men and youth in preventing crimes of violence against women with the goal of developing mutually respectful, nonviolent relationships.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 35 respondents (grantees from the Engaging Men and Youth Program) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. An Engaging Men and Youth Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 70 hours, that is 35 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–17690 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–NEW]

Office on Violence Against Women; Agency Information Collection Activities: New Collection

ACTION: 30-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for Grantees from the Court Training and Improvements Program.

The Department of Justice, Office on Violence Against Women (OVW), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75 Number 95, page 27818, on May 18, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 19, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(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, 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

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Court Training and Improvements Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–XXXX. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 23 grantees of the Court Training and Improvements Program. The grant program creates a unique opportunity for Federal, State, Territorial, and Tribal courts or court-

based programs to significantly improve court responses to sexual assault, domestic violence, dating violence, and stalking cases utilizing proven specialized court processes to ensure victim safety and offender accountability. The program challenges courts and court-based programs to work with their communities to develop specialized practices and educational resources that will result in significantly improved responses to sexual assault, domestic violence, dating violence and stalking cases, ensure offender accountability, and promote informed judicial decision making.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 23 respondents (grantees from the Court Training and Improvements Program) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Court Training and Improvements Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 46 hours, that is 23 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530.

Dated: July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–17688 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act; Clean Water Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; Toxic Substances Control Act; and the Reporting Requirements of the Emergency Planning and Community Right-To-Know Act and the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on July 14, 2010, a proposed Consent Decree in *United States et al.* v. *McWane, Inc.,* Civil Action No. CV–10–JEO–1902–S was lodged with the United States District Court for the Northern District of Alabama.

In this action the United States sought injunctive relief and civil penalties for violations of the Clean Air Act, 42 U.S.C. 7401 to 7671q ("CAA"); Clean Water Act, 33 U.S.C. 1311 to 1387 ("CWA"); Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 to 6992k; Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300f to 300j-26; Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2601 to 2692, and the reporting requirements of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 to 11050 ("EPCRA"); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.,* together with their implementing regulations and permits, at twenty-eight of McWane's facilities in fourteen states. McWane, Inc. is a national company operating iron foundries, brass foundries, and various valve and tank manufacturing facilities. McWane's major plants by industry include four pipe plants, four valve and hydrant plants, seven soil pipe and utility fittings plants, seven tank manufacturing plants and one fire extinguisher plant. Most of these facilities operate under trade names, including Tyler Pipe, Manchester Tank, Pacific States, Kennedy Valve, M & H Valve, Clow, Ransom Industries, Union Foundry, Empire Coke Company, Amerex Corporation, Atlantic States, and Anaco. The Alabama Department of Environmental Management and the State of Iowa are co-plaintiffs in this action.

Under the proposed Consent Decree, McWane will pay a civil penalty of $4,000,000 (to be divided among the United States, Alabama and Iowa), implement a slate of Supplemental Environmental Projects at a cost of $9,154,050, and complete the final evaluation of a comprehensive, corporate-wide Environmental Management System (EMS) at all of its facilities. McWane has already undertaken corrective measures to resolve all the violations alleged in the Complaint, at a cost of over $7.6 million. The proposed Consent Decree resolves only the specific violations alleged in the Complaint.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *McWane, Inc.,* D.J. Ref. 90–5–1–1–08282.

The Consent Decree may be examined at the Office of the United States Attorney for the Northern District of Alabama, 1801 4th Avenue North, Birmingham, Alabama 35203–2101, and at the following U.S. EPA Regions: Region 1 (CT, MA, ME, NH, RI, VT), Environmental Protection Agency, 5 Post Office Square—Suite 100, Boston, MA 02109–3912, Phone: (617) 918–1111, Fax: (617) 918–1809, Toll free within Region 1: (888) 372–7341.

Region 2 (NJ, NY, PR, VI), Environmental Protection Agency, 290 Broadway, New York, NY 10007–1866, Phone: (212) 637–3000, Fax: (212) 637–3526.

Region 3 (DC, DE, MD, PA, VA, WV), Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone: (215) 814–5000, Fax: (215) 814–5103, Toll free: (800) 438–2474.

Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303–3104, Phone: (404) 562–9900, Fax: (404) 562–8174, Toll free: (800) 241–1754.

Region 5 (IL, IN, MI, MN, OH, WI), Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, IL 60604–3507, Phone: (312) 353–2000 Fax: (312) 353–4135, Toll free within Region 5: (800) 621–8431

Region 6 (AR, LA, NM, OK, TX), 1445 Ross Avenue, Dallas, TX 75202–2733, Phone: (214) 665–2200, Fax: (214) 665–7113, Toll free within Region 6: (800) 887–6063).

Region 7 (IA, KS, MO, NE), Environmental Protection Agency, 901 North 5th Street, Kansas City, KS 66101, Phone: (913) 551–7003, Toll free: (800) 223–0425.

Region 8 (CO, MT, ND, SD, UT,WY), Environmental Protection Agency, 1595 Wynkoop St., Denver, CO 80202–1129, Phone: (303) 312–6312, Fax: (303) 312–6339.

Region 9 (AZ, CA, HI, NV), Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105, Phone: (415) 947–8000, (866) EPA–WEST (toll free in Region 9), Fax: (415) 947–3553.

Region 10 (AK, ID, OR, WA), Environmental Protection Agency, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, Phone: (206) 553–1200, Fax: (206) 553–2955, Toll free: (800) 424–4372.

EPA Headquarters: Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, 2100 Pennsylvania Avenue, NW., Washington DC 20460, (202) 564–2220.

During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, at *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $33.70 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–17600 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on July 13, 2010, a proposed Consent Decree in *United States* v. *Edgeboro Disposal, Inc., et al.,* Civil Action No. 3:10–cv–03541–FLW–TJB, was filed with the United States District Court for the District of New Jersey.

In this action, the United States sought penalties and injunctive relief for the Defendants' violations of the Clean Air Act, 42 U.S.C. 7411 *et seq.,* and the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C–1 *et seq.,* at the Edgeboro landfill in East Brunswick, New Jersey.

To resolve the United States' claims, the Defendants will pay a penalty of $750,000 to the United States and New Jersey, and shall upgrade the Edgeboro Landfill Gas Collection and Control System, and operate that system in compliance with regulations promulgated pursuant to the Clean Air Act.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to either: *United States* v. *Edgeboro Disposal, Inc., et al.,* Civil Action No. 3:10–cv–03541–FLW–TJB, or D.J. Ref. 90–5–2–1–09122. The Consent Decree may be examined at the Office of the United States Attorney, District of New Jersey, 970 Broad Street, Room 502, Newark, New Jersey 07102, and at the United States Environmental Protection Agency, 290 Broadway New York, New York 10007–1866. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check, payable to the U.S. Treasury, in the amount of $15.50 (25 cents per page reproduction cost), or, if by e-mail or fax, forward a check in the applicable amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–17601 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

Notice is hereby given that on July 14, 2010, a proposed Consent Decree in *United States* v. *City of Tacoma,* Civ. A. No. 3:10–cv–05497, was lodged with the United States Court for the Western District of Washington in Tacoma.

In this action, the United States sought penalties pursuant to Section 608(c) of the Clean Air Act, 42 U.S.C. 7671g, against the City of Tacoma's Public Works Department. The Complaint alleges that Defendant failed to comply with regulations issued pursuant to Section 608(c) of the CAA—40 CFR Part 82, Subpart F—that makes the knowing venting or release of Class I or II refrigerants into the environment during the disposal of a refrigerant-containing appliance unlawful. The Complaint alleges the City of Tacoma, through its Solid Waste Management Division that is internal to the Public Works Department, illegally released regulated refrigerant into the environment for almost three years dating from October 2004 to August 2007 at its municipal landfill.

Pursuant to the proposed Consent Decree, Defendant will pay to the United States a civil penalty of $224,684 and perform a Supplemental Environmental Project that will cost approximately $269,783. The SEP consists of the City purchasing a hydraulic launch assist refuse collection vehicle, purchasing a pluggable hybrid electric terminal truck to replace one of the City's diesel yard tractors, and retrofitting 10 of its municipal diesel vehicles with diesel particulate filters. The hydraulic launch assist refuse collection vehicle is designed to be more efficient by using energy created during braking as well as increase fuel economy and reduce particulate emissions typically emitted from traditional refuse collection vehicles. The pluggable hybrid electric terminal truck is designed to decrease diesel fuel use and reduce emissions as well as increase the City's fuel economy. The diesel particulate filters are aimed to reduce particulate matter emissions as well as carbon monoxide and hydrocarbons emissions. Overall, these projects are intended to help improve air quality in and around the City's municipal landfill by reducing smog-forming chemicals such as ground level ozone, particulates, and nitrous oxides (as well as carbon dioxide).

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S.

Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *City of Tacoma,* Civ. A. No. 3:10–cv–05497 (Western District of Washington), Department of Justice Case Number 90–5–2–1–09582.

During the public comment period, the Consent Decree may be examined at the Office of the United States Attorney, Western District of Washington, 700 Stewart Street, Suite 5220, Seattle, WA 98101–1271. The Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html* . A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $11.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–17604 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Pursuant to 28 CFR 50.7, notice is hereby given that on July 12, 2010, a proposed consent decree in *United States* v. *Summit Builders Construction Co.,* Civil No. CIV–10–1461–PHX–JAT, was lodged with the United States District Court for the District of Arizona.

This Consent Decree will address claims asserted by the United States in a Complaint filed contemporaneously with the Consent Decree against Summit Builders Construction Co. (Summit) for civil penalties and injunctive relief under Section 113(b) of the Clean Air Act (the Act), 42 U.S.C. 7413(b), for failure to install suitable trackout control devices and failure to immediately clean up trackout while conducting earthmoving, failure to operate a water application system while conducting earthmoving, and failure to implement approved dust control measures in violation of Rule 2 Regulation 1, and Rule 310 of Regulation 3 of the Maricopa County Air Quality Department (MCAQD) which are part of the Federally approved and Federally enforceable State Implementation Plan (SIP) submitted to EPA by the State of Arizona pursuant to Section 110 of the Act, 42 U.S.C. 7410.

The proposed Consent Decree provides for the payment of $105,610 in civil penalties. The Consent Decree also includes measures designed to abate fugitive dust emissions; employing a dust control monitor at sites with 1 acre or more of surface; and requiring dust control training for employees and certain employees of sub-contractors whose job responsibilities involve dust generating operations.

The Department of Justice will receive for a period of thirty (30) days from the date of the publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or submitted to the following e-mail address: *pubcommentees.enrd@usdoj.gov,* and should refer to *United States* v. *Summit Builders Construction Co.,* D.J. Ref. 90–5–2–1–09616.

The Consent Decree may be examined at the Office of the United States Attorney for the District of Arizona, Two Renaissance Square, 40 N. Central Avenue, Suite 1200, Phoenix, Arizona 85004–4408, and at U.S. Environmental Protection Agency, Region 9, Office of Regional Counsel, 75 Hawthorne Street, San Francisco, California 94105. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.75 (.25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–17603 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

Notice is hereby given that on July 14, 2010, a proposed Consent Decree in *United States* v. *City of Tacoma,* Civ. A. No. 3:10–cv–05497, was lodged with the United States Court for the Western District of Washington in Tacoma.

In this action, the United States sought penalties pursuant to Section 608(c) of the Clean Air Act, 42 U.S.C. 7671g, against the City of Tacoma's Public Works Department. The Complaint alleges that Defendant failed to comply with regulations issued pursuant to Section 608(c) of the CAA—40 CFR Part 82, Subpart F—that makes the knowing venting or release of Class I or II refrigerants into the environment during the disposal of a refrigerant-containing appliance unlawful. The Complaint alleges the City of Tacoma, through its Solid Waste Management Division that is internal to the Public Works Department, illegally released regulated refrigerant into the environment for almost three years dating from October 2004 to August 2007 at its municipal landfill.

Pursuant to the proposed Consent Decree, Defendant will pay to the United States a civil penalty of $224,684 and perform a Supplemental Environmental Project that will cost approximately $269,783. The SEP consists of the City purchasing a hydraulic launch assist refuse collection vehicle, purchasing a pluggable hybrid electric terminal truck to replace one of the City's diesel yard tractors, and retrofitting 10 of its municipal diesel vehicles with diesel particulate filters. The hydraulic launch assist refuse collection vehicle is designed to be more efficient by using energy created during braking as well as increase fuel economy and reduce particulate emissions typically emitted from traditional refuse collection vehicles. The pluggable hybrid electric terminal truck is designed to decrease diesel fuel use and reduce emissions as well as increase the City's fuel economy. The diesel particulate filters are aimed to reduce particulate matter emissions as well as carbon monoxide and hydrocarbons emissions. Overall, these projects are intended to help improve air quality in and around the City's municipal landfill by reducing smog-forming chemicals such as ground level ozone, particulates, and nitrous oxides (as well as carbon dioxide).

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments

relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *City of Tacoma,* Civ. A. No. 3:10-cv-05497 (Western District of Washington), Department of Justice Case Number 90–5–2–1–09582.

During the public comment period, the Consent Decree may be examined at the Office of the United States Attorney, Western District of Washington, 700 Stewart Street, Suite 5220, Seattle, WA 98101–1271. The Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $11.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–17602 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0008]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Application for Procurement Quota for Controlled Substances and Ephedrine, Pseudoephedrine, and Phenylpropanolamine—DEA Form 250

ACTION: 60-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until September 20, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection 1117–0008

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Procurement Quota for Controlled Substances and Ephedrine, Pseudoephedrine, and Phenylpropanolamine (DEA Form 250).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* DEA Form 250, Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: 21 U.S.C. 826 and 21 CFR 1303.12 and 1315.32 require that U.S. companies who desire to use any basic class of controlled substances listed in Schedule I or II or the List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine for purposes of manufacturing during the next calendar year shall apply on DEA Form 250 for procurement quota for such class or List I chemical.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that each form takes 1 hour to complete. DEA estimates that 420 individual respondents will respond to this form. DEA estimates that 2,348 responses are received annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total public burden for this collection is 2,348 hours annually.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NE., Suite 2E–502, Washington, DC 20530

Dated: July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–17694 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0006]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Application for Individual Manufacturing Quota for a Basic Class of Controlled Substance and for Ephedrine, Pseudoephedrine, and Phenylpropanolamine

ACTION: 60-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until September 20, 2010. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0006:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Individual Manufacturing Quota for a Basic Class of Controlled Substance and for Ephedrine, Pseudoephedrine, and Phenylpropanolamine (DEA Form 189).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: DEA Form 189, Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: 21 U.S.C. 826 and 21 CFR 1303.22 and 1315.22 require that any person who is registered to manufacture any basic class of controlled substances listed in Schedule I or II and who desires to manufacture a quantity of such class, or who desires to manufacture using the List I chemicals ephedrine, pseudoephedrine, or phenylpropanolamine, must apply on DEA Form 189 for a manufacturing quota for such quantity of such class or List I chemical.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that each form takes 0.5 hours (30 minutes) to complete. In total, 31 firms submit 468 responses, with each response taking 0.5 hours (30 minutes) to complete. This results in a total public burden of 234 hours annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* In total, 31 firms submit 468 responses, with each response taking 0.5 hours (30 minutes) to complete. This results in a total public burden of 234 hours annually.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street, NW., Suite 2E–502, Washington, DC 20530.

July 15, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–17696 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Keyspan Corporation; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Keyspan Corporation.* Civil Action No. 1:10–CV–01415–WHP, which were filed in the United States District Court for the Southern District of New York on June 11, 2010, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the Southern District of New York. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Deputy Director of Operations.

In the United States District Court for the Southern District of New York

United States of America, Plaintiff, v. *Keyspan Corporation,* Defendant.

Civil Action No.: 1:10–cv–01415–WHP

Hon. William H. Pauley III

Plaintiff United States's Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration, the United States continues to believe that the relief sought in the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).[1]

The United States brought this lawsuit against Defendant KeySpan Corporation ("KeySpan")to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. On January 18, 2006, KeySpan entered into an agreement in the form of a financial derivative (the "KeySpan Swap") that essentially transferred to KeySpan, the largest supplier of electricity generating capacity in the New York City market, the capacity of its largest competitor. The KeySpan Swap ensured that KeySpan would withhold substantial output from the capacity market, a market that was created to ensure the supply of sufficient generation capacity for the millions of New York City consumers of electricity. The likely effect of this agreement was to increase capacity prices for the retail electricity suppliers that must purchase capacity and, in turn, to increase the prices consumers pay for electricity.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment (to be modified pursuant to the Court's direction, *see,* supra, n. 1) and a

[1] The United States and KeySpan will submit an amended proposed Final Judgment that takes account of the retention of jurisdiction concerns expressed by the Court with respect to Section IV of the proposed Final Judgment.

Stipulation signed by the United States and KeySpan consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on February 23, 2010; published the proposed Final Judgment and CIS in the **Federal Register** on March 4, 2010, see United States v. KeySpan corporation, 75 FR 9946–01, 2010 WL 723203; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in The Washington Post for seven days beginning on March 10, 2010 and ending on March 16, 2010 and in The New York Post beginning on March 11, 2010 and ending on March 17, 2010. The 60-day period for public comments ended on May 16, 2010. The United States received seven comments, as described below, which are attached hereto.[2]

1. Background

A. The United States's Investigation of the Transaction

On November 21, 2006, the United States opened its investigation into the transaction at issue and its impact on the market. During the course of its extensive investigation, the United States received and considered over a million pages of documents and analyzed significant amounts of complex data, including bidding data from market participants. The United States issued Civil Investigative Demands to market participants and other entities with relevant information, interviewed market participants and the market's regulators, and conducted detailed economic analyses.

The United States considered the potential competitive effects of the KeySpan Swap in light of all relevant circumstances and concluded, as the Complaint alleges, that the KeySpan Swap was an anticompetitive agreement in violation of Section 1 of the Sherman Act.

B. The New York City installed Capacity Market

In the state of New York, sellers of retail electricity must purchase a product from generators known as "capacity:"[3] Electricity retailers are required to purchase capacity in an amount equal to their expected peak energy demand plus a share of reserve capacity. These payments for capacity assure that retail electric companies do not use more electricity than the system can deliver and encourage electric generating companies to build new facilities as needed. Because transmission constraints limit the amount of energy that can be imported into the New York City area from the power grid, the New York Independent System Operator ("NYISO") requires retail providers of electricity to consumers in New York City to purchase 80% of their capacity from generators in that region. The New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

The price for installed capacity in New York City has been set through auctions administered by the NYISO. The NYISO organizes the auctions to serve two distinct seasonal periods, summer (May though October) and winter (November through April). For each season, the NYISO conducts seasonal, monthly, and spot auctions in which capacity for New York City can be acquired for all or some of the seasonal period. Capacity suppliers offer price and quantity bids in each of these three auctions. Suppliers may bid all of their capacity at a single price or in separate increments of capacity at different prices. Supplier bids are "stacked" from lowest-priced to highest. The stack is then compared to the amount of demand. The offering price of the last bid in the "stack" needed to meet requisite demand establishes the market price for all capacity sold into that auction. Any capacity bid at higher than this price is unsold, as is any capacity bid at what becomes the market price not needed to meet demand.

The NYC Capacity Market was highly concentrated during the relevant period, with three firms—KeySpan, Astoria, and NRG Energy, Inc.—controlling a substantial portion of the market's generating capacity. These three firms were designated as "pivotal" suppliers by the Federal Energy Regulatory Commission ("FERC"), meaning that at least some of each of these three suppliers' output was required to satisfy demand. The three firms were subject to bid and price caps—KeySpan's being the highest for nearly all of their generating capacity in New York City and were not allowed to sell their capacity outside of the NYISO auction process.

C. The Anticompetitive Agreement

As discussed more fully in the CIS, in the tight market conditions that existed from June 2003 through December 2005, almost all capacity in the New York City market was needed to meet demand, and KeySpan could sell nearly all of its capacity into the market even while bidding at its cap. KeySpan did so, and the market cleared at the price established by the cap, with only a small fraction of KeySpan's capacity remaining unsold.

Those tight conditions in the NYC Capacity Market were expected to end in 2006 due to the entry of approximately 1,000MW of new generating capacity, with excess supply of capacity forecast to last into 2009. The increased supply meant KeySpan could no longer be confident that "bid the cap" would remain its most profitable strategy during the 2006–2009 period. While bidding the cap would keep market prices high, doing so also would entail withholding sales of substantially more capacity. The additional withholding could reduce KeySpan's revenues by as much as $90 million a year. Alternatively, KeySpan could compete with its rivals for sales by bidding more capacity at lower prices, which could potentially produce much higher returns for KeySpan than bidding the cap, but carried the risk that competitors would undercut its price and take sales away.

KeySpan contemplated acquiring Astoria's generating assets, which were for sale. The acquisition would have solved the problem that new entry posed for KeySpan's revenue stream, as Astoria's capacity would have provided KeySpan with sufficient additional revenues to make continuing to bid its cap its best strategy. KeySpan, however, soon concluded that the market power issues raised by an acquisition of its largest competitor would imperil the contemplated transaction. Instead of purchasing the Astoria assets outright, KeySpan devised a plan to acquire a financial interest in Astoria's capacity. KeySpan would pay Astoria's owner a fixed revenue stream in return for the revenues generated from Astoria's capacity sales in the auctions. Rather than directly approach its competitor, KeySpan turned to a financial services company to act as the counterparty to the derivative agreement the KeySpan Swap recognizing that the financial services company would, and in fact did, enter an offsetting agreement with Astoria (the "Astoria Hedge").[4]

[2] To respond to the concerns raised by the submitted comments, this Response provides greater detail beyond the allegations in the Complaint.

[3] Except where noted otherwise, this description pertains to the market conditions that existed from May 2003 through March 2008.

[4] Although KeySpan knew about Astoria's role in the transaction, the financial services company did

Continued

The KeySpan Swap remained in effect from May 1, 2006 through April 30, 2008. During that two year period, KeySpan earned approximately $49 million in net revenues under the Swap.[5]

D. The Anticompetitive Effect of the KeySpan Swap

The clear tendency of the KeySpan Swap was to alter KeySpan's bidding behavior in the NYC Capacity Market auctions. The KeySpan Swap effectively eliminated KeySpan's incentive to compete for sales by lowering price. As a result, KeySpan bid its cap, causing capacity market prices to clear at a level higher than likely would have occurred absent the agreement.

1. Likely Bidding Scenarios Absent the KeySpan Swap

Absent the Swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity and, had it done so, the price of capacity likely would have declined. Although one cannot confidently predict the price level that would have occurred but for the Swap, it is likely that oligopoly pricing in this highly concentrated market would have been the outcome; i.e., prices would have fallen below the cap levels but would have remained above levels that would have prevailed under perfect competition.[6]

In considering how to bid when the new capacity entered the market, the key suppliers KeySpan, Astoria and NRG (each of which would have remained pivotal) would have sought to mitigate the risk of lost sales that could occur if they bid too high and their capacity was not taken (*i.e.,* volume risk) and the risk of low price from competitive bidding (*i.e.,* price risk). To protect against these risks, these suppliers likely would have bid increments of capacity at different price levels ("tiered bids") rather than bid all of their capacity at a single price. The strategic tiering of bids at relatively high prices would have made sense for these suppliers because it would have preserved the possibility of obtaining the rewards of discounting (selling a greater volume of capacity) while simultaneously mitigating the price risk of discounting.

The United States believes that, absent the KeySpan Swap, KeySpan and the other pivotal suppliers would have engaged in tiered bidding upon the entry of new generation capacity in 2006.[7] In other words, in the but-for world, tiered bidding strategies at prices lower than the cap would have been compelling for KeySpan and the other pivotal suppliers because they offered significant upside, and these suppliers would have been able to structure their tiered bids to limit their downside risk relative to bidding their caps. As a result, market prices likely would have cleared at a level below the cap but above competitive levels.[8] This view is consistent with the pattern observed during prior periods of excess capacity, when prices did not fall to perfectly competitive levels.

2. With the KeySpan Swap in Place, KeySpan Bid Its Cap

With the Swap, capacity prices remained high. By providing KeySpan with revenues from Astoria's capacity in addition to KeySpan's own revenues, the Swap made bidding the cap KeySpan's most profitable strategy regardless of its rivals' bids. Following entry of the substantial amount of new capacity into the market in 2006, KeySpan continued to bid its cap even though a significant portion of its capacity went unsold. In contrast to the historic pattern following significant supply increases, the market price of capacity did not decline.

E. The Proposed Remedy

The proposed Final Judgment requires KeySpan to disgorge profits gained as a result of its unlawful agreement in restraint of trade. KeySpan is to surrender $12 million to the Treasury of the United States.

II. Summary Of Comments

A. The Pennsylvania Public Utility Commission (PaPUC)

The PaPUC stated it was deeply concerned with the "existence of a sophisticated multi year effort by the defendant to evade competition" and the impact of the defendant's conduct on electricity markets and electricity prices. The PaPUC expressed its appreciation to the Department of Justice for bringing this enforcement action, stating that it does not oppose the proposed Final Judgment and explaining that this enforcement action demonstrates that conduct in electricity markets that is "inimical to competition * * * may result in prosecution and serious consequences under the antitrust laws." The PaPUC concluded by noting that "the PaPUC and other public and private entities with a critical stake in the success of wholesale electric generation competition have benefitted from studying the facts of this case and will be better able to detect and deter similar schemes in the future."

B. New York State Consumer Protection Board (NYSCPB)

The NYSCPB commended the Department of Justice for pursuing the improper collusive behavior at issue. NYSCPB expressed two concerns with the settlement. First, it argued that the United States has a burden to provide sufficient evidence for the court to determine the total harm from the wrongful behavior, explain how the amount to be disgorged will deter future

not inform Astoria about KeySpan. It appears that Astoria believed that the financial services company had found a counter-party other than a competing supplier of capacity to offset the financial services company's market risk from the Astoria Hedge.

[5] The New York Public Service Commission ("NYPSC") estimated KeySpan's net revenues under the KeySpan Swap at $67.8 million for the period May 2006 through March 2008. See NYPSC Comment, Paynter Affidavit at ¶ 15. The estimate, however, fails to reflect the fact that the terms of the KeySpan Swap imposed a ceiling on the spot auction clearing price used to determine revenues under the Swap. This ceiling is based on the average of the bid caps for KeySpan, Astoria and NRG. Using this ceiling for the appropriate months, KeySpan's net Swap revenues were approximately $61 .2 million for the May 2006 through March 2008 period. The NYPSC estimate also fails to include the last month of the Swap (April 2008) in which KeySpan had to pay out approximately $12.2 million.

[6] The New York City Economic Development Corporation ("NYCEDC") comments cite an affidavit submitted in a FERC proceeding by the NYISO market monitor, David Patton, for the proposition that, had all capacity been sold, prices would have cleared under $6/kW month, which is less than half the level of the pivotal suppliers' caps (which were above $ 121kw month). NYCEDC Comments at 9; see also AARP Comments at 11. Dr. Patton described the effect all suppliers would have had on the auction if bidding as "price-takers" (*i.e.,* a "perfectly competitive" outcome), but he does not opine that suppliers actually would have bid in this manner absent the Swap.

[7] If all the pivotal suppliers used tiered bidding, it is more likely, at any given clearing price, that withholding would be shared (*i.e.,* that each would lose some sales) rather than one supplier taking on the high cost of being the sole withholder of capacity and losing the greatest share of sales.

[8] NYCEDC claims that the effect of the Swap was to "more than doubl[e] what would otherwise be the market clearing price" and that, absent the Swap, prices would have fallen to competitive levels. NYCEDC Comment at 9–10. In an attempt to show that prices but for the Swap would have fallen dramatically to levels consistent with perfect competition, NYCEDC compares prices for specific auction periods during certain years the Swap was in effect to those same auction periods after the Swap's expiration in April 2008. *See Id.* (*e.g.,* $12.34/kW-month price in May 2007 compared to $6.52/kW-month in May 2008). These comparisons, however, are flawed because FERC changed the rules for the auction in May 2008, requiring, among other things, that the pivotal suppliers bid zero, as would a "price taker," thereby causing prices to fall to the competitive floor. Given this significant rule change, these comparisons cannot serve as a meaningful test for how the auctions would have cleared had KeySpan, Astoria, and NRG been free, as they had been in the past, to engage in strategic, tiered bidding strategies.

wrongdoing, and identify the responsible officers. Second, it argued that the proposed Final Judgment is not in the public interest because the disgorgement proceeds are remitted to the Treasury rather than to the harmed electricity customers and concluded that the proposed Final Judgment should contain a mechanism to distribute the proceeds to customers or establish an energy efficiency program.

C. New York City Economic Development Corporation (NYCEDC)

The NYCEDC was "highly appreciative" of the enforcement effort and commended using antitrust remedies to address anticompetitive practices in the New York City energy sector. The NYCEDC criticized the $12 million disgorgement as inadequate "given the scale of unjust enrichment to KeySpan." It asserted that there are "professional estimates" and other evidence of the harm that the Court should use to review the adequacy of the remedy, including a KeySpan statement of the amount it made under the Swap and various independent estimates of capacity prices if KeySpan had not entered the Swap.

D. New York State Public Service Commission (NYPSC)

NYPSC stated that the Department of Justice "is to be commended for its faithful enforcement of the antitrust laws to protect the integrity of the electricity markets in New York City." It argued, however, that the Court has no basis for evaluating whether the proposed disgorgement will prevent KeySpan's unjust enrichment or whether it is sufficient to deter anticompetitive conduct in the future. It recommended that the Court order additional evidence to be produced and asserted that "anything less than full disgorgement" would be inadequate for deterrence.

NYISC also asserted that because "ratepayers may have no recourse" due to the filed rate doctrine, the remedy in the United States' case should reflect the "standard measure of damages," which is the amount of the "overcharge" in the capacity market. It concluded that payment to the U.S. Treasury instead of to consumers "would be a manifestly unfair result" and that the disgorged proceeds should either be credited to ratepayers or used to establish an energy efficiency program.

E. Consolidated Edison (Con Ed)

Con Ed argued that the settlement is not in the public interest because it fails to provide payment to electricity consumers despite the United States' recognition that "private individuals could not bring an antitrust suit here due to the barrier of the filed rate doctrine." It argued that the filed rate doctrine should have no application to the equitable distribution of disgorged funds to consumers as a remedy in this case.

F. AARP

AARP asserted that the settlement is not in the public interest because of the "lack of any monetary remedy or other discernible benefit for injured consumers, and the absence of a credible deterrent." It claimed that there is an inadequate factual foundation to determine the appropriateness of the amount of the remedy and its deterrent effect. It further noted that the decree contains no admission of guilt by KeySpan and no "public shaming."

AARP requested that the proposed Final Judgment be amended to require an acknowledgment of wrongdoing, identification of total "inflated prices" for capacity, identification of the derivative contracts at issue, and disgorgement of all profits. In the alternative, AARP argued that the record should be augmented to show the total profit "achieved by all sellers in the NYISO capacity market," an estimate of the "total damage and economic harm" to consumers in the entire state of New York, the revenues KeySpan received under the Swap, and the rationale for accepting less than full disgorgement and for not providing any remedy to benefit injured customers.

G. Nelson M. Stewart

Mr. Stewart urged the United States not to "accept a plea" from KeySpan. He alleged that KeySpan and related entities committed fraud, perjury, and forgery with respect to construction contracts wholly unrelated to the capacity market or the Swap.

III. Standards Governing the Court's Public Interest Determination Under the Tunney Act

As discussed in detail in the Competitive Impact Statement, the Court, in making the public interest determination called for by the Tunney Act, is required to consider certain factors relating to the competitive impact of the judgment and whether it adequately remedies the harm alleged in the complaint. *See* 15 U.S.C. 16(e)(1)(A) & (B) (listing factors to be considered).

This public interest inquiry is necessarily a limited one, as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. See generally *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1458–62 (D.C. Cir. 1995); *United States* v. *SBC Commc'ns,* 489 F. Supp. 2d 1, 12–17 (D.D.C. 2007). Although the Tunney Act was designed to prevent "judicial rubberstamping" of proposed Unites States consent decrees, the "Court's function is not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will best serve society, but only to ensure that the resulting settlement is 'within the reaches of the public interest.'" *United States* v. *Alex Brown & Sons,* 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting Microsoft, 56 F.3d at 1460) (emphasis in original), aff'd sub nom, *United States* v. *Bleznak,* 153 F.3d 16 (2d Cir. 1998).

With respect to the scope of the complaint, the Tunney Act review does not provide for an examination of possible competitive harms the United States did not allege. *See, e.g., Microsoft,* 56 F.3d at 1459 (holding that the district judge may not reach beyond the complaint to evaluate claims that the government did not make).

With respect to the sufficiency of the proposed remedy, a district court should accord due respect to the United States's views of the nature of the case, its perception of the market structure, and its predictions as to the effect of proposed remedies. *See, e.g., SBC,* 489 F. Supp. 2d at 17 (United States entitled to deference as to predictions about the efficacy of its remedies). Under this standard, the United States need not show that a settlement will perfectly remedy the alleged antitrust harm; rather, it need only provide a factual basis for concluding that the settlement is a reasonably adequate remedy for the alleged harm. *Id.*[9]

IV. Response to the New York Commentors and AARP

Disgorgement serves the public interest by depriving KeySpan of ill-gotten gains, thereby deterring KeySpan and others from engaging in similar anticompetitive conduct in the future. No other remedy would be as effective to fulfill the remedial goals of the Sherman Act to "prevent and restrain"

[9] Tunney Act review is not so that the court can engage in an "unrestricted evaluation of what relief would best serve the public," United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)), or determine the relief "that will best serve society," Bechtel, 648 F.2d at 666, but simply for the court to determine whether the proposed decree is within the reaches of the public interest "even if it falls short of the remedy the court would impose on its own." United States v. AT&TCo., 552 F. Supp. 131, 151 (D.D.C. 1982).

antitrust violations.[10] Given that the KeySpan Swap has now expired and KeySpan no longer owns the generating assets associated with the anticompetitive conduct, injunctive relief against KeySpan would not be meaningful.[11]

The comments of the New York Public Service Commission, the New York State Consumer Protection Board, the New York City Economic Development Corporation, and Consolidated Edison Company (collectively the "New York Commentors") and AARP have two central objections: (1) That the $12 million dollar disgorgement is inadequate to serve its remedial purpose, and (2) that the disgorged proceeds, rather than being remitted to the Treasury, should directly or indirectly benefit electricity consumers who paid higher electricity bills or be used to fund programs that benefit electricity consumers. The United States has carefully considered these objections but finds that they do not warrant modification of the proposed Final Judgment.

A. The Proposed Remedy Is Appropriate and Deters Anticompetitive Conduct

The New York Commentors argue that disgorgement of $12 million is an inadequate remedy that will not serve as an effective deterrent, especially when compared to KeySpan's approximately $49 million net revenues earned under the Swap and the increased prices paid by electricity consumers. Such concerns are misplaced.

Disgorgement in and of itself constitutes significant and meaningful relief. This is the first time that the United States has sought disgorgement under the Sherman Act. Parties contemplating anticompetitive agreements similar to the KeySpan Swap now will have to take into account possible disgorgement, thereby directly affecting their incentives to engage in illegal behavior. Disgorgement is particularly appropriate here as the anticompetitive conduct at issue may not be subject to other remedies. For example, absent disgorgement, KeySpan likely would retain all the benefits of its anticompetitive conduct because the filed rate doctrine creates significant obstacles to the collection of damages.[12]

Had the case proceeded to trial, the United States would have sought disgorgement of the approximately $49 million in net revenues that KeySpan received under the Swap,[13] contending that these net revenues reflected the value that KeySpan received from trading the uncertainty of competing for the certainty of the bid-the-cap strategy. The United States recognizes that it has not proved its case at trial and that "a court considering a proposed settlement does not have actual findings that the defendant {] engaged in illegal practices, as would exist after a trial."[14] The $12 million disgorgement amount is the product of settlement and accounts for litigation risk and costs. As courts have stressed, it is altogether appropriate to consider litigation risk and the context of settlement when evaluating whether a proposed remedy is in the public interest.[15]

Commentors nevertheless assert that anything less than full disgorgement is inadequate as it would not deter the conduct at issue. This position ignores the fact that the loss to KeySpan of $12 million in Swap revenues would have had a deterrent effect on KeySpan's incentive to enter into the Swap. The United States contends that the Swap removed any incentive for KeySpan to bid competitively, locking it into bidding its cap instead of evaluating competitive choices, each of which could have resulted in different market clearing prices for capacity.[16] The violation was based on the anticompetitive effect of the agreement on KeySpan's incentives to compete, not on a specific lower price that would have resulted absent the Swap.[17] In evaluating whether to pursue an anticompetitive Swap, KeySpan would have engaged in a cost-benefit analysis weighing the returns from the anticompetitive strategy against the returns of various potential competitive bidding strategies. While we cannot quantify with certainty KeySpan's bid levels or the outcome of the market clearing price that would have resulted but for the Swap, depriving KeySpan of $12 million in Swap revenues would have reduced the value to KeySpan of engaging in the anticompetitive Swap strategy, thereby shifting the results of KeySpan's cost benefit analysis toward competitive strategies rather than entering into the Swap.[18]

Moreover, it is improper to consider the adequacy of the disgorgement amount by comparing $12 million to some measure of overcharges to consumers in the electricity market. Disgorgement is not aimed at making consumers whole. As this Court has previously recognized, the purpose of disgorgement is to deprive the violator of unjust enrichment rather than to compensate victims of the violation.[19] The extent of market harm is not relevant, as once a violation has been established, a district court "possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the violation]."[20] Such an inquiry would require the Court to assess the price of capacity that would have prevailed absent the Swap,[21] a

[10] U.S.C. 4 (investing district courts with equitable jurisdiction to "prevent and restrain" violations of the antitrust laws).

[11] The disgorgement here seeks to prevent anticompetitive conduct and, in this way, is similar in focus to the traditional antitrust remedy of injunctive relief.

[12] *See Keogh* v. *Chicago & NW. Ry. Co.,* 260 U.S. 156 (1922); *see* also, infra, § IV.B.

[13] The NYPSC suggests that the disgorgement calculation should also include the "profits gained by KeySpan through the unlawfully higher price of capacity." NYPSC Comments at 14 & n.5. The NYPSC appears to be contending that, for example, if KeySpan sold 1600 MW at its cap of approximately $12/kW-month under its anticompetitive Swap strategy but would have sold 2400 MW at a lower price (assume $8/kW-month), then KeySpan gained an additional profit of $6.4 million (1600 MW × $4/kW-month). This contention is misplaced, as it fails to account for revenues from the additional volume that KeySpan would have sold at the lower clearing price and thereby ignores the net auction revenues that KeySpan would have earned in the but-for world.

[14] SBC, 489 F. Supp. 2d at 15 (citing Microsoft, 56 F.3d at 1461).

[15] "It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial. Remedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the district judge to assume that the allegations have been formally made out is quite unwarranted." Microsoft, 56 F.3d at 1461; see also SBC, 489 F. Supp. 2d at 15 ("[R]oom must be made for the government to grant concessions in the negotiation process for settlements.")

[16] *See* Complaint, ¶¶ 4–5.

[17] *See* CIS at 6–7.

[18] KeySpan would have had two revenue streams to consider when deciding upon a bidding strategy: revenues directly from sales of capacity in the auctions and revenues from the Swap. It is likely that KeySpan absent the Swap would have earned more in auction revenues from tiered bidding strategies than from bidding its cap. Indeed, if this were not the case, the Swap would not have altered how KeySpan bid. KeySpan earned more total revenues by bidding its cap when accounting for earnings it receives with the Swap in effect. The disgorgement remedy here serves to reduce the additional earnings the Swap would have provided KeySpan.

[19] *SEC* v. *Bear Stearns & Co., Inc.,* 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009).

[20] *SEC* v. *Blavin,* 760 F.2d 706, 713 (6th Cir. 1985). *See also SEC* v. *Tome,* 833 F.2d 1086, 1096 (2d Cir. 1987) ("Whether or not [any victims] may be entitled to money damages is immaterial [to disgorgement].")

[21] Such an assessment is disfavored under the filed rate doctrine in cases where private claimants seek damages for overcharges. *See, e.g. Arkansas Louisiana Gas Company* v. *Hall,* 453 U.S. 571, 580–81 (1981) ("In the case before us, the Louisiana Supreme Court's award of damages to respondents was necessarily supported by an assumption that the [different] rate respondents might have filed with the [regulator] was reasonable. Otherwise, there would have been no basis for that court's conclusion * * * that the [regulator] would have approved the rate. But under the filed rate doctrine, the [regulator] alone is empowered to make that

problematic exercise given the uncertainty of determining market outcomes absent the Swap.[22]

B. Disgorgement Proceeds Should Be Remitted to the U.S. Treasury

Several commentors argued that KeySpan's $12 million disgorgement payment should be made to entities other than the U.S. Treasury in order to benefit the electricity customers in New York City who paid higher prices as a result of KeySpan's conduct. The United States shares the commentors' concern for the New York City ratepayers and, indeed, brought this case and sought disgorgement in order to deter future anticompetitive agreements like the KeySpan Swap. The United States has carefully considered the suggested alternative uses for the disgorgement proceeds but has determined that payment to the U.S. Treasury is the most appropriate result in this circumstance. The alternative distribution plans proposed by commentors seek, in effect, to restore funds to ratepayers. The United States, however, specifically chose to seek disgorgement, rather than restitution, as a remedy for this violation. As discussed in the CIS, disgorgement is particularly appropriate on the facts of this case to fulfill the remedial goals of the Sherman Act.[23] Disgorgement also provides finality, certainty, avoidance of transaction costs, and potential to do the most good for the most people.[24]

Legal concerns would arise with a remedy based on restitution that sought to directly or indirectly reimburse New York City ratepayers. Such a remedy would raise questions relating to the filed rate doctrine, which bars remedies (such as damages) that result, in effect, in payment by customers and receipt by sellers of a rate different from that on file for the regulated service.[25] Some of the commentors recognize the doctrine's potential limitation on their own ability to seek such reimbursement directly. They do not discuss the fact that regulators such as the FERC and the NYPSC seeking to offer refunds may also be constrained by the doctrine and its corollary bar to retroactive ratemaking.[26] The mechanisms suggested by the commentors could be seen as an end run around those well-established doctrines. In this case, payment to the U.S. Treasury avoids this unnecessary and thorny issue.

Moreover, the Miscellaneous Receipts Act ("MRA") states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. 3302(b). Under this statute, members of the Executive Branch[27] that receive money for the United States are to remit such funds directly to the U.S. Treasury. A purpose of the statute is to protect Congress's appropriations authority by ensuring that money collected from various sources cannot be used for programs not authorized by law. The proposed remedy avoids any issues of compliance with the MRA.[28]

V. Response to Comments of Nelson M. Stewart

Mr. Stewart's comment alleges fraud, perjury, and forgery committed by KeySpan and its subsidiary KSI Contracting. The allegations concern conduct that is wholly unrelated to the capacity market or the KeySpan Swap and are unrelated to the antitrust violations that the United States alleges in its Complaint. As noted above, in making its public interest determination in accordance with the Tunney Act, it would be "error for the judge to inquire into allegations outside the complaint." Microsoft, 56 F.3d at 1463. These Tunney Act proceedings, therefore, are not an appropriate venue for the consideration of Mr. Stewart's claims.

VI. Conclusion

After careful consideration of the public comments, the United States remains of the view that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint and that its entry would therefore be in the public interest. Plaintiffs' chosen remedy in this case deprives KeySpan of ill-gotten gains, effectively deters the harmful behavior, and establishes the United States's willingness to seek disgorgement in appropriate cases. The PaPUC (as well as other commentors) noted that the action has established an important antitrust enforcement precedent in regulated energy markets and that, as a result, it and other public and private entities with a critical stake in the success of wholesale electric generation competition will be better able to detect and deter similar schemes in the future.[29] Based on the factors set forth in the Tunney Act, entry of the proposed Final Judgment is in the public interest.

Pursuant to section 16(d) of the Tunney Act, the United States is submitting the public comments and this Response to the **Federal Register** for publication. This Response is also being provided to each of the commentors. After the comments and this Response are published in the **Federal Register**, the United States will move this Court to enter the proposed Final Judgment.

Dated: June 11, 2010.

Respectfully submitted,

/s/

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Nelson M. Stewart,
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April 10, 2010

Donna N. Kooperstein, Chief, Transportation, Energy and Agriculture Section, Antitrust Division, 115. Department of Justice, 450 5th St. NW., Suite 8000, Washington, DC 20530

Re: United States of America, U.S. Department of Justice, Antitrust Division v. Keyspan Corporation.

judgment, and until it has done so, no rate other than the one on file may be charged.")

[22] Given the difficulty of definitively estimating the harm to the market and its irrelevance to the questions relating to the adequacy of the disgorgement remedy, the United States has no obligation, as AARP asserts, to provide estimates of total economic harm and profits received by all market participants resulting from the alleged violation.

[23] CIS at 9–10.

[24] *See Bear Stearns,* 626 F. Supp. 2d at 419 (directing the transfer of remaining disgorgement related settlement funds to the Treasury to be used by the Government for its operations).

[25] *See* generally Square D (o. Niagara Frontier, 476 U.S. 409, 423 (1986).

[26] *See, e.g.,* Ark/a, 453 U.S. at 578 ("Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. * * * This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.' "(citations omitted)). Con Ed—a commentor here—directly requested that FERC order refunds of the higher cost of capacity due to KeySpan's behavior. The FERC declined to grant them. New York Indep. Sys. Operator, Inc., 122 FERC ¶ 61,211 (2008) (March 7, 2008 Order).

[27] The MRA applies to the Department of Justice as a member of the Executive Branch. We are not aware of its application to independent agencies such as the Securities and Exchange Commission.

[28] In addition to legal concerns, distribution of the disgorged funds to entities other than the Treasury also would raise practical concerns. Distribution directly to the numerous individual electricity consumers would have high administrative costs relative to the overall disgorgement amount. Distribution to the electricity companies that purchased capacity from generators for ultimate refund to consumers could involve monitoring and compliance issues. And, the funding of an energy efficiency program would also raise administrative issues (and would be attenuated from the harm alleged in the Complaint).

[29] E.g., PaPUC Comments at 3.

Dear Ms. Kooperstein, In accordance with the details of the February 22, 2010 press release issued by the United States Department of Justice I am writing to urge you not to accept the plea from Keyspan Energy that now awaits approval from the United States District Court. Keyspan Energy has been the subject of numerous investigations resulting from questionable conduct over the years. In many instances the company simply paid a fine and admitted no wrongdoing. Particularly with large corporations like Keyspan Energy, the profit gained from this behavior is usually much more substantial than the fines levied. Consider the golden parachute payments to William Catacasinos and other executives (a $1.5 million settlement was paid to the NYS Attorney General's Office) and the sale of $29 Million in stock by Keyspan's CFO, COO and President prior to the publication of substantial losses related to the acquisition of Roy Kay, Inc. I would contend that such penalties fail to alter misconduct and increase the temptation to push the boundaries of unethical conduct. Where one might expect the compliance office to guard against such conduct, the compliance office of Keyspan Energy and its parent company National Grid appears to ignore these actions and, on at least one occasion, even assisted in an attempt to retaliate against someone who endeavored to report them.

In 2008 I attempted to follow up on my third effort to notify Keyspan Energy/National Grid of fraud, perjury, forgery and accounting fraud committed by employees of Keyspan Energy, its wholly owned subsidiary 1(51 Contracting (The former Roy Kay, mc) and their attorneys. These highly unethical and illegal acts stem from two contract actions filed by my company related to work performed for the now infamous Roy Kay, Inc./KSI Contracting. On this third attempt I spoke with Margaret Ireland of the National Grid Compliance Office and detailed a number of these allegations. I further explained that the attorney defending this matter, Mark Rosen of McElroy, Mulvaney, Deutsche and Carpenter, UP, had used illegal and highly unethical tactics to prevent further discovery of the conduct I alleged. Ms. Ireland asked me to send her whatever recent documentation I had and said she would look into the matter. Having received no response I called again and asked if she would like me to send more documentation. Ms. Ireland stated she had not had time to look into the documents I had sent but I should call again at a later time. The document in Attachment a is the only response I have ever received from National Grid or Keyspan regarding the information I submitted to Ms. Ireland. It is the direct result of a message I left for Ms. Ireland with the National Grid compliance office after several failed attempts to contact her as she had suggested. Mr. Rosen's email is a continuation of the threats made in his letter of December 27, 2007 (See page of Attachment b) in response to my previous attempts to contact the defendants concerning the conduct of their employees and Mr. Rosen. To date I have made no less than five attempts to report this conduct to the compliance offices of Keyspan and National Grid. Mr. Rosen's letter and email are the only responses I have ever received. A copy of the documents sent to Ms. Ireland are included as Attachment c.

Mr. Rosen and his clients have good reason to thwart any discovery related to Roy Kay, Inc/KSI Contracting. In response to our initial claims to recover monies from work performed for Roy Kay, Inc/KSI Contracting the defendants produced two forged contracts and purported them to be genuine. One contract forged the signature of our company's president, Nelson Stewart, Sr. and the other reduced the amount of the original contract from $750,000.00 to $250,000.00 and altered the original date from March 15, 2002 to May 14, 2002 (despite the fact that the date of the signature page, which is identical on their contract and the genuine contract, reads March 15, 2002). The defendants also submitted false, unsubstantiated back charges and several of the statements made by employees of the defendants have proved to be untrue. In over seven years of litigation the defendants have never produced a single document that would refute or explain the evidence we have submitted.

The documentation we have been able to obtain from third parties provide evidence that Roy Kay/KSI Contracting was altering accounting documents and omitting information from job records to make it appear as though work performed by subcontractors was performed by KSI Contracting. What were actually liabilities to Roy Kay, Inc/KSI Contracting appear to have been misrepresented as money owed to the company. While the documents we obtained are only relevant to the two projects our company worked on, Roy Kay, Inc/KSI Contracting was involved in up to twenty-six projects at the time. Losses from Roy Kay, Inc/KSI Contracting, well over $100 Million in the third quarter of 2002 alone, were a thorn in the side of Keyspan Energy and company executives were desperate to stop them (Please see Attachment d). If this same conduct was found to be present at these other projects the amount of money being misrepresented would be enormous.

The ability to report allegations of unethical and criminal conduct to the compliance office of a publicly traded corporation without the threat of retaliation is a fairly reasonable expectation. Most first year law students, if not most lay people, would know that that represented parties to a litigation may discuss issues related to that litigation. I am not an attorney and neither is my business partner. My attempts to communicate with Ms Ireland were not improper. Yet this was the second time Mr. Rosen attempted to prevent such communication. Knowledge of the facts and the law mean little to Mr. Rosen and his clients. What is most important is the use of any tactic, however unethical, to deter continued discovery of the assertions raised in these matters. That the compliance office would refer this matter back to the same attorney who played a substantial role in the allegations at issue illustrates that these practices are systemic throughout the company. Keyspan's refusal to even consider these allegations is bad enough. Threats of further abuse of the legal process by their attorney in this matter demonstrate that the compliance offices of Keyspan Energy and National Grid exist simply to pay tip service to the ideal of ethical and legal business conduct. When these ideals become an inconvenience the compliance office not only steps aside but, as evidenced by attachment a, actively participates in attempting to remove that inconvenience.

The conduct of Keyspan Energy's compliance office in this matter is indicative of a pattern that has led to numerous allegations of misconduct over the years. I respectfully submit to the Department of Justice that fines have done little to correct the conduct of this company in the past and cannot be expected to alter such conduct in the future. It is worth noting that Mr. Rosen and his clients, no doubt encouraged by the support they have received thus far, continue the same pattern of obstructive and improper conduct to this day in the above referenced actions. For much the same reason that an independent auditor oversees the accounting statements of a public company, a separate compliance office, free from the influence of Keyspan Energy and National Grid, should be charged with the responsibility of enforcing the

ethical business standards to which both companies publicly claim to aspire. To deter the kind of behavior that is now before the United States District Court, Keyspan needs a truly independent compliance office that will respond to allegations of unethical practices in a diligent and appropriate manner. It is clear that the current management lacks the will to impose these standards on itself. Without this kind of impartial supervision of company conduct the next mendacious scheme will likely be a simple matter of time.

I truly appreciate the opportunity to voice an opinion in this matter and I thank you for your consideration.

Sincerely,

Nelson Stewart

List of Attachments

Please Note: The documents I have submitted and the allegations I have raised are by no means a complete account of the actions of Keyspan Energy and KSI Contracting with respect to these matters. There are well over 1,500 documents related to these matters.

In consideration of the two-month time constraint the court is acting under I have attempted to be as brief as possible while providing an informative sample of the unethical conduct of both Keyspan Energy and its compliance office. Additional documentation can he made available at your request.

Attachment a

This email was sent to my attorney in response to a phone call I placed to Margaret Ireland, compliance officer for National Grid. National Grid is the parent company of Keyspan Energy. Together with attachment b it is the only response I have ever received from Keyspan Energy regarding the allegations I raised.

Attachment b

This letter was sent in response to our numerous demands upon Mr. Rosen and his clients for the production of documents. The court did not accept Mr. Rosen's attempts to blame the plaintiffs for his failure to produce witnesses and documents. A motion to strike the defendants' answer in this matter was granted by the court on December 22, 2008.

Attachment c

These letters were sent to several members of the National Grid Compliance Office by return-receipt mail. They came back unsigned for. When Ms. Ireland of National Grid asked me to send her a copy of some of the allegations I had related to her I sent the letter to Vincent Miseo, Claims Attorney for Federal Insurance, (Federal issued the payment and performance bond on one of the projects) along with my letter to the NYS Insurance Department because they included the most recent developments with respect to these actions. Two previous letters containing substantial documentation of our allegations were sent on June 28, 2006 and October 24, 2006. A copy of these documents can be made available at your request.

Attachment d

The attached exchange between Keyspan executives demonstrates the frustration resulting from the Roy Kay losses. Keyspan eventually offset these losses by hiring out the remaining work on these projects to subcontractors and later refusing to pay them. Many of those who attempted to collect these sums in Court were met with the same tactics described in this letter.

http://wwss.justice.gov/atr/cases/f259700//259704-7pdf

United States District Court for the Southern District of New York

United States of America, Plaintiff vs. *KeySpan Corporation,* Defendant.

Civil Action No. 10–cv–1415 (WHP)

Comments of the New York City Economic Development Corporation Made Pursuant to the Antitrust Procedures and Penalties Act

The New York City Economic Development Corporation ("NYCEDC"), acting on its own behalf and on that of the City of New York City as electricity ratepayers in the market affected by the conduct of the Defendant, hereby files comments on the proposed Final Judgment in the above-captioned matter. These comments are responsive to a Notice published at 75 FR 9946, Proposed Final Judgment and competitive impact Statement, on March 4, 2010.

I. Interest of Title, New York City Economic Development Corporation, and of the City of New York as Electric Ratepayers in the New York Market

The City of New York ("City") and NYCEDC, along with other commercial and residential electricity ratepayers located in the jurisdiction of the City, are directly affected by the operation of the electric capacity market administered by the New York Independent System Operator (CCNYISO). The City is geographically coextensive with NYISO Zone J, one of several regions that comprise the NYISO's New York Control Area, which is itself coextensive with the State of New York. NYISO Zone J forms the relevant geographic market affected by the conduct of KeySpan set out in the Complaint filed in this matter by the Department of Justice on February 22, 2010. The relevant geographic and product market in the action brought by the Department of Justice against KeySpan is described in the Complaint as the "New York City Installed Capacity Market" or "NYC Capacity." [1]

Even more than most urban areas in the nation, New York City and its residents and businesses are particularly dependent on electricity for transportation and other critical energy needs. The costs borne by City ratepayers are among the highest in the continental United States, as was recognized by the Electric Energy Market Competition Task Force [2] in its Draft Report to Congress pursuant to section 1815 of the Federal Energy Policy Act of 2005.

NYCEDC, acting through its Energy Policy Department, serves as Mayor Michael Bloomberg's principal energy policy adviser, and also serves as the Chair of the City's Energy Policy Task Force, and the New York City Energy Planning Board. NYCEDC also serves as a catalyst for City economic development, capital investment, and growth. All of these concerns are vitally dependent on the provision of reliable energy at just and reasonable prices. The City is also a voting member in the NYISO governance structure as a large governmental end user.

II. Summary and Background

As noted in the materials submitted to the Court in this matter, a very large increment of in-City electric capacity, some 1000 megawatts ("MW"), entered the City market in early 2006. However, in contravention of basic economic theory, this addition resulted in no reduction in NYISO capacity prices, and in at least some instances, those prices actually rose. The premise of deregulated energy and capacity markets in New York as conceived by the New York State Public Service Commission ("NYSPSC") was in large measure based on the presumed salutary effects of rivalrous market behavior, including the expected value of new entrants in enhancing consumer welfare, and in moderating prices in the constrained New York electricity market.

[1] Complaint herein at page 4.

[2] Draft Report to Congress on Competition in the Wholesale and Retail Markets for Electric Energy, at pp. 20–22, 73 (issued June 5, 2006).

However, as the Complaint herein alleges, actions taken by KeySpan in violation of the Sherman Act had the effect of negating the beneficial effects associated with the arrival of new, highly efficient generation facilities. KeySpan's bidding practices, coupled with its artful use of a derivative financial instrument to leverage its already dominant market position as the City's largest generator, permitted it to distort the capacity market, and to impose artificially high capacity prices on City consumers. The imposition of these artificial prices resulted, as the Department of Justice notes, in unjust enrichment to KeySpan. Moreover, because of the manner in which the NYISO capacity operates and clears based on the highest bid that is accepted, the illegal conduct alleged here also served to provide supranormal capacity revenue prices to Zone J generation capacity providers at large, thereby exacerbating the already great consumer harm (done to ratepayers by the conduct described in the Complaint.

III. Discussion

The NYISO capacity market was intended to set the clearing price as a function of the free interplay of the forces of supply and demand. Here, however, that process was distorted through a form of market gaming by KeySpan.

More than ten years ago, when the New York State energy markets were deregulated by the NYSPSC, the City power plants were divested in an effort to reduce the potential for market power abuse. However, as the Complaint herein describes, the in-City capacity market is an oligopoly, with three dominant generation suppliers known as the divested generation owners ("DGOs"). This was true during the operative period of the illegal conduct alleged by the Department of Justice ("DOJ") Antitrust Division here, and it remains true today. KeySpan was a pivotal bidder, i.e., at least a portion of its capacity was needed to permit the market to clear. Moreover, it was the largest generation supplier in the City, with some 2400 megawatts of capacity.

In recognition of the market power enjoyed by DGO, the Federal Energy Regulatory Commission imposed capacity bid caps on them. KeySpan was given the highest bid cap dollar value, which actually served to increase the effect of the market-distorting conduct that the Complaint herein describes, as it permitted the highest possible clearing price in the relevant market. Economic withholding, the practice of pricing bids at artificially high prices, was permitted by the NYISO market rules so long as KeySpan bid at or below its fixed bid cap amount. The NYISO Services Tariff, Attachment H, Section 2.4 defines economic withholding in the energy market as "submitting bids for an Electric Facility that are unjustifiably high so that (i) the Electric Facility is not or will not he dispatched or scheduled, or (ii) the bids will set a market clearing price."

DGOs are prohibited by FERC-imposed NYISO market rules from physically withholding capacity in the periodic capacity auctions. In practice, however, as the Complaint here details, the form of economic withholding practiced by KeySpan achieved virtually the same end: Causing capacity prices to clear at supranormal levels.

The addition in early 2006 of a very large increment of new in-City capacity—1000 megawatts—failed to lower capacity prices, thus to a degree refuting the promise of the demand curve addition to the New York Control Area market earlier approved by the Commission. Indeed, in some instances the capacity clearing prices in 2006 actually increased compared to the equivalent 2005 auction levels, a result that was clearly anomalous.

These bidding practices distorted the capacity market and imposed excessive prices on the consuming public, while enriching incumbent capacity providers in a manner that exceeded even the generous existing capacity compensation formula. The price of a commodity should decrease as the supply of that commodity increases. This theory underlies the capacity demand curve market design that was implemented by the NYISO, and approved by the Federal Energy Regulatory Commission in 2003. The Commission observed in its Order that the price would gradually fall as the amount of available capacity beyond 1 18 percent of peak load.[3]

As noted above, in early 2006, approximately 1,000 MW of new capacity was added in the City, markedly increasing the amount that could be bid into the periodic NYISO capacity auctions.[4] Yet, the price of capacity remained at the maximum permissible price cap level.

The conduct of KeySpan as set out in the Complaint raised critical market power issues in the period of 2006–2008 and raised prices for some three million Zone J electric ratepayers. The illegal conduct alleged here was only stopped when the NYSPSC exercised its supervisory authority over KeySpan in early 2008, and compelled the company to bid in the Zone J capacity market as a price-taker, i.e., at a zero price. This action effectively eliminated the ability of KeySpan to raise capacity prices.

In the case of KeySpan, the issue of its status and role as the largest of the pivotal capacity DGO bidders was heightened by its use of a contractual arrangement with Morgan Stanley to financially purchase 1,800 MW of capacity in the New York City market for a period of three years at a fixed price of $7.57 per kW-month.[5] Under the contractual terms, KeySpan would profit to the extent that the City capacity price cleared above that level. The combination of its own very large generation presence, and this financial arrangement gave KeySpan a direct or indirect interest in the price of some 4200 MW of in-City capacity.

IV. Analysis of Proposed Disgorgement Remedy

As was observed by the New York State Department of Public Service in its comments herein,[6] there are two primary concerns: (1) The amount of the disgorgement fund amount that is appropriate here, and (2) the proper recipients of the disgorgement funds. The City and NYCEDC are in accord with the view expressed by NYSPSC that the proposed $12 million disgorgement is inadequate given the scale of the unjust enrichment to KeySpan here. We also believe that a credit for the disgorgement amount could readily be provided to the victims of the conduct here through credits provided through the NYISO wholesale market. Such credits would flow in the wholesale market operated by the NYISO to the load serving entities ("LSEs"), who would be compelled by the NYSPSC to maintain those funds as bill credits available to the retail customers of the LSEs. This process

[3] May 2003 Demand Curve Order in FERC Docket ERO3–647–009 at p. 3, ¶ 5; the Commission's decision also referenced a NYISO estimate that a 1% increase in capacity in the State would result in average consumer savings of $100 million annually. *Id.* at p. 6, ¶ 9 and at p. 16, fit 23.

[4] In early 2006, two new 500 MW combined-cycle, gas-fired power plants entered service in New York City. These were the SCS/Astoria, operated by Astoria Energy LLC, a subsidiary of SCS Energy LLC, and the New York Power Authority's new Poletti unit in Astoria, Queens. See Securities & Exchange Commission Form 8–K filed by KeySpan Corporation, May 4, 2006, Accession Number 0001062379–06–000054; KeySpan First Quarter 2006 Earnings Conference Call, p. 9 (held May 4, 2006).

[5] Securities & Exchange Commission Form 8–K filed by KeySpan Corporation, May 4, 2006, Accession Number 0001062379–06–000054; KeySpan First Quarter 2006 Earnings Conference Call, p. 9 (held May 4, 2006).

[6] Tunney Act Comments of the New York State Public Service Commission re *U.S.* v. *KeySpan,* Case No. 10–cv–14l5 (Comments filed April 30, 2010).

would avoid the kinds of customer apportionment issues and transaction costs that might otherwise present insuperable obstacles to the process of attempting to fashion disgorgement remedies intended to reach some three million electric ratepayers in the New York City market.

As to the proper amount of disgorgement that should be required of KeySpan, there are available in the record some professional estimates of the harm that was done to the City capacity market. There are also some available figures from KeySpan that bear to some degree on the same question. These estimates and corporate statements should provide guidance to the Court in exercising its judgment concerning the adequacy of the proposed settlement.

In early 2006, KeySpan publicly expressed confidence that average City capacity prices would in fact exceed the contractual level of $7.57, and observed that as of the first monthly summer capacity auction period in 2006, the Zone J capacity price settled at $12.71 per kW-month. Clearly, such corporate confidence concerning maintenance of capacity clearing prices was not misplaced: as a dominant entity it was in a position, even when acting unilaterally, to make capacity prices clear well above the contractual level established in the Morgan Stanley agreement. Regarding the gain attributable to the conduct challenged here by DOJ as violative of the Sherman Act, at least a portion of the benefits were disclosed by the company itself: KeySpan stated its gain attributable to the Morgan Stanley agreement was $44.3 million in the period from May through September of 2006.[7] Given the workings of the market clearing process, the overall adverse impact on City energy consumers flowing from the practices described in the Complaint was of course far larger.

An initial New York State Department of Public Service ("NYSDPS") analysis of the price level for the NYISO capacity auctions early June of 2006 revealed the price to be in large part the product of a failure to bid some 800 MW into the May and June 2006 auctions. Having conducted a preliminary review of the auction numbers, NYSDPS representatives indicated that economic withholding appeared to have effectively kept capacity prices considerably higher than they would have been had the remaining 800 MW been bid into the auction:

> Based on NYISO posted data, it appears that about 800 MW of NYC capacity went unsold in the spot auctions for May and June 2006. This implies higher prices in both the NYC and statewide capacity markets, compared to an auction where all available NYC supplies had cleared.
>
> If all available NYC capacity had been sold, the NYC UCAP price would have dropped by about $7.26/kW-month (from $12.71 to $5.45).
>
> In addition, the NYS UCAP price could have dropped by as much as 1.28kW month.[8]

This preliminary analysis by DPS was borne out in later estimates offered by the NYISO's own Independent Market Monitor, Dr. David B. Patton:

> Prior to 2006, nearly all of the ICAP [Installed Capacity] in New York City was scheduled or sold in the NYISO capacity markets. Beginning in January 2006, more than 1000 MW new capacity has been installed in NYC. Given that the marginal cost of selling capacity is close to zero for most units, the amount of capacity sold in New York City under the NYC Locality Demand Curve would have increased by this amount if the market were performing competitively. However, the total ICAP sales actually fell slightly after 500 MW of new capacity at Poletti became available in early 2006. This occurred because one incumbent supplier reduced its sales by approximately the same amount as the new capacity at Poletti. This supplier routinely offered the bulk of this unsold Capacity into the Energy market, which indicates that it could have been sold in the Capacity market with little additional cost.
>
> The unsold Capacity quantities increased in May 2006 when an additional 500 MW of Capacity from the SCS/Astona Energy LLC facility came online.
>
> The unsold Capacity in question was not sold because the supplier offered the Capacity at a price that was higher than the Capacity Demand Curve price levels that would have allowed the Capacity to clear. In particular. the DGO supplier offered the Capacity at the level of its offer cap, which exceeded $12 per KW-month in the Summer Capability Period. Had all Capacity been sold, the price during the May auction would have cleared at less than $6 per KW-month.[9]

It is thus clear, as Dr. Patton states, that the withholding of capacity took place, and moreover, that such withholding materially affected its price—more than doubling what would otherwise be the capacity market clearing price.

The foregoing is very important to this Court's assessment of whether the $12 million disgorgement cut amount proposed to be imposed on KeySpan in this matter is one that can be said to be in the interest of justice, and therefore should be approved for entry of a Final Judgment herein.

Moreover, the Court is not solely reliant on even such well-supported opinions as those advanced by Public Service Staff and by Dr. Patton estimating the excessive capacity charges imposed on City consumers. There is at least one other extrinsic form of evidence that can readily be accessed from an incontrovertible source.

A well recognized economic analytic tool in assessing antitrust damages is the during and after test that examines market activity during the period of illegal conduct and the period when that activity came to an end. The NYISO maintains extensive records of capacity prices in the various auctions that it operates. Attached as Exhibit A to this document is a summary of capacity clearing prices in the period between 2006, when the alleged conduct violating the Sherman Act began, during the succeeding period, and after the action of the NYSPSC put a stop to the conduct in question in early 2008 with its Order mandating that KeySpan bid into the various NYISO capacity auctions as price taker. Exhibit A was taken directly from the NYISO website, and these prices and other capacity price auction results from recent years are publicly accessible there.[10]

Zone J is reflected in Exhibit A as "NYC" and the prices reflected therein are telling and directly confirm the views of Dr. Patton on the effect of the conduct under scrutiny here. For example, in the six-month 2006 summer capability period strip auction (May-November), prices in NYC were $12.35 per kW-month, and $12.37 in the comparable period for 2007. However, by the summer strip auction of 2008, after the alleged illegal conduct had been halted, the NYC auction price fell to $6.50 per kW-month, and even in 2009 it was $6.75. The pattern in the monthly NYISO auction results is very similar: the May and June auctions in 2007 closed at $12.34 and $1 1.40 respectively, while the comparable results after the cessation of the market conduct challenged in the Complaint here were $6.52 and $6.49 respectively. The NYISO spot auction for capacity reveals a very similar pattern as well.

Armed with these numbers and the respective amounts of capacity affected 1800 MW in the Morgan Stanley agreement, and KeySpan's own offered capacity in the various NYISO auctions,

[7] Interrogatory Response to DPS Request No. 75, Subpart 14 in New York State PSC Case No. 06–M–0878, relating to the proposed KeySpan-National Grid merger (response dated September 21, 2006).

[8] Discussion presentation by NYSDPS, "In-City Capacity Market Performance" at NYISO stakeholder meeting of the ICAP Working Group, June 12, 2006, available at: *nyiso.com/public/webdocs/committees/bicicapwg/meeting_materials/2006–06–12/in_city_capacity_markey_performance_nydps.pdf.*

[9] Affidavit of NYISO market Monitor Dr. David B. Patton in FERC Docket Number ERO7–360–000, at page 4 of 19 (filed December 22, 2006)[emphasis added]

one can readily ascertain at least an informed estimate of the impact on Zone J consumers of the overcharges associated with the conduct here.

V. Role of the Justice Department

One final observation: NYCEDC and the City are highly appreciative of the involvement of the Department of Justice and its Antitrust Division in this matter, and commend their action in utilizing Sherman and Clayton Act remedies to address anticompetitive practices in the New York City energy sector.

As has been noted, the City energy and capacity markets remain highly concentrated and bear the classic indicia of an oligopoly market: few significant suppliers, high barriers to entry, and accompanying high prices. Conduct similar to that outlined in the Complaint here may well occur in the future as it has in the recent past. While FERC has markedly increased its enforcement efforts in the period since the passage of the Federal Energy Policy Act of 2005, the record here also illustrates the continuing need for DOJ scrutiny of anticompetitive practices in the City's energy markets. The substantial penalties available to address Sherman Act violations will serve as a deterrent to market manipulation such as that seen here. Continued vigilance by the Antitrust Division will also operate to discourage illegal conduct, and will thereby enhance consumer welfare.

VI. Conclusion

For the foregoing reasons, the NYCEDC and the City ask that the Court carefully review the record before it, take judicial notice of publicly available evidence at FERC and at the NYISO, and examine the proposed Final Judgment with a view toward arriving at a result that will be equitable and will advance the interests of justice.

May 3, 2010

Respectfully submitted,

/s/Michael I. Delaney

Michael J. Delaney, *Director—Energy Regulatory Affairs,*
City of New York,
New York City Economic Development Corporation,
110 William Street, 4th Floor,
New York, NY 10038,
(212) 312–3787,
mdelaney@nycedc.com.

Attachment

Exhibit A—View Strip Auction Summary

BILLING CODE 4410–11–M

Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2006 Auction Month/Year May/2006 Display

View Strip Auction Summary

Summer 2006 Strip Auction Results for UCAP, Auction Starting 05/2006 Posted Date: 04/03/2006 02:54 PM	
LI	
Awarded (MW)	4.0
Price ($/kW - Month)	$6.50
NYC	
Awarded (MW)	2186.7
Price ($/kW - Month)	$12.35
ROS	
Awarded (MW)	3014.5
Price ($/kW - Month)	$1.44
HQ	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	3014.5
Total Awarded (MW)	5205.2
ROS Price Paid By Bidders (Weighted Avg.)	$1.440

Footnotes:

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Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2007 Auction Month/Year May/2007 Display

View Strip Auction Summary

Summer 2007 Strip Auction Results for UCAP, Auction Starting 05/2007 Posted Date: 04/02/2007 01:06 PM	
LI	
Awarded (MW)	2.2
Price ($/kW - Month)	$3.75
NYC	
Awarded (MW)	1894.0
Price ($/kW - Month)	$12.37
ROS	
Awarded (MW)	3166.6
Price ($/kW - Month)	$2.25
HQ	
Awarded (MW)	30.0
Price ($/kW - Month)	$2.25
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	3196.6
Total Awarded (MW)	5092.8
ROS Price Paid By Bidders (Weighted Avg.)	$2.250

Footnotes:

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Installed Capacity

View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2008 Auction Month/Year May/2008 Display

View Strip Auction Summary

Summer 2008 Strip Auction Results for UCAP, Auction Starting 05/2008 Posted Date: 04/02/2008 12:39 PM	
NYC	
Awarded (MW)	494.9
Price ($/kW - Month)	$6.50
ROS	
Awarded (MW)	2909.7
Price ($/kW - Month)	$2.67
LI	
Awarded (MW)	0.0
Price ($/kW - Month)	$2.80
HQ	
Awarded (MW)	85.0
Price ($/kW - Month)	$2.67
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	2994.7
Total Awarded (MW)	3489.6
ROS Price Paid By Bidders (Weighted Avg.)	$2.670

Footnotes:

The 85 MWs awarded from HQ is wheeled through the IESO to the NYCA.

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Installed Capacity
View Strip Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2009 Auction Month/Year May/2009 Display

View Strip Auction Summary

Summer 2009 Strip Auction Results for UCAP, Auction Starting 05/2009 Posted Date: 04/01/2009 03:34 PM	
LI	
Awarded (MW)	53.3
Price ($/kW - Month)	$3.01
NYC	
Awarded (MW)	436.7
Price ($/kW - Month)	$6.75
ROS	
Awarded (MW)	2371.1
Price ($/kW - Month)	$3.01
HQ	
Awarded (MW)	0.0
Price ($/kW - Month)	$3.01
IESO	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
NE	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
PJM	
Awarded (MW)	0.0
Price ($/kW - Month)	$0.00
Total ROS Awarded (MW)	2371.1
Total Awarded (MW)	2861.1
ROS Price Paid By Bidders (Weighted Avg.)	$3.010

Footnotes:

When an award of 0.0 MW is at a price, it indicates offers were made by supply at the location that was not awarded. ROS bidders purchased the following LI capacity: 53.3 MW at $3.01

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Installed Capacity

View Monthly Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2007 Auction Month/Year May/2007 Display

View Monthly Auction Summary

Summer 2007
Monthly Auction Results for UCAP, Auction Starting 05/2007
Posted Date: 04/16/2007 10:14 AM

	May	Jun	Jul	Aug	Sep	Oct
LI						
Awarded (MW)	3.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$3.75	$0.00	$0.00	$0.00	$0.00	$0.00
NYC						
Awarded (MW)	1099.1	15.0	15.0	15.0	15.0	15.0
Price ($/kW - Month)	$12.34	$11.40	$11.40	$11.40	$11.40	$11.40
ROS						
Awarded (MW)	2552.1	331.2	306.2	361.2	366.2	376.2
Price ($/kW - Month)	$2.40	$2.18	$2.11	$2.05	$2.05	$2.05
HQ						
Awarded (MW)	58.5	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$2.40	$2.18	$2.11	$2.05	$2.05	$2.05
IESO						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
NE						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
PJM						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total ROS Awarded (MW)	2610.6	331.2	306.2	361.2	366.2	376.2
Total Awarded (MW)	3712.7	346.2	321.2	376.2	381.2	391.2
ROS Price Paid By Bidders (Weighted Avg.)	$2.400	$2.180	$2.110	$2.050	$2.050	$2.050

Footnotes:

The 58.5 MWs awarded from HQ is wheeled through the IESO to the NYCA.

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Installed Capacity

View Monthly Auction Summary

Auction Mitigation Load Forecast Calendar

Season Summer 2008 Auction Month/Year May/2008 Display

View Monthly Auction Summary

Summer 2008
Monthly Auction Results for UCAP, Auction Starting 05/2008
Posted Date: 04/15/2008 03:42 PM

	May	Jun	Jul	Aug	Sep	Oct
LI						
Awarded (MW)	21.8	20.0	20.0	20.0	20.0	20.0
Price ($/kW - Month)	$2.80	$2.80	$2.79	$2.79	$2.75	$2.75
NYC						
Awarded (MW)	903.4	480.0	480.0	480.0	480.0	480.0
Price ($/kW - Month)	$6.52	$6.49	$6.49	$6.49	$6.49	$6.49
ROS						
Awarded (MW)	1851.8	551.1	249.5	239.6	398.6	398.6
Price ($/kW - Month)	$2.80	$2.80	$2.79	$2.79	$2.75	$2.75
HQ						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
IESO						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
NE						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
PJM						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total ROS Awarded (MW)	1851.8	551.1	249.5	239.6	398.6	398.6
Total Awarded (MW)	2777.0	1051.1	749.5	739.6	898.6	898.6
ROS Price Paid By Bidders (Weighted Avg.)	$2.800	$2.800	$2.790	$2.790	$2.750	$2.750

Footnotes:

ROS bidders purchased the following LI capacity: 19.3 MWs in May at $2.80, 20 MWs in June at $2.80, 20 MWs in July at $2.79, 20 MWs in August at $2.79, 20 MWs in September at $2.75, 20 MWs in October at $2.75

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Installed Capacity

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Auction Mitigation Load Forecast Calendar

Season Summer 2009 Auction Month/Year May/2009 Display

View Monthly Auction Summary

Summer 2009
Monthly Auction Results for UCAP, Auction Starting 05/2009
Posted Date: 04/15/2009 10:57 AM

	May	Jun	Jul	Aug	Sep	Oct
LI						
Awarded (MW)	69.5	5.0	2.4	2.4	2.4	2.4
Price ($/kW - Month)	$3.01	$3.12	$3.01	$3.00	$3.01	$3.00
NYC						
Awarded (MW)	757.9	335.0	217.0	163.0	126.0	108.0
Price ($/kW - Month)	$7.00	$6.92	$6.89	$6.87	$6.86	$6.85
ROS						
Awarded (MW)	2500.2	806.6	551.5	551.3	428.4	406.2
Price ($/kW - Month)	$3.01	$3.12	$3.01	$3.00	$3.01	$3.00
HQ						
Awarded (MW)	0.0	40.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$3.01	$3.12	$3.01	$3.00	$3.01	$3.00
IESO						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
NE						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
PJM						
Awarded (MW)	0.0	0.0	0.0	0.0	0.0	0.0
Price ($/kW - Month)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total ROS Awarded (MW)	2500.2	846.6	551.5	551.3	428.4	406.2
Total Awarded (MW)	3327.6	1186.6	770.9	716.7	556.8	516.6
ROS Price Paid By Bidders (Weighted Avg.)	$3.010	$3.120	$3.010	$3.000	$3.010	$3.000

Footnotes:

The 40 MWs awarded from HQ is wheeled through the IESO to the NYCA. When an award of 0.0 MW is at a price, it indicates offers were made by supply at the location that was not awarded. ROS bidders purchased the following LI capacity: 69.5 MW at $3.01 for May; 5 MW at $3.12 for June; 2.4 MW at $3.01 for July; 2.4 MW at $3.00 for August; 2.4 MW at $3.01 for September; 2.4 MW at $3.00 for October.

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BILLING CODE 4410–11–C

In the United States District Court for the Southern District of New York

Civil Case No. 10–CIV–1415

United States of America, Petitioner v. *KeySpan Corporation,* Respondent.

Comments of Consolidated Edison Company of New York, Inc.

Dated: May 3, 2010

Comments of Consolidated Edison Company of New York, Inc.

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) and in response to the March 4, 2010 Notice published in the **Federal Register**, U.S. Department of Justice, Antitrust Division, United States v. KeySpan Corporation, Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946 (Mar. 4, 2010), Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") hereby files these comments with respect to the settlement agreement entered into between the United States Department of Justice ("DOT") and KeySpan Corporation ("KeySpan").

I. Preliminary Statement

This case involves an antitrust violation that limited or restrained competition in the market for electric generating capacity in New York City for almost two years. Con Edison commends the DOJ for investigating and condemning the agreement entered into by KeySpan. As DOJ has advised the Court, the likely effect of that agreement was to increase the prices paid for electricity by consumers in New York City. In fact, once the subject agreement ceased to operate, the market price for capacity indeed declined. DOJ Complaint at ¶ 33. The DOJ's proposed consent judgment in this case requires that KeySpan disgorge $12 million of the profits it gained from its illegal agreement.

Unfortunately, however, the consent judgment does not provide for any of these disgorged funds to go the persons ultimately harmed by KeySpan's illegal conduct—the consumers subjected to the artificially inflated prices. The Competitive Impact Statement ("CIS") does not appear to address this alternative or explain why it was omitted. As a result of this shortcoming the proposed consent judgment does not acceptably satisfy the public interest standard as required by the Tunney Act. Indeed, it leaves the victims of KeySpan's antitrust violation without any remedy. This Court should not approve the proposed consent judgment until it is amended so that any monetary payments made by KeySpan are

distributed to the New York City retail electricity consumers who were harmed by its antitrust violations.

II. Background

On February 22, 2010, the DOJ entered into a consent judgment with KeySpan proposing to settle a civil antitrust proceeding brought by DOJ to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The relief provided in the proposed Final Judgment calls for KeySpan to pay the sum of $12 million to the United States government. Final Judgment at III.A. This payment by KeySpan represents "a portion of its ill gotten gains from its recent illegal behavior." 75 FR 9951.

According to the DOJ, this illegal behavior consisted of KeySpan entering into an anticompetitive agreement that would raise electricity prices to New York City consumers: "KeySpan entered into an agreement in the form of a financial derivative ['the KeySpan Swap Agreement'] essentially transferring to KeySpan, the largest supplier of electric generating capacity in the New York City market, the capacity of its largest competitor. 75 Fed. Reg. at 9947. The DOJ's CIS states that "[t]he likely effect of the Swap Agreement was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity." 75 FR at 9947.

III. The Proposed Consent Judgment Fails To Satisfy Tile Public Interest Because It Fails To Provide for a Remedy to the Electric Consumers Victimized by Tile Antitrust Violation

Before entering a proposed consent judgment in antitrust cases brought by the United States, a reviewing court must "determine that the entry of such judgment is in the public interest." 15 U.S.C. 1 6(e)(1). In making that determination, the court is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 USCS § 16(e)(1)(A) & (B) (emphasis added).

As this statutory language makes clear, this Court must consider (i) whether the Government has met its duty of considering the appropriate remedies, (ii) whether the remedies in the proposed judgment cure the injuries flowing to the general public from the violation, and (iii) whether the remedies are adequate. Unfortunately, the remedy proposed in the consent judgment falls short in each of these respects.

The settlement is not in the public interest because it does not provide relief to the individuals that have been harmed by KeySpan's actions under the KeySpan Swap Agreement. The DOJ's CIS makes it explicit that the individuals ultimately harmed by KeySpan's actions are New York City's electricity consumers who were subjected to higher prices for electricity by reason of KeySpan's illegal conduct. While the DOJ commendably condemned KeySpan's anticompetitive actions, which artificially raised New York City capacity prices, and sought an equitable remedy disgorging profits, its proposed remedy is inadequate in that it provides for KeySpan to pay the $12 million to the U.S. Treasury rather than to the individuals who ultimately were harmed.

Unless these funds are paid to the consumers who were injured, the effects of the violation stated in the CIS are not cured and the proposed consent judgment is inadequate. Without providing relief to these parties, the settlement fails to satisfy the public interest standard.

As noted above, the effects of the antitrust violation on New York City electricity consumers are acknowledged clearly in DOJ's own filings with the Court. According to the DOJ, the KeySpan Swap Agreement unlawfully restrained competition in New York City's electric capacity market because it enabled KeySpan, which already possessed market power in the New York City capacity market, to "enter into an agreement that gave it a financial interest in the capacity of Astoria—KeySpan's largest competitor." 75 FR at 9947. The Keyspan Swap Agreement "effectively eliminated KeySpan's incentive to compete for sales" ' of capacity. 75 Fed. Reg. at 9948. The net result "was to alter KeySpan's bidding in the NYC Capacity Market auctions." 75 Fed. Reg. at 9948. "But for the Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008." 75 Fed. Reg. at 9951. In other words, the KeySpan Swap Agreement enabled KeySpan to unlawfully and artificially raise capacity prices in New York City to the detriment of New York's retail electricity consumers.

In New York, "sellers of retail electricity must purchase a product from generators known as 'installed capacity.' " 75 FR 9947. The capacity price becomes part of the price of retail energy that is charged to retail consumers. Thus, any artificial increase in the price of capacity in New York City was initially borne by Load Serving Entities or "LSEs" (*i.e.,* retail sellers) and then passed on to their retail customers. As DOJ itself states, the ultimate effect of the KeySpan Swap Agreement "was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and in turn, to increase the prices consumers pay for electricity." 75 FR 9949. As a generator in New York City, KeySpan knew that LSEs, like Con Edison, were required to buy capacity from the market on behalf of their retail electric customers. In fact, the New York Independent System Operator ("NYISO") "requires retail providers of electricity to customers in the New York City region to purchase 80% of their capacity from generators in that City region." 75 Fed. Reg. at 9947. Thus, KeySpan knew that the increases in the price of capacity caused by the KeySpan Swap Agreement were going to be paid, and, in fact were paid, for by New York City LSEs and their retail electric customers.

Thus, unlike objectors to the remedies proposed in *United States* v. *Microsoft Corp.,* 56 F.3d 1448 (D.C. Cir. 1995), who argued that additional remedies should be imposed for injuries not pleaded in DOJ's Complaint, Con Edison's comments here focus on the fact that the proposed decree does not remedy the injury that DOJ specifically identifies in its Complaint and CIS. Nor does Con Edison in effect seek any change in the Complaint as filed. All that Con Edison requests is that the Court exercise its powers in equity to modify a proposed decree whose "impact * * * upon the public generally and individuals alleging specific injury from the violations set forth in the complaint" is manifestly to fail to remedy those injuries. 15 USCS § 16(e)(1)(B).

Equity, along with the standards for reviewing this settlement, calls for those consumers that were the ultimate victims of the KeySpan Swap Agreement to be the beneficiaries of whatever relief is provided for in the

consent judgment (the $12 million payment). DOJ acknowledges that there is no adequate remedy here at law for individuals harmed by KeySpan's antitrust violation. 75 FR 9951. The reason is that private individuals could not bring an antitrust suit here due to the barrier of the filed rate doctrine. See Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981); *Keogh* v. *Chicago & NW. Ry. Co.,* 260 U.S. 156 (1922). Where, as here, no remedy exists at law, courts have broad authority to design equitable relief that ensures fairness in light of the circumstances.

As the Supreme Court has made clear: "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman* v. *Pitts,* 503 U.S. 467, 487 (1992) (emphasis added). For example, when courts employ the "equitable remedy" of piercing the corporate veil, they are not "imposing [ ] liability" but rather "remedying the fundamental unfairness that would [otherwise] result." Trustees of *Nat'l Elevator Industry* v. *Lutyk,* 332 F.3d 188, 193 n.6 (3d Cir. 2003) (emphasis added, internal quotations omitted). "[T]hus, the theory of harm alleged may affect the scope of the remedy that equity demands." *Id; see* also *Taylor* v. *FTC*), 339 F. App'x. 995, 999 (Fed. Cir. 2009) ("district court's equity jurisdiction provides broad and flexible power to deliver justice in unique factual circumstances * * * to [the] court's best estimation").

In the circumstances of this case, the theory of harm (*i.e.,* the competitive injury) involves capacity prices that have been artificially increased as a result of the KeySpan Swap Agreement. In order to fairly redress that injury, the remedy, even if limited, should flow to the injured retail electricity consumers who paid those higher prices.

No basis exists on formalistic grounds to refrain from providing a remedy to the consumers injured by KeySpan's antitrust violation by distributing to them the $12 million disgorged by KeySpan from its illegal scheme. No party should be heard to rebuff this appropriate relief by arguing that the KeySpan Swap Agreement was with a counter-party, which entered into that transaction in arms-length bargaining, rather than consumers. That would exalt form over substance. It would also ignore the impact that the KeySpan Swap Agreement had on the New York City capacity market. As the DOJ's own CIS explicitly states, the ultimate effect of the antitrust violation was "to increase the prices consumers pay for electricity." Equitable remedies are needed because they ensure "that substance will not give way to form [and] that technical considerations will not prevent substantial justice from being done." *Pepper* v. *Littan,* 308 U.S. 295, 305 (1939); *Chase Manhattan Bank* v. *Brown & E. Ridge Partners,* 243 A.D.2d 81, 84 (NY. App. Div. 4th Dep't 1998) ("a court of equity looks to the substance of the action, not its form"); *see* also *Hechinger Liquidation Trust* v. *BankBoston* Retail Fin. Inc., 287 B.R. 145, 151–52 (D. Del. 2002) (citing Pepper and Chase in concluding that "the court should not employ a mechanical and formalistic" approach).

The DOJ does not explain in the CIS why it did not address the provision of relief to New York City consumers. Though it cites to the filed rate doctrine, DOJ appears to recognize that the filed rate doctrine does not apply to the disgorgement payments involved in the proposed consent judgment. Nor does the filed rate doctrine present any barrier to including in the judgment an equitable remedy in the form of payments to New York City consumers. The profits required to be disgorged by the proposed consent judgment are KeySpan's profits stemming from the KeySpan Swap Agreement, not from its sales of electric capacity under a filed rate. The KeySpan Swap Agreement is a private financial contract between KeySpan and the financial services company which was not filed with FERC. The KeySpan Swap Agreement is thus not part of the filed rate.[1] Accordingly, the filed rate doctrine is not a bar to providing relief to consumers in this case. Though the practical effects of restitution and disgorgement differ they are both equitable remedies. Restitution ultimately flows to the injured party, but it is neither a form of "damages" nor a means of providing "compensation for past injuries." *See Ellett Bros.,* Inc. v. *US. Fidelity & Guaranty Co.,* 275 F.3d 384, 388 (4th Cir. 2001) ("Restitution and disgorgement require payment of defendant's ill-gotten gains, not compensation of the [injured party's] loss."). Moreover, courts have interpreted statutes in a manner that does not interfere with a court's traditional equity powers, unless Congress clearly makes that "desire plain." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329–30 (1944) ("The essence of equity jurisdiction has been the power * * * to do equity and to mould each decree to the necessities of the particular case."). The filed rate doctrine, in short, has no application to the equitable distribution of the disgorged funds as a remedy in this case.

Finally, it is not a bar to providing relief to consumers that the precise amount of harm to them has not been calculated. KeySpan's conduct may have caused much greater injury than the $12 million it has agreed to disgorge. Equity does not allow a party to take advantage of imprecision that a wrongdoer is responsible for creating. While KeySpan's wrongdoing may have made it difficult to calculate the extent of the harm to consumers, the DOJ's duty is to protect the general public, and its own findings that the likely effect of the violation was to raise prices, make it apparent that an adequate equitable remedy requires distribution of the disgorged funds to the consumers that were harmed.

Such relief would, at least, partially offset the economic damage inflicted upon New York City's electricity consumers. Accordingly, any relief in the form of monetary payments provided for by this consent judgment should be for the benefit of New York City's retail electric consumers. One method to effectuate such relief would be to provide for payments to be made to New York City LSEs in proportion to the amount of capacity that they procured during the May 2006 through February 2008 time period, with the proviso that such payments be distributed to end use consumers in proportion to their relative demand during this period. Alternatively, the Court could direct the NYISO to equitably distribute the payments among consumers.

IV. Conclusion

Con Edison respectfully requests that the Court find that the proposed consent judgment is not in the public interest until and unless any monetary payments disgorged by KeySpan are used to provide relief to New York City's electricity consumers.

Dated: May 3, 2010, New York City.

Respectfully submitted,

Consolidated Edison Company of New York, Inc.

By: Neil H. Butterklee, Assistant General Counsel, Consolidated Edison Company

[1] It is the NYISO Market Administration and Control Areas Services ("Services Tariff") that is the filed rate. All of the rules, procedures and pricing formulas associated with the NYISO's capacity auctions are contained in the Services Tariff which is on file at the Federal Energy Regulatory Commission ("FERC"). Thus, the filed rate is encompassed within the pages of the Services Tariff. It does not include the KeySpan Swap Agreement which is an extrinsic private contract.

of New York, Inc.

April 30, 2010

BY ELECTRONIC MAIL

Donna N. Kooperstein, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530.

Re: United States v. KeySpan Corporation; Proposed Final Judgment, Stipulation and Competitive Impact Statement

Dear Ms. Kooperstein: The New York State Consumer Protection Board ("NYSCPB") appreciates the invitation, provided in the **Federal Register** dated March 4, 2010, to discuss the appropriateness of the proposed Final Judgment, Stipulation and Competitive Impact Statement that have been filed with the United States District Court for the Southern District of New York in United States of America v. KeySpan Corp., CMI Case No. 10–CIV–1415. The NYSCPB is pleased that the United States Department of Justice ("USDOJ") has pursued the improper collusive behavior of KeySpan Corporation ("KeySpan" or "Company") in New York City's capacity market.[1] For almost two years, KeySpan was able to maintain artificially high capacity prices in New York City by controlling, through a third party, the bids of its main competitor and receiving that competitor's capacity revenues. The filed documents call this arrangement "the KeySpan Swap."

The NYSCPB believes that, for two reasons, entry of the proposed Final Judgment is not in the public interest. First, KeySpan has agreed to disgorge only $12 million, when the evidence is overwhelming that the Company's illicit conduct burdened New York Cit's energy consumers by at least $68 million and perhaps as much as several hundred million dollars in over payments.[2] Second, the ill-gotten gains should be paid to the victims of KeySpan's improper behavior, New York City's energy consumers, not to the Federal government.

Statement of Interest

The NYSCPB is an agency in the Executive Branch of New York State government statutorily charged with "* * * representing the interests of consumers of the state before Federal, state and local administrative and regulatory agencies.[3] Further, pursuant to Executive Order No. 45, the NYSCPB is authorized to:

Act as an advocate before other state and Federal entities by:

(a) representing the interests of consumers in proceedings of Federal, state and local administrative and regulatory agencies where the State Director deems the proceeding to affect the interest of consumers.

The NYSCPB has also been designated by the New York State Independent System Operator, Inc. ("NYISO") as the "Statewide Consumer Advocate," representing the interests of the State's residential, small business and farm electricity users in the NYISO governance process. The Agency has fully participated in the NYISO's stakeholder process since the inception of the organization in the late 1990's and has made numerous filings with the FERC.

Comments

The Competitive Impact Statement asserts that the "proposed Final Judgment remedies [KeySpan's] violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement." The NYSCPB respectfully disagrees. According to the NYSPSC, the KeySpan Swap unjustly enriched the Company by more than $68 million and imposed continued high electricity costs on consumers in amounts that could total hundreds of millions of dollars. Viewed in this context, disgorgement of $12 million will not deter the Company or other companies from engaging in anticompetitive conduct in the future. Not only is the penalty less than 20 percent of the ill-gotten gains, but it is so small compared to the Company's annual earnings that. shareholders would not notice it. Instead, the settlement should reflect KeySpan's wrongful gains from the swap, its wrongful gains from its capacity sales outside the swap, and the harm to consumers due to high capacity prices that were caused by the swap.

USDOJ has not sustained its burden to provide sufficient evidence for the Court to determine that a $12 million settlement is adequate reimbursement for KeySpan's unjust enrichment, or deter such anti-competitive conduct in the future. The NYSCPB agrees with the NYSPSC that USDOJ should be required to disclose the total amount of KeySpan's wrongful gains, and explain how, in light of these gains, a $12 million settlement would adequately recover KeySpan's unjust enrichment and deter such illegal practices. In addition, the managers who perpetuated this illegal conduct will likely suffer no negative consequences as a result of the settlement. Indeed, it is likely they received hefty bonuses as the illicit revenues began rolling in. Further, at the very least, the names of the managers who approved or condoned this behavior should be made public.

The proposed Final Judgment is also flawed because the people harmed by the Company's conduct would not receive any benefit from its remedy. Transferring $12 million to the Federal government would produce no impact on the economic lives of New York City energy consumers. A fairer and appropriate course of action would be to return the ill-gotten gains to the people from whom they were taken, primarily the electric customers in New York City (Zone J of the capacity market operated by the NYISO.) One way this could be accomplished would be to provide a credit to load serving entities within Zone J that could be used to offset the cost of current purchases. The NYSCPB recognizes, however, that it would be the NYISO's responsibility to implement such a credit mechanism. We recommend that the Court direct USDOJ to contact the NYISO to discuss the feasibility of implementing this mechanism.

If the credit mechanism proves impractical, as a substitute, we recommend using the money for expansion of energy efficiency programs in Zone J. Two New York State entities administer energy efficiency programs for low-income New Yorkers. The New York State Division of Housing and Community Renewal administers the Federally funded Weatherization Assistance Program and the New York State Energy Research and Development Authority administers the state-funded EmPower New York program. Annual and other reports by independent third-parties demonstrate that both of these entities ably administer well-designed energy efficiency and weatherization programs that lower the energy burden for low-income New Yorkers and reduce energy prices for everyone by lessening demand. The NYSCPB urges the Court to direct USDOJ to discuss with these State entities the process by which the funds could be transferred. We recommend transfer of the funds to these two State entities in equal shares, with the qualification that the funds must be used to expand their ongoing work in Zone J.

[1] USDOJ's action is especially commendable when compared to the failure of the Federal Energy Regulatory Commission (FERC") to take any action to protect consumers from KeySpan's conduct.

[2] The NYSCPB's comments rely on data contained in the affidavit accompanying the comments of the New York State Public Service Commission ("NYSPSC"). The NYSCPB supports the analyses and recommendations in the NYSPSC's comments as well as those in the comments of the City of New York.

[3] New York Executive Law § 553(2)(d).

Conclusion

The proposed Final Judgment should be rejected because it is not in the public interest. The Court should direct urge the parties to increase the amount of ill-gotten gains to be disgorged and require all disgorged funds to inure to the benefit of New York City energy consumers.

Thank you for consideration of our comments in this matter.

Respectfully yours,

Mindy A. Bockstein,
Chairperson and Executive Director.

Tariq N. Niazi,
Director of Utility Intervention.

Saul A. Rigberg,
Intervenor Attorney.

May 17, 2010

Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section. Antitrust Division. United States Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530.

RE: Comments of the Pennsylvania Public Utility Commission on United States v. Keyspan Corporation Proposed Final Judgment and Competitive Impact Settlement, 1O–civ–1415 (USDC—Southern District, New York)

Dear Ms. Kooperstein: The Pennsylvania Public Utility Commission [1] ("PaPUC") herewith files these comments under the provisions of the Tunney Act, 15 U.S.C. 16(d), with respect to the Proposed Final Judgment and Competitive impact Settlement in the matter of United States v. Keyspan Corporation presently before the United States District Court for the Southern District of New York, Civil Action 10–civ–1415.

In 1997, the General Assembly enacted the Electric Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801 *et seq,* restructuring Pennsylvania's traditional vertically integrated electric utilities and opening up retail markets to competition. As Pennsylvania is largely, and soon will be wholly within the control area of PJM interconnection, L.L.C., a FERC-jurisdictional Regional Transmission Organization, the competitiveness of Pennsylvania's retail electric markets is heavily dependent on the competitive results of the PJM electric generation wholesale markets. Approximately 80% of the delivered price of retail electricity is attributable to the wholesale cost of generation.

As a state public utility regulatory agency in a state that has, for more than a decade, supported both wholesale and retail competition in the electric power generation markets, we are deeply concerned by allegations contained in the complaint that appear to conclusively establish the existence of a sophisticated multi-year effort by the defendant to evade competition in the New York installed capacity market, resulting in higher retail electricity prices for retail users of electricity. The effort appears to have been carefully calculated and executed so as to avoid action by New York state authorities, Federal regulators and antitrust enforcers.

This concern is heightened by the fact that the Federal Energy Regulatory Commission, which has regulatory jurisdiction over the New York City wholesale generation market, was apparently unable to detect or deter the behavior recited in the instant Complaint.[2] As the complaint recites, during the 2006–2009 period, Keyspan was faced with the prospect of new competition in the New York City capacity market which had the prospect of substantially reducing its future capacity revenues. Unable to purchase control of its competitor and unwilling to risk head-to-head competition, Keyspan purchased a financial interest in the capacity sales of its competitor through a third party ("Keyspan Swap"). In turn, the third party sought and obtained a hedging agreement with the competitor Astoria to reduce its counterparty risk. The result was to make Keyspan indifferent with respect to competition, as it would receive revenue either through bidding into the capacity market or through its swap.

It appears from the factual recitations of the Complaint that Keyspan's scheme had a high likelihood of success.[3] This would seem to elevate the danger that New York City load serving entities, and ultimately the public could suffer competitive injury without remedy or the protection of the laws of New York State, or of the United States. That would seem to elevate the seriousness of the defendant's offense. Moreover, it is not clear that the facts in this case are limited in time and place; while the tariff rules in question in this case apply to a specific geographic location and time period, the general method employed by the defendant to avoid competition (i.e., the purchase of a financial interest in the operations of a competitor through a third party) is not so limited.

Because the PaPUC is a state regulatory agency with limited jurisdiction and power under Pennsylvania law, we must rely heavily upon the effective enforcement of the antitrust Jaws of the United States to protect the public and the competitive wholesale and retail electric generation markets.

The PaPUC understands that there has been a degree of difficulty associated with detecting and prosecuting the actions recited in this case; we do not oppose the proposed Stipulation and Final Judgment, although we cannot state whether the equitable and financial penalties in the Final Judgment result iii the full remedy of injury to the public from execution of the scheme.

This proceeding demonstrates that even if conduct inimical to competition is not effectively proscribed under the Federal Power Act, it may result in prosecution and serious consequences under the antitrust laws of the United States. The PaPUC and other public and private entities with a critical stake in the success of wholesale electric generation competition have benefitted from studying the facts of this case and will be better able to detect and deter similar schemes in the future.

Lastly, the PaPUC would like to convey our thanks to the U.S. Department of Justice—Antitrust Division for enforcing competition law in wholesale electricity markets and sanctions against a scheme that manifestly reduced competition and raised prices in the New York City capacity market.

Very truly yours,

Bohdan R. Pankiw,
Chief Counsel, *Pennsylvania Public Utility Commission.*

cc: James H. Cawley, Chairman

[1] The PaPUC is a state administrative commission created by the General Assembly of the Commonwealth of Pennsylvania and charged with the regulation of electric utilities, transmission siting and licensing of generation suppliers within the Commonwealth of Pennsylvania. 66 Pa.C.S. A., § 101, *et seq.*

[2] In 2007, the New York 150 sought, pursuant to Section 205 of the Federal Power Act to file capacity mitigation and market remediation tariffs to address perceived exercises of market power in the New York City capacity market. FERC rejected the proposed behavioral remediation tariffs and instead directed a staff investigation. New York Independent System Operator. Inc., 118 FERC ¶ 61,182 (2007) ("2007 FERC Order"). In the staff review of the allegations filed with respect to the New York City capacity market, it was apparently concluded, inter a/ia, that while Keyspan's actions did not violate any provision tariff or of the Federal Power Act, there was a potential problem with buyer's market power, (i.e., a potential for exercise of monopsony), and directed the New York ISO to file tariffs to address this purely theoretical concern.

[3] The facts appear to establish that there was a sophisticated effort by Keyspan to immunize its transactions from regulatory review by seeking to characterize them as ordinary and usual business transactions.

Tyrone J. Christy, Vice Chairman
Wayne E. Gardner, Commissioner
Robert F. Powelson, Commissioner

May 14, 2010

Donna N. Kooperstein, Chief, Transportation, Energy, arid Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530

Re: Public Notice Inviting Tunney Act Comments in United States v. Keyspan, SDNY Civil Action No. 10–cv–1415 (WIIP), 75 Fed. Reg. 9946, March 4, 2010.

Dear Ms. Kooperstein: AARP submits these comments in response to the above-referenced notice regarding the proposed settlement of United States v. Keyspan, SDNY Civil Action No. 10–cv–1415 (WHP). AARP is a nonpartisan, nonprofit organization that helps people over the age of 50 to have independence, choice, and control in ways that are beneficial to them and society as a whole.[3] AARP has millions of members, including more than 2,500,000 members who reside in New York.[4] AARP is greatly concerned about the threats to health and safety of vulnerable citizens caused by New York's high electricity costs.[5] Because the cost of utilities has skyrocketed, many low and middle-income families and older people must now choose between paying their energy bills for heating and cooling and paying for other essentials such as food and medicine. AARP works to protect consumers from excessive rates and charges such as were set and charged by KeySpan and passed through to consumers. As consumers, AARP members depend upon the protection of the antitrust laws from the unlawful exercise of monopoly or market power and the enforcement of the antitrust laws by DOJ and the courts.

The United States Department of Justice Antitrust Division ("DOJ") filed a Complaint against KeySpan Corporation ("KeySpan") on February 22, 2010. The Complaint alleges violation of Section 1 of the Sherman Act in connection with KeySpan's successful efforts to inflate prices paid for wholesale electric capacity from May 2006 to February 2009 in a spot market operated by the New York Independent System Operator ("NYISO").[1] Keyspan achieved this price inflation using a strategy of economic withholding, by bidding the maximum possible amount in order to drive up the market clearing price paid to all sellers in the NYISO in-City capacity auction market. Keyspan also entered into a financial derivative swap contract with Morgan Stanley, which functioned to create an interest in sales of a major competitor, providing a stream of payments to KeySpan to offset diminished sales due its withholding strategy to raise prices.

On the same day the Complaint was filed, DOJ and Keyspan filed and moved for entry of a Proposed Final Judgment that would settle and discontinue this action. Under the terms of the Proposed Final Judgment, Keyspan would pay $12 million to the U.S. Treasury, with no admission of any wrongdoing, and the Complaint would be dismissed. The Proposed Final Judgment would provide no monetary remedy or other benefit for the consumers who paid higher prices for electricity due to the antitrust law violation described in the Complaint.[2] As required by the Antitrust Procedures and Penalties Act (the "TunneyAct"), 15 U.S.C. 16(e)–(f), DOJ filed a Competitive impact Statement recommending approval by the Court of the Proposed Final Judgment. The Tunney Act requires public notice and an opportunity for public participation and input to both DOJ and the Court prior to the Court's review and decision on the settlement of an antitrust case.

AARP members in New York state were adversely affected by the inflated capacity charges due to the alleged antitrust violations.[6] The inflated charges for capacity were paid in the first instance by load-serving utilities, such as Consolidated Edison Company of New York, Inc. ("Con Edison"), which then passed through all the excessive charges to retail customers. "The exercise of supplier market power, through economic withholding, leads to higher capacity prices, and a wealth transfer from consumers to suppliers."[7] Con Edison estimated the inflated costs in 2006 to be approximately $159 Million.[8] Of that amount, $119 million was paid by New York City area utilities, and $39 million was paid by utilities in the rest of the state. The amount of capacity overcharges for 2007 and until NYISO rules were changed in early 2008 have not been identified.

AARP urges DOJ not to settle the action as proposed and urges the Court not to approve the Proposed Final Judgment. AARP's reasons for disapproval, set forth in greater detail below, include, foremost, the lack of any monetary remedy or other discernible benefit for injured consumers, and the absence of a credible deterrent that would discourage others from exercising market power in the NYTSO markets in violation of the antitrust laws. Also, there is no factual foundation in the record

- to determine appropriateness of the $12 Million disgorgement of profits;
- to determine the portion of the profits received by KeySpan that would be disgorged;
- to quantify the harm to markets and consumers caused by the antitrust law violation described in the Complaint;
- to determine the basis for arriving at the $12.1 million partial disgorgement and its appropriateness;
- to clearly identify the swap contract and its terms which violated the antitrust laws; and
- to determine if the settlement is adequate to redress the antitrust law violation that occurred.

The public interest may be harmed by the settlement if, instead of the intended deterrent effect, it sends a message that antitrust violators who inflate prices through the exercise of market power in NYISO markets can (i) escape serious consequences, (ii) have no obligation to return illegally obtained profits to those injured by the antitrust violation described in the Complaint, (iii) make no admission of wrongdoing, and (iv) disgorge only an unstated portion of their profits from their unlawful scheme. Also, the proposed settlement may tacitly condone the future use by others of private financial derivative swap contracts to compensate sellers

[3] For more information about AARP see *http://www.aarp.org/.*

[4] For more information about AARP's New York state office, see *http://www.aarp.org/states/ny/.*

[5] New York residential electric rates are currently third highest in the nation, second only to Hawaii and Connecticut. Energy Information Agency, Electric Power Monthly, April, 2010, Year to Date, available at *http://www.eia.doe.gov/cneaf/images/xls.gif.*

[1] The Complaint is available at *http://www.justice.gov/atr/cases/f255500/255507htm.*

[2] The Proposed Final Judgment is available at *http://www.justice.gov/atr/cases/f255500/2555O9.htm.*

[6] "Every Con Ed customer in the five boroughs overpaid an average total of at least $40 over two years during a price-fixing scheme set up by the owners of a giant Queens power plant, the feds charge in a court case that would let the alleged gougers get away with most of the gains." Bill Sanderson, $157 M Power Abuse, N.Y. Post, March 9, 2010, available at *http://www.nypost.com/f/printlnews/local/power_abuse_SgLN9psbhjopRMEGU68fgK.*

[7] Affidavit of Peter Cramton, Ph.D., Feb. 8, 2007, attached as Exhibit A to Answer and Request for Leave to File Answer of Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Mutliple Intervenors and the City of New York, in FERC Docket No. ER07–360, Re New York Independent System Operator, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11248666.*

[8] See Motion to Comment of Consolidated Edison Company of New York, Inc., etc., Re New York Independent System Operator, FERC Docket No. ER07–360 (Jan. 27, 2009), p. 2 and Affidavit of Stuart Nachmias, ¶ 13–14, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11236060.*

who employ anomalous withholding or bidding strategies to exert market power and inflate clearing prices in the NYISO or other organized electricity spot markets elsewhere in the nation.

Information filed in other proceedings suggests that the amount of disgorgement is not adequate, that the settlement will not deter use of private derivative contracts to support anomalous bidding in NYISO markets, and that the requisite factual foundation needed to support the proposed settlement is absent. At a minimum, further proceedings are needed to develop an adequate factual record upon which it would be possible for the Court to determine whether a proposal to compromise this antitrust action is in the public interest.

No Sufficient Factual Foundation Exists to Support a Conclusion That the Proposed Settlement Is a Reasonably Adequate Remedy or in the Public Interest

The Tunney Act proceeding is critically important because it tests, through public participation and the sunlight of public scrutiny, whether an adequate factual foundation exists to support a finding that the public interest would be advanced if a civil antitrust case brought by the United States is settled through compromise with the alleged violator. The Tunney Act provides, in relevant part:

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 USC 16(e)(l). As shown below, the necessary foundation of record support needed to answer even the most basic questions about the proposed settlement is lacking.

The Complaint filed by DOJ alleges that KeySpan violated Section 1 of the Sherman Act [9] by adopting an economic withholding strategy in the NYISO capacity market—bidding high to drive clearing prices up. Attendant to the withholding strategy was the possible consequence that not all its capacity would be sold at the maximum price that KeySpan bid, and that other competitors who bid lower would make sales and receive the high price set by KeySpan. To compensate itself for lost sales due to its withholding strategy, KeySpan entered into a financial derivative swap contract, which in effect gave it a financial interest in the capacity sales of a major new competitor. According to the Complaint:

On January 18, 2006, [KeySpan] and a financial services company executed an agreement (the "KeySpan Swap") that ensured that KeySpan would

On January 18, 2006, [KeySpan] and a financial services company executed an agreement (the "KeySpan Swap") that ensured that KeySpan would withhold substantial output from the New York City electricity generating capacity market * * *. The likely effect of the KeySpan swap was to increase prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity.

Complaint, page 1. The contract was between KeySpan and Morgan Stanley, and Morgan Stanley entered into a reciprocal financial derivative arrangement with Astoria Generating, a major new competitor of KeySpan.[10] One of the conditions of the swap contract provided for its termination if the closing for the purchase of the competitor power plant by Astoria Generating did not occur. The swap contract is not in the record of this case but an excerpt is available in a FERC filing made by Con Edison.

Because all sellers are paid the same market clearing price in the NYISO capacity market auctions, a single seller who achieves a higher clearing price through an unlawful scheme ensures that all sellers reap the benefit of that inflated price, with the consequence that every megawatt of electric capacity sold, even by those sellers not participating in the scheme, is overpriced, to the detriment of consumers. The Complaint does not quantify the amount of higher prices obtained through KeySpan's scheme or the attendant cost borne by consumers. The Complaint simply alleges that "KeySpan had revenues of approximately $850 million in 2006 and $700 million in 2007 from the sale of energy and capacity at its Ravenswood facility." Complaint, ¶ 6. The Complaint does not indicate the portion of these KeySpan revenues attributable to the illegal scheme. Nor does the Complaint indicate the total NYISO capacity market revenue or the portion of that which was inflated due to KeySpan's scheme and ultimately paid by consumers.[11]

Despite the absence of any indication in the Complaint as to the amount of total damage to markets and consumers through the inflated capacity prices, and despite the absence of any assertion regarding KeySpan's share of those inflated charges, the DOJ Competitive Impact Statement asserts:

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement.[12]

How can it possibly be said the proposed settlement "remedies this

[9] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." 15 U.S.C. 1.

[10] "On January 18, 2006, KeySpan entered into an International SWAP Dealers Association Master Agreement for a fixed for float unforced capacity financial swap (the "Agreement") with Morgan Stanley Capital Group Inc. ("Morgan Stanley"). The Agreement has a three year term that began on May 1, 2006. The notional quantity is 1,800,000kw (the "Notional Quantity") of In-City Unforced Capacity and the fixed price is $757/kWmonth ("Fixed Price"), subject to adjustment upon the occurrence of certain events. Cash settlement occurs on a monthly basis based on the In-City Unforced Capacity price determined by the relevant New York Independent System Operator ("NYISO") Spot Demand Curve Auction Market ("Floating Price"). For each monthly settlement period, the price difference equals the Fixed Price minus the Floating Price If such price difference is less than zero, Morgan Stanley will pay KeySpan an amount equal to the product of (a) the Notional Quantity and (b) the absolute value of such price difference. Conversely, if such price difference is greater than zero, KeySpan will pay Morgan Stanley an amount equal to the product of (a) the Notional Quantity and (b) the absolute value of such price difference. This derivative instrument does not qualify for hedge accounting treatment under SFAS 133 and is subject to fair value accounting treatment; although currently there is no observable market reference to value this derivative instrument. As noted, this is a financial derivative instrument and is unrelated to any physical production of electricity" Keyspan Form 10–Q, Annual Report, June 30, 2006, available at *http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?ID=45704O2&SessionID=35GoWWvvg9LHL17.*

[11] As discussed infra, there are indications that the price of capacity was increased by KeySpan's gambit by approximately $157 million in 2006.

[12] DOJ Competitive Impact Statement, p. 8. (Emphasis added). The Competitive Impact Statement is available at *http://www.justice.gov/atr/cases/f255500/255578.htm.*

violation" if there is no identification anywhere in the Complaint, the Proposed Final Judgment, or the Competitive Impact Statement of the amount of damage to markets and to consumers caused by KeySpan's anticompetitive conduct? There is simply no factual foundation in the record to support DOJ's assertion that the proposed compromise of the action "remedies this violation."

The Competitive Impact Statement places great emphasis upon the agreement of KeySpan to pay $12 million to the United States Treasury. But there is no provision in the Proposed Final Judgment which would remedy or address the harm to AARP members and other consumers caused by KeySpan's successful efforts to inflate prices in the NYISO markets.

The Competitive Impact Statement refers frequently to disgorgement of profits by KeySpan under the Proposed Final Judgment, possibly creating an impression that KeySpan will not be allowed to benefit from its scheme (even if other sellers do, due to the design of the NYISO market):

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement * * *. Disgorgement will deter KeySpan and others from future violations of the antitrust laws. [p. 1]

The proposed Final Judgment requires KeySpan to disgorge profits gained as a result of its unlawful agreement restraining trade. [p. 8]

Disgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar Anticompetitive conduct in the future. Absent disgorgement, KeySpan would be likely to retain all the benefits of its anticompetitive conduct. [p. 9]

Disgorgement here will also serve to restrain KeySpan and others from participating in similar anticompetitive conduct. [p. 10]

A disgorgement remedy should deter Keyspan and others from engaging in similar conduct. [p.11–12] [13]

Contrary to the impression cast by the above assertions, a $12 million payment by KeySpan as proposed would not amount to full disgorgement of its profits from the antitrust law violation described in the Complaint. Rather, it would represent only some undesignated portion of KeySpan's profits from the illegal scheme. The Competitive Impact Statement acknowledges that the proposed settlement does not require KeySpan to give up all its profits from the scheme:

Requiring KeySpan to disgorge a portion of its ill-gotten gains from its recent illegal behavior is the only effective way of achieving relief against KeySpan, while sending a strong message to those considering similar anticompetitive conduct.[14]

How can the the public know or Court determine if the proposed $12 million payment by KeySpan is appropriate when it represents only "a portion of its ill-gotten gains"? What portion? What is the reason, if any, for requiring KeySpan to give up less than 100% disgorgement of profits? DOJ has not explained its rationale for accepting less than full disgorgement of KeySpan's "ill-gotten gains from its recent illegal behavior.[15]

The Competitive Impact Statement asserts that "[b]ut for the Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008." [16] Hut, as discussed above, there is no indication in the record of the total amount of "ill-gotten gains" received byKeySpan due to the antitrust violations, or of the total amount by which market prices were elevated due to the scheme. An estimate of the total market price inflation in 2006 was made by Con Edison, a purchaser in the NYISO capacity market:

The resulting harm to consumers was quite significant. Economic withholding caused the price of capacity to remain close to $13/kW-month instead of decreasing to less than $6 per kWmonth, a price that [NYISO Market Monitor] Dr. Patton said would exist under competitive market conditions * * *. As calculated by Con Edison witness Stuart Nachmias, the impact on New York State's consumers of economic withholding during the 2006 Capability Year on was approximately $157 million, of which approximately $119 million impacted New York City consumers alone * * *.[17]

This estimate was only for 2006. It also indicates that about $38 million in higher costs ($157 million total minus $119 million in New York City) were experienced in the rest of New York State in 2006 due to the KeySpan withholding. The scheme continued until March 2008, according to the Competitive Impact Statement, when NYISO rules were changed. KeySpan's share of the prices raised by dint of its anticompetitive actions is not known by AARP. According to a FERC Staff Report, the KeySpan—Morgan Stanley swap agreement identified in the Complaint as violative of antitrust law "produces almost $35 million in annual revenue." [18] If so, remitting just $12 million to the government, about one-third of the revenue from the derivative, plus the enhancement of market prices paid for capacity sold at excessive prices in addition to the income from the financial derivative contract, could be a good deal for KeySpan. But it would be a very bad result for consumers, markets, competition, and public confidence in Federal antitrust law enforcement.

With no remedy for consumers who overpaid, and without a factual foundation in the record as to how much KeySpan profited from its gambit to inflate NYISO market prices, there is no way to assess whether the proposed $12 million payment to the government would be a meaningful or appropriate remedy. Although a 2008 FERC Staff Report perceived no violation of FERC orNYISO rules, and exonerated KeySpan and Morgan Stanley, the Court should not ignore the fact that the FERC Staff Report did not emerge from an open proceeding with the benefit of discovery, public testimony, or cross examination by interested intervening parties. Indeed, the ineffectiveness of FERC, which eventually approved a prospective change in NYISO market rules in 2008, highlights the patchwork nature of jurisdiction over energy markets and derivatives,[19] and

[13] DOJ Competitive Impact Statement. (Emphasis added).

[14] *Id.,* p. 10.

[15] *Id.*

[16] DOJ Competitive Impact Statement, p. 7.

[17] Re New York Independent System Operator, Inc., FERC Docket No. ERO7–360.000, Motion to Comment of Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc., p. 2, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11236060.*

[18] *Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the Ne York City Capacity Market,* FERC Enforcement Staff Report, at, (Feb. 28, 2008), P. 21, available at *http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11605597.*

[19] "Three Federal statutes, the Commodity Exchange Act (CEA), the Energy Policy Act of 2005 (EPAct 2005), and the Energy Independence and Security Act of 2007 (ElSA) all prohibit manipulation of various energy commodities and empower Federal agencies to impose penalties on manipulators Unlike the EPAct 2005 or the EISA, the CEA does distinguish between market power manipulations and fraud-based manipulations. However, a series of poorly reasoned legal decisions have undermined the efficacy of the CEA as a tool for combating market power manipulation. The EPAcI 2005 and EISA are both based on section 10b(5) of the Securities and Exchange Act, and focus on fraud-based manipulations. As a result, they are ill-suited to address market power manipulation, and attempts to use them to do so will inevitably lead to further legal confusions. * * * The FERC and FTC antimanipulation rules are newer, and have not been extensively tested in litigation, but from an economist's perspective, these rules (and the statutes that authorize them)

Continued

underscores the importance of vigorous antitrust law enforcement by DOJ to address, remedy, and deter anticompetitive conduct in the NYISO electricity markets.

In justification of the proposed settlement, the DOJ Competitive Impact Statement is replete with references to the putative deterrent effects the Proposed Final Judgment would have, claiming it would discourage future transgressions by NYISO market participants:

Disgorgement will deter KeySpan and others from future violations of the antitrust laws. [p. 2]

See *International Boxing Club* v. *United States,* 358 U.S.242, 253 (1959) (relief should "deprive 'the antitrust defendants of the benefits of their conspiracy,'" * * * The Second Circuit has held that disgorgement is among a district court's inherent equitable powers, and is a "well-established remedy * * * to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud." *SEC* v. *Cavanagh,* 445 F.3d 105, 116–17 (2d Cir. 2006). [p. 8–9].

Disgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar anticompetitive conduct in the future. Absent disgorgement, KeySpan would be likely to retain all the benefits of its anticompetitive conduct. {p. 9].

A disgorgement remedy should deter Keyspan and others from engaging in similar conduct. [p.11] [20]

There is no explanation in the DOJ Competitive impact Statement as to why only a portion of profits is being disgorged, what the total profits were, what portion is being disgorged, or how the disgorgement of part of the profits from an antitrust violation would possibly work to deter others from future efforts to inflate prices in the nation's electricity spot markets. The record is devoid of any explanation underlying DOJ's conclusion that only partial disgorgement of unquantified profits in this case would somehow deter similar conduct in the organized electric spot markets or send "a strong message to those considering similar anticompetitive conduct." [21] Indeed, DOJ, in its Competitive Impact Statement, suggests content and significance of the Proposed Final Judgment well beyond its text. DOJ states

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement.[22]

Actually, the Proposed Final Judgment simply states that:

plaintiff and KeySpan, through their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, for settlement purposes only, and without this Final Judgment constituting any evidence against or an admission by KeySpan with respect to any allegation contained in the Complaint.[23]

On its face, the Proposed Final Judgment does not contain language identifying any "violation," does not mention profit disgorgement, does not state KeySpan will "disgorge profits," and does not determine that the swap agreement was "anticompetitive." as suggested by the DOJ Competitive Impact Statement.

There is no provision in the Proposed Final Judgment one could point to as even a rhetorical or symbolic "shaming" that might deter similar future conduct of sellers concerned with their good will and public image. Rather, the Proposed Final Judgment simply would require a payment to the government with no admission of wrongdoing, no acknowledgment of any anticompetitive conduct, and no remedy for consumers harmed. The "message" conveyed by the $12 million payment to other market participants may simply be that it was a nuisance settlement equal to the cost of a handful of New York lawyers for a couple of years. If the $12 million payment is only a fraction of KeySpan's ill-gotten gain; if all sellers in the NYISO or other organized electricity markets benefit from a successful exercise of market power by any one of them; if the cost of apprehension is small or nonexistent compared to the benefits; then other market participants may be emboldened to try similar strategies if the Proposed Final Judgment permitting such results is approved. In the NYISO and similarly designed electricity markets where all sellers benefit from the wrongdoing of the one who illegally drives prices up, the proposed settlement may only incent further testing of the limits and exploitation of markets and consumers.

Analogous to bid rigging schemes where the winner secretly pays a part of his excessive profits to other sellers who deliberately overbid far in excess of the winning "low" bid, the same result might be obtained by sellers in the organized electricity spot markets such as those of the NYISO, using a financial intermediary and derivative contracts to compensate the high bidder who raises the price but sacrifices some sales to do so. The DOJ Competitive Impact Statement does not sufficiently identify the details of the swap contract arrangements made by KeySpan with Morgan Stanley to ensure that KeySpan would receive additional benefits when sales were made by competitors at higher prices due to KeySpan's economic withholding.

When all sellers benefit from any successful price-raising gambit in NYISO and similar organized electricity markets, the real "message" conveyed by this case to those entertaining an exercise of market power in violation of antitrust law, if the settlement is approved, could be "go for it." If the gambit is discovered, the market participant can escape civil antitrust liability in an antitrust case brought by DOJ four years later by simply agreeing to cede an unspecified portion of one's profits, with no admission of wrongdoing. Thus, if approved, the Proposed Final Judgment may only encourage sellers to exploit the nation's electricity spot markets and consumers, with confidence that if they are caught by DOJ, they will not be ordered to provide a remedy to exploited consumers, but merely required to pay some portion of unlawfully obtained profits to the government.

AARP Recommendations

AARP recommends that DOJ renegotiate, or the Court modify, the Proposed Final Judgment to require the following:

1. Acknowledgment of wrongdoing and violation of the antitrust law by KeySpan as described in the Complaint;

2. Identification of the harm to markets and consumers including the total cost of the inflated prices in the NYISO capacity market due to KeySpan's anticompetitive conduct;

3. Identification of derivative contracts which violated the antitrust laws, and any other "determinative" documents under the Tunney Act;[24]

are completely misguided and hopelessly ill-suited to reach the kinds of manipulative conduct most likely to occur in energy markets. * * * Manipulation is a potentially serious problem in all derivatives markets, energy included. Craig Pirrong, Energy Market Manipulation: Definition, Diagnosis, and Deterrence, 31 Energy Law Journal 1–2 (2010) (Emphasis added).

[20] DOJ Competitive Impact Statement. (Emphases added).

[21] *Id.*,p. 1O.

[22] Competitive Impact Statement, p. 2.

[23] Proposed Final Judgment, para. 1 (Emphasis added,).

[24] The DOJ Competitive Impact Statement asserts that there are no "determinative" documents required to be submitted under the Tunney Act. See

4. Disgorgement by KeySpan of all profits it realized through the scheme to inflate prices;

5. Refunding by KeySpan of its profits from antitrust violations to reduce the harm to consumers, and other measures to protect consumers and deter similar schemes to exercise market power in violation of the antitrust laws.

Under the Tunney Act, there must be a "factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable." *United States* v. *SBC Commc'ns,* Inc., 489 F. Supp. 2d1, 15–16 (D.D.C. 2007). For the reasons previously stated, the Proposed Final Judgment is not supported by the record as it now stands, and the requisite "factual foundation" for compromise of the action as proposed by DOJ and KeySpan is lacking. Accordingly, the request of DOJ arid KeySpan for Tunney Act approval of the Proposed Final Judgment should not be granted by the Court.

Alternatively, the Court should require DOJ to supplement the record, if DOJ does not renegotiate the proposed settlement or provide further factual support in response to these or other comments, or conduct a public hearing to determine whether the Proposed Final Judgment is in the public interest. Obtaining additional evidence is an appropriate way to assure protection of the public interest in a Tunney Act proceeding:

In addition, the Court found there to be insufficient material in the record, which consisted largely or exclusively of unverified legal pleadings, to allow the Court to adequately discharge its duties under the Tunney Act. * * * Rather than hold an evidentiary hearing, the Court ordered the government to provide further materials that would allow the Court to make the public interest determination required by the Tunney Act. The Court allowed the government to decide exactly what types of materials were appropriate to submit. The Court also provided the other parties and amici the opportunity to respond to this supplemental filing.

United States v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007).[25] AARP believes augmentation of the record in this case should include additional evidence sufficient to address, at a minimum, the following matters:

1. The total amount of inflated profits achieved by all sellers in the NYISO capacity market due to the antitrust law violation identified in the Complaint, and an estimate of the total damage and economic harm to electricity consumers in New York City and the rest of the state;

2. The total amount of inflated profits received by KeySpan due to the antitrust violation identified in the Complaint;

3. The relationship of any proposed disgorgement to the total profits received by KeySpan from the violation identified in the Complaint;

4. The amount of revenue received by KeySpan under its financial swap agreement with Morgan Stanley;

5. The rationale for not requiring full disgorgement of profits due to the antitrust violation, if the settlement proposal is not modified and partial disgorgement is still proposed;

6. The rationale for not providing any remedy to benefit customers injured by the antitrust violation identified in the Complaint, if the settlement proposal is not modified and no financial or other remedy for consumers is proposed.

Thank you for your consideration.

Respectfully submitted,

AARP, New York State Office.

AARP

In the United States District Court for the Southern District of New York

Civil Case No. 10–CIV–1415

United States of America, Petitioner v. *KeySpan Corporation,* Respondent.

Comments of the Public Service Commission of the State Of New York, Pursuant to the Antitrust Procedures and Penalties Act, on the Proposed Final Judgment

Summary

The Public Service Commission of the State of New York ("PSC") submits these comments pursuant to the Antitrust Procedures and Penalties Act, 15 U.s.c. 16(b)–(h), in response to the notice published in the **Federal Register** on March 4, 2010, in this matter. U.S. Dep't ofJustice, Antitrust Div., *United States* v. *Keyspan Corporation,* Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946 (March 4, 2010).

DOJ is to be commended for its faithful enforcement of the antitrust law to protect the integrity of electricity markets in New York City. The electric capacity market for New York City is highly concentrated. The antitrust law is properly applied in this case to address wrongful anti-competitive practices of KeySpan Corporation ("KeySpan"). DOJ's enforcement of the antitrust law is critical to protect consumers against the harmful effects of KeySpan's anti-competitive conduct in this particular case and, more generally, to protect the public interest in the integrity of the newly-created competitive electricity markets.

DOJ proposes to settle this litigation by having KeySpan pay the United States government $12 million. DOJ asserts such a settlement will be in the public interest because KeySpan's payment of $12 million into the U.S. Treasury will prevent KeySpan's unjust enrichment, and deter others from agreeing not to compete in the future. However, because DOJ has not offered any information as to how much KeySpan profited from its unlawful conduct, the Court has no basis for evaluating whether the proposed $1 2 million settlement will prevent KeySpan's unjust enrichment or is sufficient to deter such conduct in the future. Therefore, the Court should direct DOJ to supplement the record to show how much KeySpan gained by virtue of its anti-competitive conduct. Only in this way can the Court evaluate whether the proposed settlement would be in the public interest. POINT 1, below.

As explained more fully below, it is highly probable that KeySpan's gains were well in excess of $12 million. Its net profits under the complained-of "swap" agreement amounted to nearly $68 million. The proposed $12 million settlement would not prevent KeySpan's unjust enrichment, and would not deter such conduct in the future. POINT II, below.

Finally, KeySpan's unlawful anti-competitive conduct harmed consumers to an extent far exceeding both the proposed $12 million settlement and KeySpan's nearly $68 million net profit under the swap. The costs to consumers, in the form of excessive electricity costs caused by KeySpan's unlawful agreement, may well exceed hundreds of millions of dollars over a two-year period. Proceeds from any settlement should be used to benefit ratepayers, who were greatly harmed by KeySpan's wrongful conduct. POINT Ill, below.

Background

In this civil antitrust action, brought by the United States Department of Justice ("DOJ") under Section 1 of the Sherman Act, 15 U.S.C. 1, the government seeks equitable and other relief against KeySpan for violating the antitrust law. According to DOJ, KeySpan entered into an agreement (the

United States v. *Central Contracting Co., Inc.,* 537 F. Supp. 571 (E.D. Va. 1982) ("The Court simply cannot accept an interpretation of legislation that permits the government to assert in 172 out of 188 cases that it considered neither documents nor any other materials determinative in reaching its conclusion to enter into a consent decree").

[25] If DOJ supplements the record the public should have an opportunity to comment on new material offered to justify the proposed settlement or any modification of it.

"KeySpan Swap" or the "swap") with an unnamed financial services company (the "FSC") which, in purpose and effect, ensured that KeySpan would "withhold substantial output from the New York City electricity generating capacity market. * * *" 75 FR 9947. DOJ states that "[t]he likely effect of the Keyspan Swap was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity." 75 FR 9947.

According to DOJ, the KeySpan Swap was an agreement that unlawfully restrained competition in New York City's electric capacity market. KeySpan entered into the swap agreement to protect itself against increased losses from its preferred bidding strategy, due to the entry of new competitors into the market. 75 FR 9947. Under the swap agreement, KeySpan, which already possessed substantial market power in the highly concentrated and constrained New York City capacity market, "enter[ed] into an agreement that gave it a financial interest in the capacity of Astoria—KeySpan's largest competitor." 75 FR 9947. By giving KeySpan revenues not only from its own sales, but also from the capacity sales of its largest competitor, the KeySpan Swap "effectively eliminated KeySpan's incentive to compete for sales" of capacity. 75 FR 9948. Thus, "[t]he clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions." 75 FR 9948. After entering into the swap, KeySpan was able to continue bidding its capacity into the market at the highest level allowed, knowing any losses from foregone sales would be more than offset by profits from the swap and from its remaining sales. 75 FR 9948.

As a result, electric capacity prices remained unlawfully inflated, and KeySpan was paid, under the terms of the swap agreement, as much as $67.8 million. Attached Affidavit of Thomas Paynter dated April 27,2010 ("Paynter Affidavit") ¶ 15. In addition, the elimination of competitive pressures, due to KeySpan's anti-competitive agreement, imposed unnecessary costs on consumers which may total hundreds of millions of dollars.

DOJ's proposal, however, does not include enough information to allow the Court to find, as is required under the Tunney Act, 15 U.S.C. 16e(1), that the settlement would be in the public interest. DOJ asserts the public interest will be served by preventing KeySpan's unjust enrichment, but DOJ has not offered any estimates of how much money KeySpan made by agreeing, with its biggest competitor, not to compete. For the same reason, DOJ has not offered enough information to assess its claim that the settlement will deter such unlawful conduct in the future, Finally, the proposed settlement will do nothing to address the substantial harm to competitiveness of the market that KeySpan caused. For these reasons, the Court should direct DOJ to supplement the record with information about how much KeySpan profited, and how much KeySpan harmed the integrity of the electricity markets. Finally the Court should require that proceeds of any settlement be used to ameliorate the harm KeySpan caused to electric ratepayers in the downstate New York area.

Point I: DOJ Has Not Provided Enough Information to Determine Whether the Proposed Settlement is in the Public Interest

Before entering any consent judgment proposed by the United States, the Court must first determine that entry of such a judgment "is in the public interest." 15 USCS § 16(e)(1). In doing so, "the court shall consider—

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 USCS § 16(e)(1)(A) & (B).

In seeking the Court's approval, DOJ has the burden to "provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *United States* v. *SBC Communs.,* Inc., 489 F. Supp. 2d 1, 17 (D.D.C. 2007). In this case, DOJ has not met this burden. Neither the competitive impact statement, nor the proposed consent decree provides the information needed to evaluate whether this settlement would be a reasonably adequate remedy for the harm caused by KeySpan.

Under the proposed settlement, KeySpan would be required to pay the United States government $12 million dollars. *United States* v. *Keyspan Corporation;* Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946, 9949 (March 4, 2010). According to DOJ, this amount "remedies [KeySpan's] violation by requiring KeySpan to disgorge profits obtained through the Anticompetitive agreement." 75 FR 9949. DOJ asserts that "[d]isgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar anticompetitive conduct in the future." 75 FR 9949. Thus, according to DOJ, the public interest is served because the proposed settlement will both prevent KeySpan's unjust enrichment, and will deter such wrongful conduct in the future.

Preventing any unjust enrichment on KeySpan's part is a legitimate purpose of any proposed settlement. In fashioning relief in response to a violation of the antitrust law, "[o]ne of [the] objectives * * * is to 'deny to the defendant the fruits of its statutory violation.'" *Massachusetts* v. *Microsoft Corp.,* 373 F.3d 1199, 1232 (D.C. Cir. 2004) (quoting *United States* v. *Microsoft Corp.,* 253 F.3d 34, 103 (D.C. Cir. 2001)). However, the unstated premise underlying DOJ's claims (*i.e.,* that disgorgement is necessary to prevent unjust enrichment and that a $12 million penalty is adequate), is that KeySpan realized a gain of $12 million. Yet DOJ has not offered anything to support this. The Complaint, the Competitive Impact Statement, and the proposed Consent Judgment are silent on the critical question of how much KeySpan improperly gained by violating the antitrust law.

It is, of course, axiomatic that "the fruits of a violation must be identified before they may be denied." *Massachusetts* v. *Microsoft Corp.,* 373 F.3d 1199, 1232 (D.C. Cir. 2004). The lack of any information as to how much KeySpan gained makes it virtually impossible for the Court to meaningfully evaluate whether $12 million "represents a reasonable method of eliminating the consequences of the illegal conduct." *National Soc. of Professional Engineers* v. *United States,* 435 U.S. 679, 698 (1978). This holds true both with respect to depriving KeySpan of any unjust enrichment, and with respect to evaluating whether the settlement will deter such wrongful conduct in the future. Thus, on the current record, the Court has no basis for finding the proposed settlement would be "in the public interest."

It is noteworthy that DOJ elsewhere implies KeySpan made more than $12

million as a result of its anti-competitive conduct. More specifically, DOJ indicates the $12 million settlement would effect only partial disgorgement of KeySpan's gains. 75 FR 9951 (claiming that "[r]equiring KeySpan to disgorge a portion of its ill-gotten gains * * * is the only effective way of achieving relief against KeySpan * * *.") (emphasis added). If DOJ is actually seeking only partial disgorgement, then the settlement would not prevent KeySpan's unjust enrichment. Anything less than full disgorgement would a forliori not strip KeySpan of its wrongful gains. Moreover, if $12 million represents only a fraction of the total amount of KeySpan's unjust enrichment, such a penalty would not deter future violations of the antitrust law. Such a penalty may instead amount to nothing more than a "cost of doing business." [1] This possibility is not remote. As discussed below in POINT H, it is highly probable that the total amount of KeySpan's ill-gotten gains was much greater than $12 million.

Given that DOJ has not proffered enough information to enable the Court to determine whether the proposed settlement is in the public interest, DOJ should be directed to do so. Under the Tunney Act, "[t]he court may 'take testimony of Government officials or experts' as it deems appropriate, 15 U.S.C. 16(f)(1); authorize participation by interested persons, including appearances by amici curiae, *Id.* § 16(f)(3); review comments and objections filed with the Government concerning the proposed judgment, as well as the Government's response thereto, *Id.* § 16(f)(4); and 'take such other action in the public interest as the court may deem appropriate,' iii. § 16(f)(5)." *Massachusetts* v. *Microsoft Corp.,* 373 F.3d 1199, 1206 (D.C. Cit. 2004). Requiring DOJ to adduce facts relating to how much KeySpan gained as a result of its anticompetitive conduct will provide a record basis for any public interest determination made by the Court. Cf *S.E.C.* v. *Bank of America Corp.,* ___ F. Supp.2d ___, 2010 U.S. Dist. LEXIS 15460 (S.D.N.Y. Feb. 22, 2010) (approving a proposed consent judgment because, inter alia, after the court rejected an earlier proposed settlement, the parties conducted extensive discovery which established facts supporting the new proposal).

Point II—The Proposed Consent Decree Would Not Deter the Unlawful Anticompetitive Conduct Identified By DOJ

KeySpan's swap, in both purpose and effect, violated the antitrust law. Its purpose was to "effectively eliminate[I KeySpan's incentive to compete for sales in the same way a purchase of Astoria or a direct agreement between KeySpan and Astoria would have done." 75 FR 9948. Thus, regardless of its effect on the market, the KeySpan Swap violated the Sherman Act. Cf. Summit *Health* v. *Pinhas,* 500 U.S. 322, 330 (1991) ("[B]ecause the essence of any violation of I [of the Sherman Act] is the illegal agreement itself[,] rather than the overt acts performed in furtherance of it, * * * proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful").

The KeySpan Swap also violated the Sherman Act because of its effect on the market. Its "clear tendency" was to alter KeySpan's bidding, in order to prevent competition and keep prices high. 75 FR 9948 (col. 3). Cf. *United States* v. *Stascuk,* 517 F.2d 53, 60 & n.17 (7th Cir. Ill. 1975) ("The Federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results")

KeySpan's ill-gotten gains far exceeded the $12 million payment DOJ is seeking. DOJ alleges the KeySpan Swap was effective from January 16, 2006 until March, 2008.[2] Under the swap agreement, if the market price for capacity exceeded $7.57 per kW-month, the financial services company ("FSC") would pay KeySpan the difference between the market price and $7.57, times 1800 MW. 75 FR 9950.

The average spot market price for capacity during the period from May, 2006, through March, 2008, was $9.21/kW-month. After subtracting the $7.57 per kW month amount specified under the swap agreement, KeySpan's average revenues under the swap agreement were $1.64/kW-month, times the 1800 MW covered by the swap agreement, for a period of 23 months. Multiplying these figures out yields a total of $67.8 million. Thus, under the swap agreement alone, KeySpan received revenues of almost $68 million.[3] Paynter Affidavit ¶ 15.

The proposed $12 million payment would amount to only 17.7% of KeySpan's direct revenues/net profits under the swap agreement. Thus, if the Court approves this settlement, KeySpan would be able to retain more that $55 million in ill-gotten gains, and the FSC would be able to retain more than $20 million in additional ill gotten gains. Such a settlement would clearly not materially prevent KeySpan's unjust enrichment. Moreover, under any reasonable measure, the proposed settlement would not deter KeySpan, or other market participants, from engaging in such anti-competitive conduct in the future. Thus, the proposed $12 million settlement would not satisfy either of DOJ's rationales (i.e., preventing KeySpan's unjust enrichment, and deterring such wrongful conduct in the future) for a judicial finding that the settlement is in the public interest.

Point III—The Proposed Settlement Would Not Ameliorate the Ratepayer Harm Caused by Keyspan

The Court Should Consider Ratepayer Harm

In determining whether the settlement is in "the public interest," the Court should also consider the impact of the proposed settlement on the ratepayers that were harmed by KeySpan's anti-competitive conduct. *See* 15 U.S.C. 16(e)(1)(B) ("the court shall consider * * * the impact of entry of such judgment upon * * * the public generally * * *") [4] DOJ acknowledges

[1] Arguably, even total disgorgement would have only a limited deterrent effect. "[T]o 'limit the penalty * * * to disgorgement is to tell a violator that he may [break the law] with virtual impunity; if he gets away undetected, he can keep the proceeds, but if caught, he simply has to be give back the profits of his wrong.'" *SEC* v. *Bear, Stearns & Co.,* 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009) (quoting *S.E.C.* v. *Rabinovich & Assoc.,* 2008 U.S. Dist. LEXIS 93595, 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008)).

[2] DOJ asserts the swap agreement was effective from May, 2006, through April, 2009. 75 FR 9950–51. According to DOJ, the "effects" of the swap continued only "until" March, 2008, because the New York State Public Service Commission required KeySpan to bid its New York City capacity at zero from March 2008 until KeySpan sold its Ravenswood plant. 75 FR 9951 & n. 2. However, the analysis below assumes the swap remained "effective" between the parties during March, 2008, because the PSC's requirement that KeySpan bid at zero would not have triggered the agreement's "regulatory out" clause. This has bearing on the total amount of KeySpan's gain under the swap agreement. Including March, 2008, reduces KeySpan's total revenues under the swap because, during March, 2008, the market price of capacity was below the $7.57 per kW-month trigger in the swap agreement. Thus, for March, 2008, KeySpan would have paid moneys to the FSC.

[3] In addition, the FSC received $0.50/kW-month under the swap agreement. Multiplying this amount by the 1800 MW covered by the swap agreement, times the 23 month duration of the swap agreement, yields total revenues to the FSC of approximately $20.7 million. Paynter Affidavit ¶ 17. The FSC's profits are potentially relevant because Astoria could have directly entered into a swap agreement with a load-serving entity serving New York City. If such agreement had a "trigger" price of $7.07, the load-serving entity would have realized revenues of $89 million (i.e., $67 million, plus $21 million), which would have inured to the benefit of consumers. Paynter Affidavit ¶ 18.

[4] Cf. *United States* v. *SBC Communs.,* Inc., 489 F. Supp. 2d 1, 17 (D.D.C. 2007) ("the court should be concerned with any allegations that the proposed settlement will injure a third party").

ratepayers were harmed, in the form of inflated capacity prices, because of KeySpan's conduct. According to DOJ, "[w]ithout the Swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity. Had it done so, the price of capacity would have declined." 75 FR 9948. Because KeySpan decided to withhold capacity rather than compete, it realized ill-gotten gains on all of the capacity it sold, in addition to the nearly $68 million KeySpan received directly under the terms of the swap agreement itself.

Yet DOJ also indicates that ratepayers may have no recourse under the antitrust law because of the "fried rate" doctrine. 75 FR 9951. Moreover, ratepayers may not be able to obtain any relief from FERC because, in early 2008, FERC's Staff concluded there was no evidence that KeySpan's bidding behavior violated FERC's Anti-Manipulation Rule, 18 CFR 1c2(a). FERC Docket Nos. IN08–2–000 & ELO7–39–000, Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, p. 17 (February 28, 2008). Thus, in this case ratepayers harmed by KeySpan's anti-competitive conduct may have no meaningful recourse under either the antitrust law or the Federal Power Act.

This lack of a remedy for customers is highly significant, given the potential size of the harm to consumers caused by KeySpan's violation of the antitrust law. DOJ has not offered any factual information or analysis of how much KeySpan gained by maintaining prices at an artificially high level in violation of the antitrust laws, rather than choosing to bid at more competitive level. The measure of disgorgement should reflect the profits gained by KeySpan through the unlawfully higher price of capacity.[5] The Court should direct DOJ to address this defect in the settlement proposal. Cf. *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 424 F.3d 363, 374 (3d Cir. 2005) ("[I]the standard method of measuring damages in price enhancement cases is overcharge, [that is] the difference between the actual price and the presumed competitive price multiplied by the quantity purchased"); New York Julius Nasso Concrete Corp., 202 F.3d 82, 88–89 (2d Cir. 2000) ("Where * * * there is a dearth of market information unaffected by the collusive action of the defendants, the plaintiffs burden of proving damages, is, to an extent, lightened[,] [and] the State need only provide the court with some relevant data from which the district court can make a reasonable estimated calculation of the harm suffered * * *.") (citations and internal quotations omitted); *Id.,* 202 F.3d at 89 ("[T]o do otherwise would be a perversion of fundamental principles of justice [and would] deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts"); New York Hendrickson Bros., Inc., 840 F.2d 1065, 1078 (2d Cir. 1988) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created") (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946)); *Fishman* v. *Estate of Wirt,* 807 F.2d 520, 551 (7th Cir. 111. 1986) ("The concept of a 'yardstick' measure of damages, that is, linking the plaintiffs experience in a hypothetical free market to the experience of a comparable firm in an actual free market, is also well accepted").

If KeySpan's illegal conduct harmed consumers by preventing price declines that could have totaled hundreds of millions of dollars, then the proposed $12 million settlement is so low it would not be fair, reasonable, adequate or in the public interest. Cf. *SEC.* v. *Bank of America Corp.,* 653 F. Supp.2d 507 (S.D.N.Y. 2009) disapproving a proposed settlement in part because the proposed $33 million fine was "a trivial penalty for a false statement that materially infected a multi-billion-dollar merger"). But cf. *SEC.* v. *Bank of America Corp.,* ___ F. Supp.2d ___, 2010 U.S. Dist. LEXIS 15460 (S.D.N.Y. Feb. 22, 2010) (approving a $150 million fine even though it would have only "a very modest impact on corporate practices or victim compensation").

Settlement Proceeds Should Be Used To Ameliorate The Ratepayer Harm

DOJ seeks disgorgement, through the exercise of the Court's "inherent equitable powers * * *." 75 FR 9951. DOJ maintains the public interest requires disgorgement to prevent KeySpan's unjust enrichment. 75 FR 9951. The legal doctrine of unjust enrichment "is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another." *Nimbus Techs., Inc.* v. *SunnData Prods.,* 2005 U.S. Dist. LEXIS 46509 (ND. Ala. Dec. 7,2005) (quoting *Battles* v. *Atchison,* 545 So. 2d 814, 815 (Ala. 1989)).

In this case, DOJ's proposed $12 million partial disgorgement of KeySpan's ill gotten gains would be deposited in the United States Treasury, and will not inure to the benefit of the ratepayers directly harmed by KeySpan. KeySpan's wrongful conduct harmed consumers, and damaged the credibility of the markets, by wrongly inflating capacity prices. The cost may have totaled hundreds of millions of dollars. Given the high level of consumer harm, the proceeds of any settlement should be used to ameliorate the consumer harm KeySpan caused. Depositing the settlement proceeds in the U.S. Treasury, as DOJ proposes, would be a manifestly unfair result.

Accordingly, in the proper exercise of its equitable powers, the Court should direct that proceeds of the settlement be used to benefit the ratepayers that were directly and materially injured by KeySpan's anti-competitive conduct. The need for such relief is particularly acute in this case because consumers may not be able to obtain relief under Section 4 of the Sherman Act, and may not be able to obtain relief from FERC. Accordingly, settlement proceeds should be credited to affected ratepayers (*i.e.,* ratepayers within the New York Independent System Operators' "Zone J"). This approach will directly address the harm KeySpan caused to consumers in New York City. If this approach is unworkable, either because it would not be cost-effective or would be unduly complex, then settlement proceeds should be used for energy efficiency programs within New York City administered by the New York State Energy Research and Development Authority. Promoting energy efficiency would reduce the demand for electricity. This, in turn, would both mitigate the market power of electric suppliers in New York City and help reduce electricity prices going forward. Such a use of settlement proceeds is particularly appropriate in this case, given the ratepayer harm KeySpan caused and the potential unavailability of other meaningful relief for those most directly affected by KySpan's anti-competitive conduct.

[5] That is, the analysis in the Paynter Affidavit shows a total harm to ratepayers of $89 million from KeySpan's, and the FSC's, financial interest in the 1800 MW controlled by the swap, even without assuming any drop in spot market prices. However, KeySpan also controlled an additional 2400 MW of capacity in the New York City market. By continuing to bid at its cap (even after accounting for KeySpan's additional lost sales due to the entry of new generation into the market), KeySpan realized gains outside the swap that, roughly speaking, equaled or exceeded the nearly $68 million KeySpan received under the swap. The need for disgorgement of these additional wrongful gains is underscored by the even larger consumer harm KeySpan caused. If KeySpan had competed for sales, the resulting declines in prices could easily have saved ratepayers hundreds of millions of dollars.

Respectfully submitted,

Peter McGowan,
General Counsel.

By: Sean Mullany, Assistant Counsel of Counsel, Public Service Commission of the State of New York.

Dated: April 30, 2010, Albany, New York.

Attachment: Affidavit of Thomas Paynter In Support of Comments of The Public Service Commission of The State of New York, (April 27, 2010).

United States District Court for the Southern District of New York

United States of America, Petitioner V. *Keyspan Corporation,* Respondent.

State of New York
ss.: County of Albany

Affidavit of Thomas Paynter in Support of Comments of the Public Service Commission of the State of New York
Civil Case No. 10–CIV–1415

THOMAS PAYNTER, being duly sworn, deposes and says:

1. I am employed by the New York State Department of Public Service ("DPS" or "Department") as Supervisor of Regulatory Economics in the Office of Regulatory Economics.

2. I received a Ph.D. in Economics from the University of California at Berkeley (1985), with fields in econometrics and labor economics. I have a B.A. in Physical Science and a BA. in Economics, also from the University of California at Berkeley (1975). I am a member of the American Economic Association.

3. From 1983 to 1986, I was an Assistant Professor of Economics at Northern Illinois University, where I taught graduate and undergraduate courses in economic theory. From 1986 to 1990, I was employed by the Illinois Commerce Commission as a Senior Economic Analyst in the Policy Analysis and Research Division; I was also a member of the Electricity Subcommittee of the National Association of Regulatory Utility Commissioners, and authored an article concerning coordination and efficient pricing for independent power producers, "Coordinating the Competitors," published by The Electricity Journal in November 1990. I joined the New York Department of Public Service in November of 1990.

4. My current responsibilities include analyzing competitive issues, efficient pricing, marginal costs, regulatory policies, and system planning. I am a member of a staff team responsible for analyzing and commenting upon the pricing rules of the New York Independent System Operator, Inc. (NYISO), which operates the New York transmission system. I have participated in numerous NYTSO committee meetings related to energy and transmission pricing, system planning, and other issues.

5. I make this affidavit in support of the comments filed by the Public Service Commission of the State of New York ("PSC" or "Commission") pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), in response to the notice published in the **Federal Register** on March 4, 2010, in connection with this matter. *U.S. Dep't of Justice, Antitrust Div., United States* v. *Keyspan Corporation,*

Proposed Final Judgment and Competitive Impact Statement, 75 FR 9946 (March 4, 2010).

6. DOJ states that the KeySpan Swap was executed on January 16, 2006, and was effective from May, 2006, through April, 2009. 75 FR 9950–51. According to DOJ, the effects of the swap continued only until March, 2008, because, as of March, 2008, the NYSPSC required KeySpan to bid its NYC capacity into the market at zero until KeySpan sold its Ravenswood plant. 75 FR 9951 & n. 2.

7. However, upon information and belief, the PSC's requirement that KeySpan bid its NYC capacity into the market at zero did not trigger the swap agreement's "regulatory out" clause. Therefore, upon information and belief, the swap continued in effect until April, 2008, when FERC lowered KeySpan's bid/price cap. Accordingly, the analysis below assumes the swap agreement remained in force during the Month of March, 2008. [Note that this assumption effectively reduces the estimate of the amount of KeySpan's net revenues/profits under the swap agreement because, during the month of March, 2008, the actual price of capacity was below the $7.57 per kWmonth trigger under the swap agreement (discussed below). As a result, during the month of March, 2008, KeySpan would have been paying moneys to the financial services company ("FSC"), rather than receiving moneys from the FSC.

8. Under the KeySpan Swap, if the market price for capacity was above $7.57 per kW-month, the FSC would pay KeySpan the difference between the market price and $7.57, limes 1800 MW; if the market price for capacity was below $7.07, KeySpan would pay the FSC the difference, limes 1800 MW. 75 FR 9950 (col. 3). Thus, a comparison of the actual market price for capacity during the period from May, 2006, through and including March, 2008, and the $7.57/kW month "trigger" (or "strike") price for KeySpan, will reveal the total net revenues/profits KeySpan received from the FSC under the KeySpan Swap.[1]

9. Regarding the actual market prices of capacity during the period of the KeySpan Swap, KeySpan's bid caps were seasonally "shaped," in order to reflect higher summer prices, and lower winter prices, due to differences between summer and winter supply. For the summer 2006 period (*i.e.,* May–October 2006), the unforced capacity ("UCAP") spot price cleared at the level of KeySpan's bid cap of $12.71/kW-month.[2]

"[A] generator's unforced capacity (UCAP) is its installed capacity ([UCAP) discounted or 'de rated' by its forced outage rate (or equivalent forced outage rate demand (EFORd)). The forced outage rate equals the historical percentage of the generator's maximum output lost to forced outages when such output is demanded. The translation of installed into unforced capacity can be represented mathematically as follows: $UCAP = ICAP \times (1 - EFORd)$ * * *" Kystian-Ravenswood, LLC FERC, 474 F.3d 804, 807 (D.C. Cir. 2007).

10. For the winter 2006–07 period (*i.e.,* November 2006–April 2007), the UCAP spot price cleared at KeySpan's bid cap of $5.84/kW-month.

11. For the summer 2007 period (*i.e.,* May–October 2007), the UCAP spot price cleared at KeySpan's bid cap of $12.72/kW-month.

12. For the winter 2007–08 period, the spot price cleared at KeySpan's bid cap of $5.77/kW-month for 4 months (*i.e.,* November 2007–February 2008), and then cleared at the lower statewide prices of $1.05/kW-month during March, 2008, and at $0.75/kW-month during April, 2008.

13. The lower price during April, 2008 reflects the fact that FERC's new mitigation measures forced KeySpan and other New York City electricity suppliers to bid their capacity into the market at or near $0.

14. To compare the actual UCAP spot market prices to the swap prices of $7.57/kW-month (for KeySpan), and $7.07/kW-month (for the FSC), one can

[1] KeySpan and the FSC likely incurred some costs in preparing the swap agreements (which would make their profits under the swap something less than their net revenues), but this analysis assumes those Costs were not very significant.

[2] In describing the $7.57/kW-month and $7.07/kW-month "trigger" prices under the KeySpan and Astoria swap agreements, DOJ refers only to "the market price for capacity". *See, e.g.,* 75 FR 9950. More specifically, the "trigger" prices under the swap agreements referred to the actual "unforced capacity" spot market prices. Similarly, in describing actual market prices, my analysis refers to the actual unforced capacity ("UCAP") spot market clearing prices.

refer to the average spot price over the twenty-three month period of the KeySpan Swap (*i.e.,* May, 2006, through and including March, 2008). This consists of twenty-two months at KeySpan's bid cap, and one month (*i.e.,* March, 2008) at the lower statewide price of $1.05/kW-month.

15. Over those twenty-three months, the actual average UCAP spot price was $9.21/kW-month. Based on the difference between this amount and the threshold price specified under the swap agreement (*i.e.,* $7.57/kW-month), the revenues to KeySpan under the swap agreement were $1.64/kW-month, multiplied by the 1800 MW of UCAP covered by the swap agreement, and further multiplied by the twenty-three month effective period of the swap agreement. This yields a total of revenues to KeySpan under the swap agreements of $67.8 million.

16. The FSC's corresponding agreement with Astoria specified that, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the FSC the difference, times 1800 MW; if the market price was below $7.07, the FSC would pay Astoria the difference, times 1800 MW. 75 jkaLBgjster at 9948.

17. The differential between the "trigger" prices under the two swap agreements (*i.e.,* $7.57/kW-month for KeySpan, and $7.07/kW-month for Astoria) represented the FSC's "stake" in the swap arrangement. Because the actual average UCAP spot market price (*i.e.,* $9.21/kW-month) exceeded both the "triggers" under the swap agreements, the FSC's total revenues can be calculated by multiplying that differential (*i.e.,* $0.50/kW-month) by 1800 MW, and further multiplying it by the twenty-three month effective period of the swap agreements. Multiplying these figures out yields total revenues to the FSC of $20.7 million.

18. The FSC's profits are potentially relevant because Astoria could have directly entered into a swap agreement with a load-serving entity serving New York City. If such agreement had a "trigger" price of $7.07, the load-serving entity would have realized revenues of $89M (*i.e.,* $67 million, plus $21 million). Such revenues would have inured to the benefit of ratepayers.

Thomas Paynter,
Supervisor of Regulatory Economics,
Office of Regulatory Economics,
Department of Public Service of the
State of New York.

Sworn to before me this 27th day of April, 2010.

Notary Public

Sean Mullany
Notary Public, State of New York
Regis. #02MU6180725
Qualified in Albany County
My Commission Expires January 14, 2012.

[FR Doc. 2010–16321 Filed 7–19–10; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Office of the Secretary of Labor

Notice of Final Determination Updating the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126

AGENCY: Bureau of International Labor Affairs, Labor.

ACTION: Notice of final determination.

SUMMARY: This final determination updates the list required by Executive Order No. 13126 ("Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor"), in accordance with the "Procedural Guidelines for the Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor." This notice sets forth an updated list of products, by country of origin, which the Departments of Labor, State and Homeland Security, have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor. Under a final rule by the Federal Acquisition Regulatory Council, published January 18, 2001, which also implements Executive Order No. 13126, Federal contractors who supply products on this list are required to certify, among other things, that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the item.

DATES: This document is effective immediately upon publication of this notice.

SUPPLEMENTARY INFORMATION:

I. Background

Executive Order No. 13126 (EO 13126), which was published in the **Federal Register** on June 16, 1999 (64 FR 32383), declared that it was "the policy of the United States Government * * * that the executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of good, wares, articles, and merchandise mined, produced or manufactured wholly or in part by forced or indentured child labor." Pursuant to EO13126, and following public notice and comment, the Department of Labor published in the January 18, 2001, **Federal Register**, a final list of products (the "EO List"), identified by their country of origin, that the Department, in consultation and cooperation with the Departments of State and Treasury [relevant responsibilities now within the Department of Homeland Security], had a reasonable basis to believe might have been mined, produced or manufactured with forced or indentured child labor (66 FR 5353). In addition to the List, the Department also published on January 18, 2001, "Procedural Guidelines for Maintenance of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor" (Procedural Guidelines), which provide for maintaining, reviewing, and, as appropriate, revising the EO List (66 FR 5351). On September 11, 2009, in consultation and cooperation with the Department of State and the Department of Homeland Security, the Department of Labor published an initial determination proposing to update the EO List in the **Federal Register** (74 FR 46794), explained how the initial determination was made, and invited public comment through December 10, 2009. The initial determination and Procedural Guidelines can be accessed on the Internet at *http://www.dol.gov/ILAB/regs/eo13126/main.htm* or can be obtained from: OCFT, Bureau of International Labor Affairs, Room S–5317, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–4843; fax (202) 693–4830.

Pursuant to section 3 of E. O. 13126, the Federal Acquisition Regulatory Councils published a final rule in the **Federal Register** on January 18, 2001, providing, amongst other requirements, that Federal contractors who supply products that appear on the EO List issued by the Department of Labor must certify to the contracting officer that the contractor, or, in the case of an incorporated contractor, a responsible official of the contractor, has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of child labor. *See* 48 CFR Subpart 22.15.

II. Summary and Discussion of Significant Comments

Forty three public comments were received either through written submissions or through meetings held with the Department of Labor. All comments are available for public viewing at *http://www.regulations.gov*

(reference Docket ID No. DOL–2009–0002). In developing the final list of products, the public comments have been carefully reviewed and considered. The following is a summary of the significant or common comments and the responses.

A. Comments Asserting That Forced Child Labor Is Not Used in the Production of Products Named on the List

Multiple comments were received asserting that child labor and forced or indentured child labor did not exist or were not pervasive in the production of a variety of products. However, these assertions were not substantiated through the provision of data or information to demonstrate that the assertions were true. When analyzing comments, the information provided was reviewed to determine if it negated the original conclusion published in the initial determination or if it demonstrated that forced or indentured child labor has been significantly reduced or eliminated. In all cases, except carpets from India (see below), such information was not provided.

B. Comments on Efforts To Combat Forced or Indentured Child Labor

Multiple comments from governments and industry groups were submitted that provided detailed descriptions of legislation, policies and efforts to combat child labor and forced or indentured child labor generally, and in some cases, in particular sectors. This information was considered carefully and, while the important role of setting a solid legislative and policy framework and implementing initiatives by governments, industry and third party groups is clear, information on such efforts alone, without evidence that indicates that the efforts had significantly reduced or eliminated forced or indentured child labor, was not sufficient to remove an item from the EO List. Inclusion on the EO List indicates that the three Departments have a reasonable basis to believe forced or indentured child labor "might have" been used in the production of the named products and evidence of efforts alone would not be enough to require removal of a product from the EO List. The Department of Labor will continue to assess the progress of these efforts and welcomes further information from the public on the results of these efforts, in particular, evidence of actions and initiatives that have significantly reduced if not eliminated forced or indentured child labor in the production of a specific product named on the list.

C. Comments on Monitoring and Auditing Systems

Multiple comments were received describing efforts by government, industry and third parties to monitor and audit the establishments that produce many of the products named on the preliminary list. While such information is important and valuable in determining compliance with a variety of labor and other standards, in most cases, the information received did not provide sufficient description, data or evidence to demonstrate that forced child labor is not being used in the production process. Examples of specific limitations of the information received included, submission of general and broad statements describing monitoring and auditing programs without including details; submissions only related to products that are inspected for export rather than industry as a whole; examples of individual monitoring and auditing forms without presentation of and analysis of overall data collected; presentation of information only at the primary factory level and not down the supply chain; and lack of evidence of explicit monitoring for forced or indentured child labor. It is important to clarify that the EO List does not make distinctions between products that are exported or those that are produced for domestic consumption, nor does it distinguish between products produced in a main/final establishment versus products produced by suppliers and contractors further down the supply chain.

One submission did provide information that addressed many of the limitations described above. This submission described the nation-wide, third party monitoring of registered carpet looms in India, gave details of the monitoring program of registered looms and provided detailed analysis of data results related to child labor. Such detailed information on the monitoring of registered looms provided an analysis suggesting that child labor, including forced child labor, has been significantly reduced in the production of carpets in India. While the submission only addressed registered looms, it provided enough information to warrant further consideration of the matter especially given that a Department of Labor contractor is undertaking extensive research on child and forced labor in carpet production in South Asia, including India. The Department expects to receive information on the use of forced child labor on both registered and unregistered looms through this research and intends to wait until that time before a final decision is made on adding carpets from India to the EO List.

D. Comments on Procedures Related to Publication of the List

A variety of comments were received related to the methodology and process used to place products on the EO List, in particular on the date and reliability of sources, on the "reasonable basis to believe" criteria, and on the lack of perceived consultation prior to publication of the initial determination proposing to update EO List. Concerning the date and reliability of the sources, the Department of Labor considered information up to seven years old at the time of receipt. More current information has been generally given priority, and information older than seven years generally has not been considered, with the exception of child labor survey data, which the Department of Labor has found to be reliable over a longer period of time. The Department of Labor's experience is that the use of forced or indentured child labor in a country or in the production of a particular product typically persists for many years, particularly when no meaningful action is taken to combat it. Information about such exploitive activities is often actively concealed and therefore information that is several years old can still provide useful context for more current information. When determining whether a source should be included, the following factors were considered either from primary or secondary sources: the methodology, prior publications, degree of familiarity and experience with international labor standards, and/or reputation for accuracy and objectivity.

Some submissions raised concern that the "reasonable basis to believe" standard is relatively low. This standard was established in EO13126 and the Department believes that the standard is appropriate given the nature of the EO List and the challenge in finding data. The EO List does not reflect a determination that forced or indentured child labor actually was used to produce a particular product. Rather, it establishes the need for further inquiry by a Federal contractor who wishes to supply the product, in order to make sure that forced or indentured child labor was not, in fact, used. The factors consider in determining whether a "reasonable basis to believe" exists for the inclusion of a product on the EO List are set forth in the Department of Labor's January 18, 2001, Procedural Guidelines (66 FR 5351), as well as the Department's September 11, 2009,

Notice of Initial Determination (74 FR 46794).

Several submissions from both governments and industry groups described their frustration at not being consulted prior to publication of the initial determination on September 11, 2009. EO13126 does not require the Department to engage in such consultations, although the Department did undertake a series of activities to gather information from the public on child labor and forced labor more broadly prior to publication of the initial determination, including a public request for information published in the **Federal Register** and a public hearing on May 28, 2008. Additionally, the primary purpose of the initial determination proposing to update the EO List and the accompanying 90-day public comment period was to gather additional information from the public and a wide variety of stakeholders prior to publication of the final determination.

E. Comments Related to Impact of the List on Industries and Exports

Some comments raised concerns that being named on the EO List would negatively affect their trade and export income. It is important to note that while the scope of the EO List is global, the application of EO13126's requirements is narrow. The EO only affects products being procured by the U.S. Government. It is designed to make sure that U.S. Federal agencies do not buy products made with forced or indentured child labor. The EO reinforces the current law (the Tariff Act of 1930, 19 U.S.C. 1307, enforced by the Department of Homeland Security) prohibition on the import of products made with forced or indentured child labor. There is nothing in the EO that provides for trade sanctions or penalties against countries. Rather, EO13126 requires U.S. Federal contractors who furnish a product on the EO List to certify that forced or indentured child labor was not used to make the product.

F. Comments on Discrepancies Between the 2001 List and the Current List

Several comments noted that products are included in the proposed update to the EO List that were not included in the existing EO List, most specifically carpets from India, Nepal and Pakistan. The research for the current proposed update to the EO List covers information published from 2001 onward, which includes information not available at the time of the publication of the 2001 EO List. Therefore, the product lists will not necessarily be the same as the period of review and available data sources are different.

G. Comments Related to the Trafficking Victims Protection Reauthorization Act List of Goods Made With Child Labor or Forced Labor

Multiple submissions included information that addressed goods named on the List of Goods Made with Child Labor or Forced Labor pursuant to the 2005 Trafficking Victims Protection Reauthorization Act (TVPRA List), which was published on the same date as the proposed update to the EO List. The Department would like to clarify that these two lists are produced under separate mandates and the public comment period identified for submissions relevant to the EO List initial determination did not apply to the TVPRA List. EO13126 is intended to ensure that Federal agencies enforce laws relating to forced or indentured child labor in the procurement process. Thus, the EO List differs from the TVPRA List, which is intended to promote efforts to monitor and combat forced labor and child labor in the production of goods in foreign countries. The EO on Federal procurement applies only to the goods on the EO List, not to those on the TVPRA List. In addition, the EO List covers forced or indentured child labor, while the TVPRA List focuses on a broader population, including adults in forced labor and children in exploitive labor that is not necessarily forced or indentured.

While the process for updating the EO List does not apply to the TVPRA List, the ongoing maintenance of the TVPRA list is governed by procedural guidelines that are available at *http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=20376.* The Department of Labor considered all information received during the EO List public comment period addressing goods named on the TVPRA List as an official TVPRA list submission and provided that information to the appropriate Department staff for their review. Additional information on the TVPRA List can be found at *http://www.dol.gov/ILAB/programs/ocft/tvpra.htm.*

H. Comments Related to Procurement of Products Named on the List

Two comments were received urging additional measures related to enforcement of EO 13126 and clarifications related to the EO List. The Department of Labor's only mandate pursuant to the EO is to produce the EO List in collaboration with the Departments of State and Homeland Security. The enforcement of the procurement regulation (48 CFR subpart 22.15) issued by the General Services Administration pursuant to the EO falls to the various procurement offices in each of the Executive Branch agencies. It is up to each agency to determine what guidance, if any, is provided to contractors on the EO regulation, as well as to determine how they monitor compliance with the EO regulation. Any changes to the content of regulation fall under the authority of the General Services Administration.

Specific areas where clarifications were requested related to the type and state of the products listed. It was stated that product descriptions were often too broad and it was suggested that products be named using the harmonized tariff schedule. We believe that the descriptions are sufficiently specific based on the nature of the list and the types of information that are available. The EO does not require the use of the harmonized tariff schedule in the products list. At this time, the Departments do not have reason to believe that the use of such terminology in the EO List would result in more efficient implementation of EO 13126. Additionally, it was requested that the Department of Labor clarify that 48 CFR subpart 22.15 only applies to the end product named on the EO List. It is not the Department's role to interpret the applicability of the regulation on behalf of the General Services Administration. However, the Department of Labor can clarify that the placement of a good on the EO List depends on the stage of production at which forced or indentured child labor was involved. For example, if forced child labor was used in the extraction, harvesting, assembly, or production of raw materials or component articles, and these materials or articles are subsequently used under non-violative conditions in the manufacture or processing of a final good, only the raw materials or component articles are on the EO List and only for those countries where they were extracted, harvested, assembled, or produced. If forced or indentured child labor was used in both the production or extraction of raw materials or component articles and the manufacture or processing of a final good, then both the raw materials or component articles and the final good are included on the EO List.

III. Final List of Products

We have determined that it would be appropriate to publish a final list of products that comprises the products included in the initial determination, with the exception of carpets from

India. Other than with regard to the one exception described above, no new information was provided through public comments to negate the original conclusion or to indicate that forced or indentured child labor has been significantly reduced or eliminated in the production of the listed products. The basis for including those products on the list is set forth in the Department of Labor's September 11, 2009, notice in the **Federal Register** (74 FR 46794). As noted in the September 11 notice, information provided in a public submission by Free the Slaves, alleging forced or indentured child labor in the cocoa industry in Cote d'Ivoire, and a public submission by State Department Watch, alleging forced or indentured child labor in the production of eight products in China, both filed pursuant to section D of the Procedural Guidelines (66 FR 5351), was considered in finalizing the update to the EO List. This final determination completes consideration of the two submissions. The final list of products appears below.

Based on recent, credible, and appropriately corroborated information from various sources, the Department of Labor, the Department of State, and the Department of Homeland Security have concluded that there is a reasonable basis to believe that the following products, identified by their country of origin, might have been mined, produced, or manufactured by forced or indentured child labor:

Product	Countries
Bamboo	Burma.
Beans (green, soy, yellow).	Burma.
Brazil Nuts/Chestnuts	Bolivia.
Bricks	Burma, China, India, Nepal, Pakistan.
Carpets	Nepal, Pakistan.
Charcoal	Brazil.
Coal	Pakistan.
Coca (stimulant plant)	Colombia.
Cocoa	Cote d'Ivoire, Nigeria.
Coffee	Cote d'Ivoire.
Cotton	Benin, Burkina Faso, China, Tajikistan, Uzbekistan.
Cottonseed (hybrid)	India.
Diamonds	Sierra Leone.
Electronics	China.
Embroidered Textiles (zari).	India, Nepal.
Garments	Argentina, India, Thailand.
Gold	Burkina Faso.
Granite	Nigeria.
Gravel (crushed stones).	Nigeria.
Pornography	Russia.
Rice	Burma, India, Mali.
Rubber	Burma.
Shrimp	Thailand.
Stones	India, Nepal.
Sugarcane	Bolivia, Burma.
Teak	Burma.
Tilapia (fish)	Ghana.
Tobacco	Malawi.
Toys	China.

The bibliographies providing the basis for including each product on the list are available on the Internet at *http://www.dol.gov/ILAB/regs/eo13126/main.htm.*

Signed at Washington, DC, this 7th day of July 2010.

Sandra Polaski,

Deputy Undersecretary, Bureau of International Labor Affairs.

[FR Doc. 2010–16886 Filed 7–19–10; 8:45 am]

BILLING CODE 4510–28–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors

Amended Notice Changes to the Meeting Time

NOTICE: The Legal Services Corporation (LSC) is announcing an amendment to the notice of the meeting of the Board of Directors. The meeting, originally noticed to be convened at 11 a.m., on July 21, 2010, announced in the **Federal Register** dated July 16, 2010, Volume 75, Number 136. The amendment is being made to reflect a change to the meeting *time.* There are no other changes.

AMENDED TIME: The Board of Directors will meet *telephonically* on July 21, 2010 commencing at 10:30 a.m., Eastern Daylight Time.

LOCATION: Legal Services Corporation, 3333 K Street, NW., Washington, DC, 20007, 3rd Floor Conference Center.

PUBLIC OBSERVATION: For all meetings and portions thereof open to public observation, members of the public that wish to listen to the proceedings may do so by following the telephone call-in directions given below. You are asked to keep your telephone muted to eliminate background noises. From time to time the Chairman may solicit comments from the public.

Call-In Directions for Open Session(s):

- Call toll-free number: 1 (866) 451–4981;
- When prompted, enter the following numeric pass code: 5907707348;
- When connected to the call, please "*MUTE*" your telephone immediately.

STATUS OF MEETING: Closed. A portion of the meeting of the Board of Directors may be closed to the public pursuant to a vote of the Board so the Board can consider and perhaps act on the recommendation of the Search Committee for LSC President ("Search Committee") regarding selection of an executive search recruiter.

This closure will be authorized by the relevant provisions of the Government in the Sunshine Act [5 U.S.C. 552b(c)(4) and (6)] and LSC's implementing regulation 45 CFR 1622.5(c) [1] and (e).[2]

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)(4) and (6)] and LSC's implementing regulation 45 CFR 1622.5(c) and (e), 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

Open Session

1. Approval of the agenda.
2. Consider and act on *Resolution 2010–009* which authorizes the Board Chairman to establish a Fiscal Oversight Taskforce.
3. Public comment.

Closed Session

4. Consider and act on recommendation of the Search Committee for LSC President regarding selection of an executive search recruiter.

Open Session

5. Consider and act on other business.
6. Consider and act on motion to adjourn meeting.

CONTACT PERSON FOR INFORMATION: Kathleen Connors, Executive Assistant to the President, 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

[1] 45 CFR 1622.5(c)—Protects information the disclosure of which would disclose trade secrets and commercial or financial information which is confidential.

[2] 45 CFR 1622.5(e)–45 CFR 5(e)—Protects information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

may notify Kathleen Connors at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov.*

Dated: July 16, 2010.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 2010–17789 Filed 7–16–10; 4:15 pm]

BILLING CODE 7050–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0118]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on March 24, 2010.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants."

3. *Current OMB approval number:* 3150–0151.

4. *The form number if applicable:* Not applicable.

5. *How often the collection is required:* Whenever applications are made for Early Site Permits (ESPs), Standard Design Certifications (SDCs), Combined Licenses (COLs), Standard Design Approvals (SDAs), or Manufacturing Licenses (MLs); and every 10 to 20 years for applications for renewal.

6. *Who will be required or asked to report:* Designers of commercial nuclear power plants (NPPs), electric power companies, and any person eligible under the Atomic Energy Act to apply for ESPs, SDCs, COLs, or MLs.

7. *An estimate of the number of annual responses:* 11.332.

8. *The estimated number of annual respondents:* 4.666.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 204,075 (191,774 reporting, 12,301 recordkeeping).

10. *Abstract:* 10 CFR Part 52 establishes requirements for the granting of ESPs, certifications of standard NPP designs, and licenses which combine in a single license a construction permit, and an operating license with conditions, OLs, MLs, SDAs, and pre-application reviews of site suitability issues. Part 52 also establishes requirements for renewal of those approvals, permits, certifications, and licenses; amendments to them; exemptions from certifications; and variances from ESPs.

NRC uses the information collected to assess the adequacy and suitability of an applicant's site, plant design, construction, training and experience, plans and procedures for the protection of public health and safety. The NRC review of such information and the findings derived from that information form the basis of NRC decisions and actions concerning the issuance, modification or revocation of site permits, DCs, COLs, and MLs for NPPs.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by August 19, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0151), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 13th day of July 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–17662 Filed 7–19–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–443; NRC–2010–0206]

Nextera Energy Seabrook; Notice of Intent To Prepare an Environmental Impact Statement and Conduct the Scoping Process for Seabrook Station, Unit 1

NextEra Energy Seabrook, LLC has submitted an application for renewal of Facility Operating License No. NPF–86 for an additional 20 years of operation at Seabrook Station, Unit 1 (Seabrook Station). Seabrook Station is located 13 miles south of Portsmouth, NH.

The current operating license for Seabrook Station expires on March 15, 2030. The application for renewal, dated May 25, 2010, was submitted pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 54, which included an environmental report (ER). A separate notice of receipt and availability of the application was published in the **Federal Register** on June 16, 2010 (75 FR 34180). A notice of acceptance for docketing of the application and opportunity for hearing regarding renewal of the facility operating license is also being published in the **Federal Register.** The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) related to the review of the license renewal application and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29.

As outlined in 36 CFR 800.8, "Coordination with the National Environmental Policy Act," the NRC plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) in meeting the requirements of the National Environmental Policy Act of 1969 (NEPA). Pursuant to 36 CFR 800.8(c), the NRC intends to use the NEPA process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, NextEra Energy Seabrook submitted the ER as part of the application. The ER was prepared

pursuant to 10 CFR Part 51 and is publicly available at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible 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. The ADAMS Accession Number for the Seabrook Station ER is ML101590094. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 800–397–4209 (or 301–415–4737) or by e-mail at *pdr.resource@nrc.gov*. The ER may also be viewed on the Internet at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications/seabrook.html*. In addition, paper copies of the ER are available to the public near the site at the Seabrook Library, 25 Liberty Street, Seabrook, NH 03874 and at the Amesbury Public Library, 149 Main Street, Amesbury, MA 01913. Public comments and supporting materials related to this notice can be found at the Federal rulemaking Web site, *http://www.regulations.gov*, by searching on Docket ID NRC–2010–0206.

This notice advises the public that the NRC intends to gather the information necessary to prepare a plant-specific supplement to the NRC's "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants," (NUREG–1437) related to the review of the application for renewal of the Seabrook Station operating license for an additional 20 years. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources. The NRC is required by 10 CFR 51.95 to prepare a supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations found at 10 CFR Part 51.

The NRC will first conduct a scoping process for the supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in the scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action, which is to be the subject of the supplement to the GEIS;

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant;

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS being considered;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies; and

h. Describe how the supplement to the GEIS will be prepared and include any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, NextEra Energy Seabrook;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC has decided to hold public meetings for the Seabrook Station license renewal supplement to the GEIS. The scoping meetings will be held on August 19, 2010, and there will be two sessions to accommodate interested parties. The first session will convene at 1:30 p.m. and will continue until 3:30 p.m., as necessary. The second session will convene at 7 p.m., with a repeat of the overview portions of the first meeting, and will continue until 9 p.m., as necessary. Both sessions will be held at the Galley Hatch Conference Center, 815 Lafayette Road, Hampton, NH 03842. Both meetings will be transcribed and will include: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the supplement to the GEIS. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No formal comments on the proposed scope of the supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed below.

Persons may register to attend or present oral comments at the meetings on the scope of the NEPA review by contacting the NRC Project Manager, Mr. Jeremy Susco, by telephone at 800–368–5642, extension 2927, or by e-mail at *Jeremy.Susco@nrc.gov* no later than August 12, 2010. Members of the public may also register to speak at the meeting within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak if time permits. Public comments will be considered in the scoping process for the supplement to the GEIS. Mr. Susco will need to be contacted no later than August 5, 2010, if special equipment or accommodations are needed to attend or present information at the public meeting so that the NRC staff can determine whether the request can be accommodated.

Members of the public may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0206 in the subject line of the comments. Comments submitted in writing or in electronic form will be posted on the NRC website and on the Federal rulemaking website, *http://www.regulations.gov*. Because comments will not be edited to remove any identifying or contact information, the NRC cautions against including any information that the submitter does 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.

Submit comments electronically via the Federal rulemaking website: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0206. Address questions about NRC dockets to Carol Gallagher at 301–492–3668 or via e-mail at *Carol.Gallagher@nrc.gov*.

Mail comments to: Chief, Rulemaking and Directives Branch (RADB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Fax comments to RADB at 301–492–3446. Comments will be available electronically and accessible at *http://www.regulations.gov* and through ADAMS at *http://www.nrc.gov/reading-rm/adams.html.* All comments must be received by September 21, 2010.

Participation in the scoping process for the supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

Dated at Rockville, Maryland, this 13th day of July, 2010.

For the Nuclear Regulatory Commission.

Bo M. Pham,

Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–17652 Filed 7–19–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0425]

Final Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Regulatory Guide, RG 8.40, "Methods for Measuring Effective Dose Equivalent From External Exposure."

FOR FURTHER INFORMATION CONTACT: Roger Pedersen, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–3162 or e-mail *Roger.Pedersen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a new guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Regulatory Guide 8.40 was issued with a temporary identification as Draft Regulatory Guide, DG–8039. This guide describes dosimetry methods that the NRC considers acceptable for determining the effective dose equivalent (EDE) for external (EDEX) radiation exposures. These methods provide a conservative estimate of the EDEX and may be used to calculate the total effective dose equivalent (TEDE) in demonstrating compliance with TEDE-based NRC regulatory requirements.

II. Further Information

In September 2009, DG–8039 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on November 26, 2009. The staff's responses to the public comments received are located in the NRC's Agencywide Documents Access and Management System under Accession Number ML100620118. The regulatory analysis may be found in ADAMS under Accession No. ML101940038. Electronic copies of RG 8.40 are available through the NRC's public Web site under "Regulatory Guides" at *http://www.nrc.gov/reading-rm/doc-collections/.*

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 13th day of July 2010.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2010–17649 Filed 7–19–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0002]

Sunshine Act Notice

DATES: Weeks of July 19, 26, August 2, 9, 16, 23, 2010.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of July 19, 2010

There are no meetings scheduled for the week of July 19, 2010.

Week of July 26, 2010—Tentative

There are no meetings scheduled for the week of July 26, 2010.

Week of August 2, 2010—Tentative

There are no meetings scheduled for the week of August 2, 2010.

Week of August 9, 2010—Tentative

Thursday, August 12, 2010

9:30 a.m. Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Cindy Flannery, 301 415–0223).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of August 16, 2010—Tentative

There are no meetings scheduled for the week of August 16, 2010.

Week of August 23, 2010—Tentative

There are no meetings scheduled for the week of August 23, 2010.

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*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.

* * * * *

Additional Information

By a vote of 5–0 on July 13, 2010, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that Affirmation of: David Geisen, NRC Staff Petition for Review of LBP–09–24 (Aug. 28, 2009) be

held on July 16, 2010, with less than one week notice to the public.

* * * * *

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 Angela Bolduc, Chief, Employee/Labor Relations and Work Life Branch, at 301–492–2230, TDD: 301–415–2100, or by e-mail at *angela.bolduc@nrc.gov. mailto:dlc@nrc.gov.mailto:aks@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: July 15, 2010.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2010–17771 Filed 7–16–10; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2010–66; Order No. 488]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add a Global Expedited Package Services 2 (GEPS 2) contract to the existing GEPS 2 product. This notice addresses procedural steps associated with this filing.

DATES: Comments are due: July 22, 2010.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Notice of Filing
III. Ordering Paragraphs

I. Introduction

On July 13, 2010, the Postal Service filed a notice announcing that it has entered into an additional Global Expedited Package Services 2 (GEPS 2) contract.[1] The Postal Service believes the instant contract is functionally equivalent to previously submitted GEPS 2 contracts, and is supported by Governors' Decision No. 08–7, attached to the Notice and originally filed in Docket No. CP2008–4. *Id.* at 1, Attachment 3. The Notice also explains that Order No. 86, which established GEPS 1 as a product, also authorized functionally equivalent agreements to be included within the product, provided that they meet the requirements of 39 U.S.C. 3633. *Id.* at 1. In Order No. 290, the Commission approved the GEPS 2 product.[2]

The instant contract. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. In addition, the Postal Service contends that the contract is in accordance with Order No. 86. The term of the contract is 1 year from the date the Postal Service notifies the customer that all necessary regulatory approvals have been received.

In support of its Notice, the Postal Service filed four attachments as follows:

1. Attachment 1–a redacted copy of the contract;
2. Attachment 2–a certified statement required by 39 CFR 3015.5(c)(2);
3. Attachment 3–a redacted copy of Governors' Decision No. 08–07, which establishes prices and classifications for GEPS contracts, a description of applicable GEPS contracts, formulas for prices, an analysis and certification of the Governors' vote; and
4. Attachment 4–an application for non-public treatment of materials to maintain redacted portions of the contract and supporting documents under seal.

The Notice advances reasons why the instant GEPS 2 contract fits within the Mail Classification Schedule language for GEPS 2. The Postal Service identifies customer-specific information, general contract terms and other differences that distinguish the instant contract from the baseline GEPS 2 agreement, all of which are highlighted in the Notice. Notice at 3–6.

The Postal Service contends that the instant contract is functionally equivalent to previously filed GEPS contracts and is substantially similar to that in Docket No. CP2009–50 in terms of the product being offered, the market in which it is offered, and its cost characteristics. *Id.* 2–3. *See also id.* at 6. ("[T]he relevant cost and market characteristics are similar, if not the same, for this contract and the baseline GEPS 2 contract.").

The Postal Service also contends that its filings demonstrate that the new GEPS 2 contract complies with the requirements of 39 U.S.C. 3633. It requests that the contract be included within the GEPS 2 product. *Id.* at 6.

II. Notice of Filing

The Commission establishes Docket No. CP2010–66 for consideration of matters related to the contract identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's contract is consistent with the policies of 39 U.S.C. 3632, 3633 or 3642. Comments are due no later than July 22, 2010. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in the captioned filings.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2010–66 for consideration of matters raised by the Postal Service's Notice.

2. Comments by interested persons in these proceedings are due no later than July 22, 2010.

3. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as the officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

[1] Notice of United States Postal Service Filing of Functionally Equivalent Global Expedited Package Services 2 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, July 13, 2010 (Notice).

[2] Docket No. CP2009–50, Order Granting Clarification and Adding Global Expedited Package Services 2 to the Competitive Product List, August 28, 2009 (Order No. 290).

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2010–17613 Filed 7–19–10; 8:45 am]

BILLING CODE 7710–FW–S

RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD

Agenda and Notice of Partially Closed Meeting of the Recovery Independent Advisory Panel

AGENCY: Recovery Accountability and Transparency Board.

ACTION: Notice of partially closed meeting.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009, Public Law 111–5 (Recovery Act), and the Federal Advisory Committee Act of 1972 (FACA), the Recovery Accountability and Transparency Board's (Board) Recovery Independent Advisory Panel (RIAP) will meet as indicated below. Notice of this meeting is required under Section 10(a)(2) of FACA. This notice is intended to notify the general public of their opportunity to attend the open portion of the meeting.

DATES: The RIAP meeting will be held on Thursday, August 5, 2010, from 1 p.m. to 5 p.m.

ADDRESSES: Hyatt Regency Cambridge, 575 Memorial Drive, Cambridge, MA 02139.

FOR FURTHER INFORMATION CONTACT: Glen Walker, Executive Director, Recovery Independent Advisory Panel, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006; Telephone 202–254–7900.

SUPPLEMENTARY INFORMATION: Pursuant to Section 1543 of the Recovery Act, the RIAP is charged with making recommendations to the Board on actions the Board could take to prevent fraud, waste, and abuse of Recovery Act funds. The purpose of the August 5, 2010 meeting is to allow the RIAP to have an open dialogue, with input from the public, on issues relating to fraud, waste, and abuse of Recovery Act funds. More specifically, the RIAP is interested in obtaining input regarding the following matters:

- Actions the Board can take to prevent fraud, waste, and abuse;
- Transparency of entitlements and tax benefits funded by the Recovery Act;
- The public's experience with obtaining information from Recovery.gov and how that experience can be improved; and
- Random sampling as a tool for detecting fraud, waste, and abuse.

In keeping with FACA procedures, members of the public are invited to provide comments to the RIAP. The preference of the RIAP is to have members of the public provide written comments addressing any of the matters listed above no later than July 29, 2010. There will be limited space for this meeting; therefore, members of the public who have submitted written statements addressing matters outlined above will be given priority in attending this meeting and speaking to the RIAP. The next highest priority for attending the meeting and speaking to the RIAP will be those individuals who have signed up in advance by submitting their names via e-mail to the RIAP in advance of the meeting. Members of the public who have submitted written comments and/or who have signed up in advance will be given priority to attend the meeting and be heard first in the order in which their written statements and/or sign-up e-mails were received. Other members of the public will be heard in the order in which they sign up at the beginning of the meeting, space permitting. A time limit will be placed on those members of the public wishing to speak at the meeting, with time allocated in accordance with the number of people who have signed up indicating a desire to speak to the RIAP. The RIAP will make every effort to hear the views of all interested persons. The Chairperson of the RIAP is empowered to conduct the meeting in a fashion that will, to the Chairperson's judgment, facilitate the orderly conduct of business. You may submit written comments by mail to 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006. "RIAP comments" should be written on the envelope. Persons wishing to e-mail their written comments and/or sign up in advance to speak to the RIAP at the meeting should send their written comments and/or names to *panel@ratb.gov* and write "August 5, 2010 RIAP public comment" in the Subject line.

The meeting will close to the public at 4:15 p.m. under the authority of Section 10(d) of FACA and under exemption (7) of Section 552b(c) of the Government in the Sunshine Act (Pub. L. 92–463). During the closed portion of the meeting there will be a discussion that would disclose investigative techniques and procedures. A summary of the activities at the closed session and related matters which are informative to the public consistent with the policy of 5 U.S.C. 552b(c) will be available to the public within fourteen days of the meeting. Records will be kept of all RIAP proceedings and will be available for public inspection on *http://www.recovery.gov.*

Ivan J. Flores,

Paralegal Specialist, Recovery Accountability and Transparency Board.

[FR Doc. 2010–17589 Filed 7–19–10; 8:45 am]

BILLING CODE 6820–GA–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12151 and #12152]

North Dakota Disaster Number ND–00022

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of North Dakota (FEMA–1907–DR), dated 04/30/2010.

Incident: Flooding.

Incident Period: 02/26/2010 and continuing.

DATES: *Effective Date:* 07/13/2010.

Physical Loan Application Deadline Date: 06/29/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 01/31/2011.

ADDRESSES: *Submit completed loan applications to:* U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of North Dakota, dated 04/30/2010, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Bottineau, McHenry, Kidder, Renville, Ward.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2010–17659 Filed 7–19–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12206 and #12207]

Oklahoma Disaster Number OK–00040

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Oklahoma (FEMA–1917–DR), dated 06/11/2010.

Incident: Severe Storms, Tornadoes, and Straight-Line Winds.

Incident Period: 05/10/2010 through 05/13/2010.

DATES: *Effective Date:* 07/09/2010.

Physical Loan Application Deadline Date: 08/10/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 03/11/2011.

ADDRESSES: *Submit completed loan applications to:* U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Oklahoma, dated 06/11/2010, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Garvin, Love, Okmulgee.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2010–17660 Filed 7–19–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12231 and #12232]

Oklahoma Disaster #OK–00041

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Oklahoma dated 07/13/2010.

Incident: Tornadoes, Severe Storms, Straight Line Winds and Flooding.

Incident Period: 06/13/2010 through 06/15/2010.

DATES: *Effective Date:* 07/13/2010.

Physical Loan Application Deadline Date: 09/13/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 04/13/2011.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Oklahoma.

Contiguous Counties: Oklahoma: Cleveland, Canadian, Kingfisher, Lincoln, Logan, Pottawatomie.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.500
Homeowners Without Credit Available Elsewhere	2.750
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.625
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12231 B and for economic injury is 12232 0.

The State which received an EIDL Declaration # is: Oklahoma.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 13, 2010.

Karen G. Mills,

Administrator.

[FR Doc. 2010–17664 Filed 7–19–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of Waiver to the Nonmanufacturer Rule for Configured Tape Library Storage Equipment.

SUMMARY: The U.S. Small Business Administration (SBA) is granting a class waiver of the Nonmanufacturer Rule for Configured Tape Library Storage Equipment, Product Service Code (PSC) 7025 Automated Data Processing (ADP) Input/Output and Storage Devices, PSC 7035 ADP Support Equipment, and PSC 7045 ADP Supplies, under the North American Industry Classification System (NAICS) code 334112 (Computer Storage Device Manufacturing). The basis for waiver is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of this waiver will be to allow otherwise qualified small businesses to supply the products of any manufacturer on a Federal contract set aside for small businesses, Service-Disabled Veteran-Owned (SDVO) small businesses or Participants in SBA's 8(a) Business Development (BD) Program.

DATES: This waiver is effective August 4, 2010.

FOR FURTHER INFORMATI0N CONTACT: Ms. Edith Butler, Procurement Analyst, by telephone at (202) 619–0422; by FAX at (202) 481–1788; or by e-mail at *Edith.Butler@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act (Act), 15 U.S.C. 637(a)(17), and SBA's implementing regulations require that recipients of Federal supply contracts set aside for small businesses, SDVO small businesses, or Participants in the SBA's 8(a) BD Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor of the product. This requirement is commonly referred to as the Nonmanufacturer Rule. 13 CFR 121.406(b), 125.15(c). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any "class of products" for which there are no small business manufacturers or processors available to participate in the Federal market.

In order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a

proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. 13 CFR 121.1202(c). The SBA defines "class of products" based on the Office of Management and Budget's NAICS. In addition, SBA uses PSCs to further identify particular products within the NAICS code to which a waiver would apply. The SBA may then identify a specific item within a PSC and NAICS to which a class waiver would apply.

On June 7, 2010, SBA published in the **Federal Register** a notice of intent to waive the Nonmanufacturer Rule for Configured Tape Library Storage Equipment, PSC 7025 (ADP Input/Output and Storage Devices), PSC 7035 (ADP Support Equipment), and PSC 7045 (ADP Supplies), under NAICS code 334112 (Computer Storage Device Manufacturing).

SBA explained in the notice that it was soliciting comments and sources of small business manufacturers of these classes of products. No comments were received in response to this notice. SBA has determined that there are no small business manufacturers of these classes of products, and is therefore granting the waiver of the Nonmanufacturer Rule for Configured Tape Library Storage Equipment, PSC 7025 (ADP Input/Output and Storage Devices), PSC 7035 (ADP Support Equipment), and PSC 7045 (ADP Supplies), under NAICS code 334112 (Computer Storage Device Manufacturing).

Authority: 15 U.S.C. 637(a)(17).

Karen Hontz,

Director, Office of Government Contracting.

[FR Doc. 2010–17705 Filed 7–19–10; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Regulation S, OMB Control No. 3235–0357, SEC File No. 270–315.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Regulation S (17 CFR 230.901 through 230.905) includes rules governing offers and sales of securities made outside the United States without registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). The purpose of Regulation S is to provide clarification of the extent to which section 5 of the Securities Act applies to offers and sales of securities outside of the United States. Regulation S is assigned one burden hour for administrative convenience.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: July 14, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–17644 Filed 7–19–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Existing Collection; New OMB Control No.: Rule 0–4, SEC File No. 270–569, OMB Control No. 3235–0633.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for approval of the collection of information discussed below.

Rule 0–4 (17 CFR 275.0–4) under the Investment Advisers Act of 1940 ("Act" or "Advisers Act") (15 U.S.C. 80b–1 *et seq.*) entitled "General Requirements of Papers and Applications," prescribes general instructions for filing an application seeking exemptive relief with the Commission. Rule 0–4 currently requires that every application for an order for which a form is not specifically prescribed and which is executed by a corporation, partnership or other company and filed with the Commission contain a statement of the applicable provisions of the articles of incorporation, bylaws or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the application is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions must be attached as an exhibit to or quoted in the application. Any amendment to the application must contain a similar statement as to the applicability of the original statement of authorization. When any application or amendment is signed by an agent or attorney, rule 0–4 requires that the power of attorney evidencing his authority to sign shall state the basis for the agent's authority and shall be filed with the Commission. Every application subject to rule 0–4 must be verified by the person executing the application by providing a notarized signature in substantially the form specified in the rule. Each application subject to rule 0–4 must state the reasons why the applicant is deemed to be entitled to the action requested with a reference to the provisions of the Act and rules thereunder, the name and address of each applicant, and the name and address of any person to whom any questions regarding the application should be directed. Rule 0–4 requires that a proposed notice of the proceeding initiated by the filing of the application accompany each application as an exhibit and, if necessary, be modified to reflect any amendment to the application.

The requirements of rule 0–4 are designed to provide Commission staff with the necessary information to assess whether granting the orders of exemption are necessary and appropriate in the public interest and consistent with the protection of investors and the intended purposes of the Act.

Applicants for orders under the Advisers Act can include registered investment advisers, affiliated persons of registered investment advisers, and entities seeking to avoid investment adviser status, among others.

Commission staff estimates that it receives approximately 9 applications per year submitted under rule 0–4 of the Act. Although each application typically is submitted on behalf of multiple applicants, the applicants in the vast majority of cases are related entities and are treated as a single respondent for purposes of this analysis. Most of the work of preparing an application is performed by outside counsel and, therefore, imposes no hourly burden on respondents. The cost outside counsel charges applicants depends on the complexity of the issues covered by the application and the time required. Based on conversations with applicants and attorneys, the cost ranges from approximately $7,000 for preparing a well-precedented, routine application to approximately $80,000 to prepare a complex or novel application. We estimate that the Commission receives 2 of the most time-consuming applications annually, 4 applications of medium difficulty, and 3 of the least difficult applications subject to rule 0–4. This distribution gives a total estimated annual cost burden to applicants of filing all applications of $355,000 [(2 × $80,000) + (4 × $43,500) + (3 × $7,000)]. The estimates of annual burden hours and costs are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

The requirements of this collection of information are required to obtain or retain benefits. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to Shagufta Ahmed at *Shagufta_Ahmed@omb.eop.gov;* and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: July 14, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–17640 Filed 7–19–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 19b–5 and Form PILOT, SEC File No. 270–448, OMB Control No. 3235–0507.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for approval of extension of the previously approved collection of information provided for in Rule 19b–5 (17 CFR 240.19b–5) and Form PILOT (17 CFR 249.821) under the Securities Exchange Act of 1934, as amended ("Act") (15 U.S.C. 78a *et seq.*).

Rule 19b–5 provides a temporary exemption from the rule-filing requirements of Section 19(b) of the Act (15 U.S.C. 78s(b)) to self-regulatory organizations ("SROs") wishing to establish and operate pilot trading systems. Rule 19b–5 permits an SRO to develop a pilot trading system and to begin operation of such system shortly after submitting an initial report on Form PILOT to the Commission. During operation of any such pilot trading system, the SRO must submit quarterly reports of the system's operation to the Commission, as well as timely amendments describing any material changes to the system. After two years of operating such pilot trading system under the exemption afforded by Rule 19b–5, the SRO must submit a rule filing pursuant to Section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)) in order to obtain permanent approval of the pilot trading system from the Commission.

The collection of information is designed to allow the Commission to maintain an accurate record of all new pilot trading systems operated by SROs and to determine whether an SRO has properly availed itself of the exemption afforded by Rule 19b–5, is operating a pilot trading system in compliance with the Act, and is carrying out its statutory oversight obligations under the Act.

The respondents to the collection of information are national securities exchanges and national securities associations.

While there are 14 national securities exchanges and national securities associations that may avail themselves of the exemption under Rule 19b–5 and the use of Form PILOT, it is estimated that approximately three respondents will file a total of 3 initial reports (for a 72 hour estimated annual burden), 12 quarterly reports (for a 36 hour estimated annual burden), and 6 amendments (for an 18 hour estimated annual burden) on Form PILOT per year, with an estimated total annual response burden of 126 hours. At an average hourly cost of $307.74, the aggregate related cost of compliance with Rule 19b–5 for all respondents is $38,775 per year (126 burden hours multiplied by $307.74/hour = $38,775).

Although Rule 19b–5 does not in itself impose recordkeeping burdens on SROs, it relies on existing requirements imposed by Rule 17a–1 under the Act (17 CFR 240.17a–1) to require SROs to retain all the rules and procedures relating to each pilot trading system operating pursuant to Rule 19b–5, and to make such records available for Commission inspection for a period of not less than five years, the first two years in an easily accessible place.

The filing of a Form PILOT is mandatory for any SRO seeking a temporary exemption under Rule 19b–5 from the rule filing requirements of Section 19(b) of the Act in connection with the operation of a pilot trading system. It is also mandatory that an SRO operating a pilot trading system file with the Commission notices of material systems changes and quarterly transaction reports on Form PILOT. Information provided on Form PILOT is deemed confidential and shall be available only for examination by the Commission, other agencies of the federal government and state securities authorities.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: July 14, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–17642 Filed 7–19–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Approval of Existing Information Collection: Rule 17a–8, SEC File No. 270–225,OMB, Control No. 3235–0235.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

Rule 17a–8 (17 CFR 270.17a–8) under the Investment Company Act of 1940 (the "Act") (15 U.S.C. 80a) is entitled "Mergers of affiliated companies." Rule 17a–8 exempts certain mergers and similar business combinations ("mergers") of affiliated registered investment companies ("funds") from prohibitions under section 17(a) of the Act (15 U.S.C. 80a–17(a)) on purchases and sales between a fund and its affiliates. The rule requires fund directors to consider certain issues and to record their findings in board minutes. The rule requires the directors of any fund merging with an unregistered entity to approve procedures for the valuation of assets received from that entity. These procedures must provide for the preparation of a report by an independent evaluator that sets forth the fair value of each such asset for which market quotations are not readily available. The rule also requires a fund being acquired to obtain approval of the merger transaction by a majority of its outstanding voting securities, except in certain situations, and requires any surviving fund to preserve written records describing the merger and its terms for six years after the merger (the first two in an easily accessible place).

The average annual burden of meeting the requirements of rule 17a–8 is estimated to be 7 hours for each fund. The Commission staff estimates that each year approximately 610 funds rely on the rule. The estimated total average annual burden for all respondents therefore is 4270 hours.

This estimate represents a decrease of 2170 hours from the prior estimate of 6440 hours. The decrease results from a change in the methodology used to estimate the number of mergers between affiliated funds or fund portfolios.

The average cost burden of preparing a report by an independent evaluator in a merger with an unregistered entity is estimated to be $15,000. The average net cost burden of obtaining approval of a merger transaction by a majority of a fund's outstanding voting securities is estimated to be $80,000. The Commission staff estimates that each year approximately 0 mergers with unregistered entities occur and approximately 15 funds hold shareholder votes that would not otherwise have held a shareholder vote to comply with state law. The total annual cost burden of meeting these requirements is estimated to be $1,200,000.

The estimates of average burden hours and average cost burdens are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to *Shagufta Ahmed at Shagufta_Ahmed@omb.eop.gov;* and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: July 14, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–17641 Filed 7–19–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15a–6, SEC File No. 270–0329, OMB Control No. 3235–0371.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 15a–6 (17 CFR 240.15a–6) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act") provides, among other things, an exemption from broker-dealer registration for foreign broker-dealers that effect trades with or for U.S. institutional investors through a U.S. registered broker-dealer, provided that the U.S. broker-dealer obtains certain information about, and consents to service of process from, the personnel of the foreign broker-dealer involved in such transactions, and maintains certain records in connection therewith.

These requirements are intended to ensure: (a) That the U.S. broker-dealer will receive notice of the identity of, and has reviewed the background of, foreign personnel who will contact U.S. institutional investors, (b) that the foreign broker-dealer and its personnel effectively may be served with process in the event enforcement action is necessary, and (c) that the Commission has ready access to information concerning these persons and their U.S. securities activities.

It is estimated that approximately 2,000 respondents will incur an average burden of three hours per year to comply with this rule, for a total burden of 6,000 hours. At an average cost per hour of approximately $105, the resultant total cost of compliance for the respondents is $600,000 per year (2,000 entities × 3 hours/entity × $105/hour = $630,000).

In general, the records to be maintained under Rule 15a–6 must be kept for the applicable time periods as set forth in Rule 17a–4 (17 CFR 240.17a–4) under the Exchange Act or, with respect to the consents to service of process, for a period of not less than six years after the applicable person ceases engaging in U.S. securities activities. Reliance on the exemption set forth in Rule 15a–6 is voluntary, but if a foreign broker-dealer elects to rely on such exemption, the collection of information described therein is mandatory. The collection does not involve confidential information.

Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: *Shagufta_Ahmed@omb.eop.gov* and (ii) Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: July 14, 2010.

Florence H. Harmon,

Deputy Secretary.

[FR Doc. 2010–17643 Filed 7–19–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Form N–SAR; SEC File No. 270–292; OMB Control No. 3235–0330]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–SAR, SEC File No. 270–292, OMB Control No. 3235–0330.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

Form N–SAR (OMB Control No. 3235–0330, 17 CFR 249.330) is the form used by all registered investment companies with the exception of face amount certificate companies, to comply with the periodic filing and disclosure requirements imposed by Section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) ("Investment Company Act"), and of rules 30a–1 and 30b1–1 thereunder (17 CFR 270.30a–1 and 17 CFR 270.30b1–1). The information required to be filed with the Commission assures the public availability of the information and permits verification of compliance with Investment Company Act requirements. Registered unit investment trusts are required to provide this information on an annual report filed with the Commission on Form N–SAR pursuant to rule 30a–1 under the Investment Company Act, and registered management investment companies must submit the required information on a semi-annual report on Form N–SAR pursuant to rule 30b1–1 under the Investment Company Act.

The Commission estimates that the total number of respondents is 3,480 and the total annual number of responses is 6,180 ((2,700 management investment company respondents × 2 responses per year) + (780 unit investment trust respondents × 1 response per year)). The Commission estimates that each registrant filing a report on Form N–SAR would spend, on average, approximately 14.31 hours in preparing and filing reports on Form N–SAR and that the total hour burden for all filings on Form N–SAR would be 88,436 hours.

The collection of information under Form N–SAR is mandatory. Responses to the collection of information will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: July 14, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–17639 Filed 7–19–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29341; File No. 812–13743]

Federated Enhanced Treasury Income Fund, et al.; Notice of Application

July 14, 2010.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 19(b) of the Act and rule 19b–1 under the Act.

SUMMARY: *Summary of Application:* Applicants request an order ("Order") to permit certain registered closed-end management investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common stock as frequently as monthly in any taxable year, and as frequently as distributions are specified by or in accordance with the terms of any outstanding preferred stock that such investment companies may issue.

Applicants: Federated Enhanced Treasury Income Fund, Federated Premier Intermediate Municipal Income Fund, Federated Premier Municipal Income Fund (collectively, the "Current Funds") and Federated Investment Management Company ("Federated" or the "Adviser").

DATES: *Filing Dates:* The application was filed on January 15, 2010 and amended on May 18, 2010, and July 9, 2010.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 9, 2010, and should be accompanied by proof of service on the applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, c/o Gregory Dulski, Federated Investors Tower, 1001 Liberty Avenue, Pittsburgh, Pennsylvania 15222–3779.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at (202) 551–6990, or Jennifer L. Sawin, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. Each Current Fund is a registered closed-end management investment company organized as a Delaware statutory trust.[1] The common shares of the Current Funds are listed on the New York Stock Exchange. The Premier Intermediate Municipal Income Fund and Premier Municipal Income Fund have also issued preferred shares. Applicants believe that investors in the common shares of the Current Funds may prefer an investment vehicle that provides regular/monthly distributions and a steady cash flow.

2. Federated, a registered investment adviser under the Investment Advisers Act of 1940, as amended ("Advisers Act"), acts as the Current Funds' investment adviser and administrator. Federated is a wholly-owned subsidiary of Federated Investors, Inc. Each future Investment Adviser to a Fund will be registered under the Advisers Act.

3. Applicants state that, prior to a Fund's implementing a distribution plan in reliance on the Order, the Board of Trustees (the "Board") of the Fund, including a majority of the trustees who are not "interested persons," of such Fund as defined in section 2(a)(19) of the Act (the "Independent Trustees"), shall have requested, and the Adviser shall have provided, such information as is reasonably necessary to make an informed determination on whether the Board should adopt a proposed distribution policy. In particular, the Board and the Independent Trustees shall have reviewed information regarding the purpose and terms of a proposed distribution policy, the likely effects of such policy on such Fund's long-term total return (in relation to market price and its net asset value per common share ("NAV")) and the relationship between such Fund's distribution rate on its common shares under the policy and such Fund's total return (in relation to NAV); whether the rate of distribution would exceed such Fund's expected total return in relation to its NAV; and any foreseeable material effects of such policy on such Fund's long-term total return (in relation to market price and NAV). The Independent Trustees shall also have considered what conflicts of interest the Adviser and the affiliated persons of the Adviser and each such Fund might have with respect to the adoption or implementation of such policy. Applicants state that, only after considering such information shall the Board, including the Independent Trustees, of a Fund approve a distribution policy with respect to such Fund's common shares (the "Plan") and in connection with such approval shall have determined that such Plan is consistent with a Fund's investment objectives and in the best interests of a Fund's common shareholders.

4. Applicants state that the purpose of a Plan would be to permit a Fund to distribute over the course of each year, through periodic distributions as nearly equal as practicable and any required special distributions, an amount closely approximating the total taxable income of such Fund during such year and, if so determined by its Board, all or a portion of the return of capital paid by portfolio companies to such Fund during such year. It is anticipated that under the Plan of a Fund, such Fund would distribute to its respective common shareholders a fixed monthly percentage of the market price of such Fund's common shares at a particular point in time or a fixed monthly percentage of NAV at a particular time or a fixed monthly amount, any of which may be adjusted from time to time. It is anticipated that under a Plan, the minimum annual distribution rate with respect to such Fund's common shares would be independent of a Fund's performance during any particular period but would be expected to correlate with a Fund's performance over time. Except for extraordinary distributions and potential increases or decreases in the final dividend periods in light of a Fund's performance for an entire calendar year and to enable a Fund to comply with the distribution requirements of Subchapter M of the Internal Revenue Code ("Code") for the fiscal year, it is anticipated that each distribution on the common shares would be at the stated rate then in effect.

5. Applicants state that prior to the implementation of a Plan for a Fund, the Board shall have adopted policies and procedures under rule 38a–1 under the Act that: (i) Are reasonably designed to ensure that all notices required to be sent to the Fund's shareholders pursuant to section 19(a) of the Act, rule 19a–1 thereunder and condition 4 below (each a "19(a) Notice") include the disclosure required by rule 19a–1 under the Act and by condition 2(a) below, and that all other written communications by the Fund or its agents regarding distributions under the Plan include the disclosure required by condition 3(a) below; and (ii) require the Fund to keep records that demonstrate its compliance with all of the conditions of the Order and that are necessary for such Fund to form the basis for, or demonstrate the calculation of, the amounts disclosed in its 19(a) Notices.

Applicants' Legal Analysis

1. Section 19(b) of the Act generally makes it unlawful for any registered investment company to make long-term capital gains distributions more than once every twelve months. Rule 19b–1 under the Act limits the number of capital gains dividends, as defined in section 852(b)(3)C) of the Code ("distributions"), that a fund may make with respect to any one taxable year to one, plus a supplemental "clean up" distribution made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year, plus one additional capital gain dividend made in whole or in part to avoid the excise tax under section 4982 of the Code.

2. Section 6(c) of the Act provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the

[1] Applicants request that any Order issued granting the relief requested in the application also apply to any registered closed-end investment company currently advised or to be advised in the future by Federated (including any successor in interest) or by an entity controlling, controlled by or under common control (within the meaning of section 2(a)(9) of the Act) with Federated (such entities, together with Federated, the "Investment Advisers") that decides in the future to rely on the requested relief. Any closed-end investment company that relies on the Order in the future will comply with the terms and conditions of the application (such investment companies together with the Current Funds, the "Funds," and with the Investment Advisers, the "Applicants"). All existing Funds currently intending to rely on the Order have been named as Applicants. A successor in interest is limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants state that one of the concerns leading to the enactment of section 19(b) and adoption of rule 19b–1 was that shareholders might be unable to distinguish between frequent distributions of capital gains and dividends from investment income. Applicants state, however, that rule 19a–1 effectively addresses this concern by requiring that distributions (or the confirmation of the reinvestment thereof) estimated to be sourced in part from capital gains or capital be accompanied by a separate statement showing the sources of the distribution (*e.g.,* estimated net income, net short-term capital gains, net long-term capital gains, and/or return of capital). Applicants state that similar information is included in the Funds' annual reports to shareholders and on the Internal Revenue Service Form 1099 DIV, which is sent to each common and preferred shareholder who received distributions during a particular year.

4. Applicants further state that each of the Funds will make the additional disclosures required by the conditions set forth below, and each of them has adopted compliance policies and procedures in accordance with rule 38a–1 under the Act to ensure that all required 19(a) Notices and disclosures are sent to shareholders. Applicants argue that by providing the information required by section 19(a) and rule 19a–1, and by complying with the procedures adopted under the Plan and the conditions listed below, each Fund's shareholders would be provided sufficient information to understand that their periodic distributions are not tied to a Fund's net investment income and realized capital gains to date, and may not represent yield or investment return. Accordingly, Applicants assert that continuing to subject the Funds to section 19(b) and rule 19b–1 would afford shareholders no extra protection.

5. Applicants assert that section 19(b) and rule 19b–1 also were intended to prevent certain improper sales practices, including, in particular, the practice of urging an investor to purchase shares of a fund on the basis of an upcoming capital gains dividend ("selling the dividend"), where the dividend would result in an immediate corresponding reduction in NAV and would be in effect a taxable return of the investor's capital. Applicants assert that the "selling the dividend" concern should not apply to closed-end investment companies, such as the Funds, which do not continuously distribute shares. According to the Applicants, if the underlying concern extends to secondary market purchases of shares of closed-end funds that are subject to a large upcoming capital gains dividend, adoption of a periodic distribution plan actually helps minimize the concern by avoiding, through periodic distributions, any buildup of large end-of-the-year distributions.

6. Applicants note that the common stock of closed-end funds generally tends to trade in the marketplace at a discount to their NAVs. Applicants believe that this discount may be reduced if the Funds are permitted to pay relatively frequent dividends on their common shares at a consistent rate, whether or not those dividends contain an element of capital gain.

7. Applicants assert that the application of rule 19b–1 to a Plan actually gives rise to one of the concerns that rule 19b–1 was intended to avoid: Inappropriate influence on portfolio management decisions. Applicants state that, in the absence of an exemption from rule 19b–1, the adoption of a periodic distribution plan imposes pressure on management: (i) Not to realize any net long-term capital gains until the point in the year that the fund can pay all of its remaining distributions in accordance with rule 19b–1; and (ii) not to realize any long-term capital gains during any particular year in excess of the amount of the aggregate pay-out for the year (since as a practical matter excess gains must be distributed and accordingly would not be available to satisfy pay-out requirements in following years), notwithstanding that purely investment considerations might favor realization of long-term gains at different times or in different amounts. Applicants assert that by limiting the number of capital gain distributions that a fund may make with respect to any one year, rule 19b–1 may prevent the normal and efficient operation of a periodic distribution plan whenever that fund's realized net long-term capital gains in any year exceed the total of the periodic distributions that may include such capital gains under the rule.

8. In addition, Applicants assert that rule 19b–1 may cause fixed regular periodic distributions to be funded with returns of capital [2] (to the extent net investment income and realized short term capital gains are insufficient to fund the distribution), even though undistributed realized net long-term capital gains otherwise would be available. To distribute all of a fund's long-term capital gains within the limits in rule 19b–1, a fund may be required to make total distributions in excess of the annual amount called for by its periodic distribution plan or to retain and pay taxes on the excess amount. Applicants thus assert that the requested Order would minimize these anomalous effects of rule 19b–1 by enabling the Funds to realize long-term capital gains as often as investment considerations dictate without fear of violating rule 19b–1.

9. Applicants state that Revenue Ruling 89–81 under the Code requires that a fund that has both common shares and preferred shares outstanding designate the types of income, *e.g.,* investment income and capital gains, in the same proportion as the total distributions distributed to each class for that tax year. To satisfy the proportionate designation requirements of Revenue Ruling 89–81, whenever a fund has realized a long-term capital gain with respect to a given tax year, the fund must designate the required proportionate share of such capital gain to be included in common and preferred share dividends. Applicants state that although rule 19b–1 allows a fund some flexibility with respect to the frequency of capital gains distributions, a fund might use all of the exceptions available under rule 19b–1 for a tax year and still need to distribute additional capital gains allocated to the preferred shares to comply with Revenue Ruling 89–81.

10. Applicants assert the potential abuses addressed by section 19(b) and rule 19b–1 do not arise with respect to preferred shares issued by a closed-end fund. Applicants assert that such distributions are either fixed, determined in periodic auctions, or determined by reference to short-term interest rates rather than by reference to performance of the issuer, and Revenue Ruling 89–81 determines the proportion of such distributions that are comprised of long-term capital gains.

11. Applicants also submit that the "selling the dividend" concern is not applicable to preferred shares, which entitles a holder to no more than a periodic dividend at a fixed rate or the rate determined by the market, and like a debt security, is priced based upon its liquidation value, dividend rate, credit quality, and frequency of payment. Applicants assert that investors buy preferred shares for the purpose of receiving payments at the frequency bargained for and do not expect the liquidation value of their shares to change.

[2] Returns of capital as used in the application means return of capital for financial accounting purposes and not for tax accounting purposes.

12. Applicants request an order pursuant to section 6(c) of the Act granting an exemption from the provisions of section 19(b) of the Act and rule 19b–1 thereunder to permit each Fund to make periodic capital gain dividends (as defined in section 852(b)(3)(C) of the Code) as often as monthly in any one taxable year in respect of its common shares and as often as specified by or determined in accordance with the terms thereof in respect of the Fund's preferred shares.

Applicants' Conditions

Applicants agree that, with respect to each Fund seeking to rely on the Order, the Order will be subject to the following conditions.

1. Compliance Review and Reporting

The Fund's chief compliance officer will: (a) Report to the Fund's Board, no less frequently than once every three months or at the next regularly scheduled quarterly Board meeting, whether: (i) The Fund and its Investment Adviser have complied with the conditions of the order; and (ii) a material compliance matter (as defined in rule 38a–1(e)(2) under the Act) has occurred with respect to such conditions; and (b) review the adequacy of the policies and procedures adopted by the Board no less frequently than annually.

2. Disclosures to Fund Shareholders

(a) Each 19(a) Notice disseminated to the holders of the Fund's common shares, in addition to the information required by section 19(a) and rule 19a–1:

(i) Will provide, in a tabular or graphical format:

(1) The amount of the distribution, on a per common share basis, together with the amounts of such distribution amount, on a per common share basis and as a percentage of such distribution amount, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(2) The fiscal year-to-date cumulative amount of distributions, on a per common share basis, together with the amounts of such cumulative amount, on a per common share basis and as a percentage of such cumulative amount of distributions, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(3) The average annual total return in relation to the change in NAV for the 5-year period (or, if the Fund's history of operations is less than five years, the time period commencing immediately following the Fund's first public offering) ending on the last day of the month prior to the most recent distribution record date compared to the current fiscal period's annualized distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date; and

(4) The cumulative total return in relation to the change in NAV from the last completed fiscal year to the last day of the month prior to the most recent distribution record date compared to the fiscal year-to-date cumulative distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date. Such disclosure shall be made in a type size at least as large and as prominent as the estimate of the sources of the current distribution; and

(ii) Will include the following disclosure:

(1) "You should not draw any conclusions about the Fund's investment performance from the amount of this distribution or from the terms of the Fund's Plan";

(2) "The Fund estimates that it has distributed more than its income and net realized capital gains; therefore, a portion of your distribution may be a return of capital. A return of capital may occur, for example, when some or all of the money that you invested in the Fund is paid back to you. A return of capital distribution does not necessarily reflect the Fund's investment performance and should not be confused with 'yield' or 'income' ";[3] and

(3) "The amounts and sources of distributions reported in this 19(a) Notice are only estimates and are not being provided for tax reporting purposes. The actual amounts and sources of the amounts for tax reporting purposes will depend upon the Fund's investment experience during the remainder of its fiscal year and may be subject to changes based on tax regulations. The Fund will send you a Form 1099 DIV for the calendar year that will tell you how to report these distributions for federal income tax purposes."

Such disclosure shall be made in a type size at least as large as and as prominent as any other information in the 19(a) Notice and placed on the same page in close proximity to the amount and the sources of the distribution.

[3] The disclosure in this condition 2(a)(ii)(2) will be included only if the current distribution or the fiscal year-to-date cumulative distributions are estimated to include a return of capital.

(b) On the inside front cover of each report to shareholders under rule 30e–1 under the Act, the Fund will:

(i) Describe the terms of the Plan (including the fixed amount or fixed percentage of the distributions and the frequency of the distributions);

(ii) Include the disclosure required by condition 2(a)(ii)(1) above;

(iii) State, if applicable, that the Plan provides that the Board may amend or terminate the Plan at any time without prior notice to Fund shareholders; and

(iv) Describe any reasonably foreseeable circumstances that might cause the Fund to terminate the Plan and any reasonably foreseeable consequences of such termination; and

(c) Each report provided to shareholders under rule 30e–1 under the Act and each prospectus filed with the Commission on Form N–2 under the Act, will provide the Fund's total return in relation to changes in NAV in the financial highlights table and in any discussion about the Fund's total return.

3. Disclosure to Shareholders, Prospective Shareholders and Third Parties

(a) The Fund will include the information contained in the relevant 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, in any written communication (other than a communication on Form 1099) about the Plan or distributions under the Plan by the Fund, or agents that the Fund has authorized to make such communication on the Fund's behalf, to any Fund common shareholder, prospective common shareholder or third-party information provider;

(b) The Fund will issue, contemporaneously with the issuance of any 19(a) Notice, a press release containing the information in the 19(a) Notice and will file with the Commission the information contained in such 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, as an exhibit to its next filed Form N–CSR; and

(c) The Fund will post prominently a statement on its (or the Investment Adviser's) Web site containing the information in each 19(a) Notice, including the disclosure required by condition 2(a)(ii) above, and will maintain such information on such Web site for at least 24 months.

4. Delivery of 19(a) Notices to Beneficial Owners

If a broker, dealer, bank or other person ("financial intermediary") holds common shares issued by the Fund in nominee name, or otherwise, on behalf of a beneficial owner, the Fund: (a) Will

request that the financial intermediary, or its agent, forward the 19(a) Notice to all beneficial owners of the Fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the 19(a) Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the 19(a) Notice to each beneficial owner of the Fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the 19(a) Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the 19(a) Notice to such beneficial owners.

5. Additional Board Determinations for Funds Whose Shares Trade at a Premium

If:

(a) The Fund's common shares have traded on the stock exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the Fund's common shares as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

(b) The Fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period, is greater than the Fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period; then:

(i) At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board, including a majority of the Independent Trustees:

(1) Will request and evaluate, and the Fund's Investment Adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(2) Will determine whether continuation, or continuation after amendment, of the Plan is consistent with the Fund's investment objective(s) and policies and in the best interests of the Fund and its shareholders, after considering the information in condition 5(b)(i)(1) above, including, without limitation:

(A) Whether the Plan is accomplishing its purpose(s);

(B) The reasonably foreseeable material effects of the Plan on the Fund's long-term total return in relation to the market price and NAV of the Fund's common shares; and

(C) The Fund's current distribution rate, as described in condition 5(b) above, compared with the Fund's average annual taxable income or total return over the 2-year period, as described in condition 5(b), or such longer period as the Board deems appropriate; and

(3) Based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

(ii) The Board will record the information considered by it, including its consideration of the factors listed in condition 5(b)(i)(2) above, and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

6. Public Offerings

The Fund will not make a public offering of the Fund's common shares other than:

(a) A rights offering below NAV to holders of the Fund's common shares;

(b) An offering in connection with a dividend reinvestment plan, merger, consolidation, acquisition, spin-off or reorganization of the Fund; or

(c) An offering other than an offering described in conditions 6(a) and 6(b) above, provided that, with respect to such other offering:

(i) The Fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution record date,[4] expressed as a percentage of NAV as of such date, is no more than 1 percentage point greater than the Fund's average annual total return for the 5-year period ending on such date,[5] and

(ii) The transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the Fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common shares as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the terms of any outstanding preferred shares as such Fund may issue.

7. Amendments to Rule 19b–1

The requested order will expire on the effective date of any amendment to rule 19b–1 that provides relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common shares as frequently as twelve times each year.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Deputy Secretary.

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BILLING CODE 8010–01–P

[4] If the Fund has been in operation fewer than six months, the measured period will begin immediately following the Fund's first public offering.

[5] If the Fund has been in operation fewer than five years, the measured period will begin immediately following the Fund's first public offering.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary of Transportation

Notice of Funding Availability for the Small Business Transportation Resource Center Program

AGENCY: Office of the Secretary of Transportation (OST), Office of Small and Disadvantaged Business Utilization (OSDBU), Department of Transportation (DOT).

ACTION: Notice of Funding Availability.

SUMMARY: The Department of Transportation (DOT), Office of the Secretary (OST), Office of Small and Disadvantaged Business Utilization (OSDBU) announces the opportunity for: (1) Business centered community-based organizations; (2) transportation-related trade associations; (3) colleges and universities; (4) community colleges or; (5) chambers of commerce, registered with the Internal Revenue Service as 501 C(6) or 501 C(3) tax-exempt organizations, to compete for participation in OSDBU's Small Business Transportation Resource Center (SBTRC) program in the Gulf, Great Lakes, and Mid Atlantic Regions. The Southwest, South Atlantic, Northwest, Northeast, Central, Southeast, West Central, and Mid South Atlantic Regions have been previously competed in Fiscal Year 2010.

OSDBU will enter into Cooperative Agreements with these organizations to outreach to the small business community in their designated region and provide financial and technical

assistance, business training programs, such as, business assessment, management training, counseling, technical assistance, marketing and outreach, and the dissemination of information, to encourage and assist small businesses to become better prepared to compete for, obtain, and manage DOT funded transportation-related contracts and subcontracts at the federal, state and local levels. Throughout this notice, the term "small business" will refer to: 8(a), disadvantaged business enterprises (DBE), women owned small business (WOB), HubZone, service disabled veteran owned business (SDVOB), and veteran owned small business (VOSB). Throughout this notice, "transportation-related" is defined as the maintenance, rehabilitation, restructuring, improvement, or revitalization of any of the nation's modes of transportation.

Funding Opportunity Number: USDOT–OST–OSDBU–SBTRC2010–3.

Catalog of Federal Domestic Assistance (CFDA) Number: 20.910 Assistance to small and disadvantaged businesses.

Type of Award: Cooperative Agreement Grant.

Award Ceiling: $186,000.

Award Floor: $143,000.

Program Authority: DOT is authorized under 49 U.S.C. 332(b)(4), (5) & (7) to design and carry out programs to assist small disadvantaged businesses in getting transportation-related contracts and subcontracts; develop support mechanisms, including management and technical services, that will enable small disadvantaged businesses to take advantage of those business opportunities; and to make arrangements to carry out the above purposes.

DATES: Complete Proposals must be electronically submitted to OSDBU via e-mail on or before August 15, 2010, 5 p.m. Eastern Standard Time. Proposals received after the deadline will be considered non-responsive and will not be reviewed. The applicant is advised to turn on request delivery receipt notification for e-mail submissions. DOT plans to give notice of awards for the competed regions on or before August 27, 2010.

ADDRESSES: Applications must be electronically submitted to OSDBU via e-mail at *SBTRC@dot.gov.*

FOR FURTHER INFORMATION: For further information concerning this notice, contact Mr. Arthur D. Jackson, U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization, 1200 New Jersey Avenue, SE., W56–462, Washington, DC 20590. Telephone: 1–800–532–1169. E-mail: *art.jackson@dot.gov.*

SUPPLEMENTARY INFORMATION:

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1. Introduction

1.1 Background

The United States Department of Transportation (DOT) established the Office of Small and Disadvantaged Business Utilization (OSDBU) in accordance with Public Law 95–507, an amendment to the Small Business Act and the Small Business Investment Act of 1958.

The mission of OSDBU at DOT is to ensure that the small and disadvantaged business policies and goals of the Secretary of Transportation are developed and implemented in a fair, efficient and effective manner to serve small and disadvantaged businesses throughout the country. The OSDBU also administers the provisions of Title 49, Section 332, the Minority Resource Center (MRC) which includes the duties of advocacy, outreach and financial services on behalf of small and disadvantaged business and those certified under CFR 49 parts 23 and or 26 as Disadvantaged Business Enterprises (DBE) and the development of programs to encourage, stimulate, promote and assist small businesses to become better prepared to compete for, obtain and manage transportation-related contracts, and subcontracts.

The Regional Partnerships Division of OSDBU, through the SBTRC program allows OSDBU to partner with local organizations to offer a comprehensive delivery system of business training, technical assistance and dissemination of information, targeted towards small business transportation enterprises in their regions.

1.2 Program Description and Goals

The national SBTRC program utilizes Cooperative Agreements with chambers of commerce, trade associations, educational institutions and business-centered community based organizations to establish SBTRCs to provide business training, technical assistance and information to DOT grantees and recipients, prime contractors and subcontractors. In order to be effective and serve their target audience, the SBTRCs must be active in the local transportation community in order to identify and communicate opportunities and provide the required technical assistance. SBTRCs must already have, or demonstrate the ability to establish working relationships with the state and local transportation agencies and technical assistance agencies (*i.e.,* The U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Small Business Development Centers (SBDCs), Procurement Technical Assistance Centers (PTACs), SCORE and State DOT highway supportive services contractors in their region. Utilizing these relationships and their own expertise, the SBTRCs are involved in activities such as information dissemination, small business counseling, and technical assistance with small businesses currently doing business with public and private entities in the transportation industry.

Effective outreach is critical to the success of the SBTRC program. In order for their outreach efforts to be effective, SBTRCs must be familiar with DOT's Operating Administrations, its funding sources, and how funding is awarded to DOT grantees, recipients, contractors, subcontractors, and its financial assistance programs. SBTRCs must outreach to the regional small business transportation community to disseminate information and distribute DOT-published marketing materials, such as STLP Program Information, Bonding Assistance information, SBTRC brochures and literature, Procurement Forecasts; Contracting with DOT booklets, and any other materials or resources that DOT or OSDBU may develop for this purpose. To maximize outreach, the SBTRC may be called upon to participate in regional and national conferences and seminars. Quantities of DOT publications for on-hand inventory and dissemination at conferences and seminars will be available upon request from the OSDBU office.

1.3 Description of Competition

The purpose of this RFP is to solicit proposals from transportation-related trade associations, chambers of commerce, community based entities, colleges and universities, community colleges, and any other qualifying transportation-related non-profit organizations with the desire and ability to partner with OSDBU to establish and maintain an SBTRC.

It is OSDBU's intent to award Cooperative Agreement to one organization in each of the designated geographical area(s), from herein referred to as "region(s)", competed in this solicitation. However, if warranted, OSDBU reserves the option to make multiple awards to selected partners. Proposals submitted for a region must contain a plan to service the entire region, not just the SBTRC state or local geographical area. The region's SBTRC headquarters must be established in the designated state set forth below. Submitted proposals must also contain justification for the establishment of the SBTRC headquarters in a particular city within the designated state.

SBTRC Region(s) Competed in This Solicitation:

Gulf Region: Texas, Headquarters, Louisiana, Oklahoma, New Mexico.

Great Lakes Region: Illinois, Headquarters; Michigan, Indiana, Wisconsin.

Mid-Atlantic Region: Pennsylvania, Headquarters; Ohio, Maryland, District of Columbia, Delaware.

Program requirements and selection criteria, set forth in Sections 2 and 4 respectively, indicate, the OSDBU intends for the SBTRC to be multidimensional; that is, the selected organizations must have the capacity to effectively access and provide supportive services to the broad range of small businesses within the respective geographical region. To this end, the SBTRC must be able to demonstrate that they currently have established relationships within the geographic region with whom they may coordinate and establish effective networks with DOT grant recipients and local/regional technical assistance agencies to maximize resources.

Cooperative agreement awards will be distributed to the region(s) as follows:

Gulf Region—Up to $143,000 per year

Great Lakes Region—Up to $187,000 per year

Mid-Atlantic Region—Up to $183,000 per year

Cooperative agreement awards by region are based upon an analysis of DBEs, Certified Small Businesses, and U.S. DOT transportation dollars in each region.

It is OSDBU's intent to maximize the benefits received by the small business transportation community through the SBTRC. Funding may be utilized to reimburse an on-site Project Director up to 100% of salary plus fringe benefits, an on-site Executive Director up to 50% of salary plus fringe benefits, the cost of designated SBTRC space, other direct costs, and all other general and administrative expenses. Selected SBTRC partners will be expected to provide in-kind administrative support. Submitted proposals must contain an alternative funding source with which the SBTRC will fund administrative support costs. Preference will be given to proposals containing in-kind contributions for the Project Director, the Executive Director, cost of designated SBTRC space, other direct costs, and all other general and administrative expenses.

1.4 Duration of Agreements

Cooperative agreements will be awarded for a period of 12 months (one year) with options for two (2) additional one year periods. OSDBU will notify the SBTRC of our intention to exercise an option year or not to exercise an option year 30 days in advance of expiration of the current year.

1.5 Authority

DOT is authorized under 49 U.S.C. § 332(b)(4), (5) & (7) to design and carry out programs to assist small disadvantaged businesses in getting transportation-related contracts and subcontracts; develop support mechanisms, including management and technical services, that will enable small disadvantaged businesses to take advantage of those business opportunities; and to make arrangements to carry out the above purposes.

1.6 Eligibility Requirements

To be eligible, an organization must be an established, nonprofit, community-based organization, transportation-related trade association, chamber of commerce, college or university, community college, and any other qualifying transportation-related non-profit organization which has the documented experience and capacity necessary to successfully operate and administer a coordinated delivery system that provides access for small businesses to prepare and compete for transportation-related contracts.

In addition, to be eligible, the applicant organization must:

(A) Be an established 501 C(3) or 501 C(6) tax-exempt organization and provide documentation as verification. No application will be accepted without proof of tax-exempt status;

(B) Have at least one year of documented and continuous experience prior to the date of application in providing advocacy, outreach, and technical assistance to small businesses within the region in which proposed services will be provided. Prior performance providing services to the transportation community is preferable, but not required; and

(C) Have an office physically located within the proposed city in the designated headquarters state in the region for which they are submitting the proposal that is readily accessible to the public.

2. Program Requirements

2.1 Recipient Responsibilities

(A) *Assessments, Business Analyses*

1. Conduct an assessment of small businesses in the SBTRC region to determine their training and technical assistance needs, and use information that is available at no cost to structure programs and services that will enable small business enterprises to become better prepared to compete for and receive transportation-related contract awards.

2. Contact other federal, state and local governmental agencies, such as the U.S. Small Business Administration, (SBA), state and local highway departments, state and local airport authorities, and transit authorities to identify relevant and current information that may support the assessment of the regional small business transportation community needs.

(B) *General Management and Technical Training and Assistance*

1. Utilize OSDBU's Intake Form to document each small business assisted by the SBTRC and type of service(s) provided. The completed form must be transmitted electronically to the SBTRC Program Manager on a monthly basis, accompanied by a narrative report on the activities and performance results for that period. The data gathered must be supportive by the narrative and must relate to the numerical data on the monthly reports.

2. Ensure that an array of information is made available for distribution to the small business transportation community that is designed to inform and educate the community on DOT/OSDBU services and opportunities.

3. Coordinate efforts with OSDBU's National Information Clearinghouse in

order to maintain an on-hand inventory of DOT/OSDBU informational materials for general dissemination and for distribution at transportation-related conferences and other events.

(C) *Business Counseling*

1. Collaborate with agencies, such as the SBA, U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Service Corps of Retired Executives (SCORE), Procurement Technical Assistance Centers (PTACs), and Small Business Development Centers (SBDCs), to offer a broad range of counseling services to transportation-related small business enterprises.

2. Create a technical assistance plan that will provide each counseled participant with the knowledge and skills necessary to improve the management of their own small business to expand their transportation-related contracts and subcontracts portfolio.

3. Provide a minimum of 20 hours of individual or group counseling sessions to small businesses per month.

(D) *Planning Committee*

1. Establish a Regional Planning Committee consisting of at least 7 members that includes representatives from the regional community and federal, state, and local agencies. The highway, airport, and transit authorities for the SBTRC's headquarters state must have representation on the planning committee. This committee shall be established no later than 60 days after the execution of the Cooperative agreement between the OSDBU and the selected SBRTC.

2. Provide a forum for the federal, state, and local agencies to disseminate information about upcoming procurements.

3. Hold either monthly or quarterly meetings at a time and place agreed upon by SBTRC and planning committee members.

4. Use the initial session (teleconference call) by the SBTRC explain the mission of the committee and identify roles of the staff and the members of the group.

5. Responsibility for the agenda and direction of the Planning Committee should be handled by the SBTRC Executive Director or his/her designee.

(E) *Outreach Services/Conference Participation*

1. Utilize the services of the Central Contractor Registration (CCR) and other sources to construct a database of regional small businesses that currently or may participate in DOT direct and DOT funded transportation related contracts, and make this database available to OSDBU, upon request.

2. Utilize the database of regional transportation-related small businesses to match opportunities identified through the planning committee forum, FedBiz Opps, a web-based system for posting solicitations and other Federal procurement-related documents on the Internet, and other sources to eligible small businesses and contact the eligible small businesses about those opportunities.

3. Develop a "targeted" database of firms (100–150) that have the capacity and capabilities, and are ready, willing and able to participate in DOT contracts and subcontracts immediately. This control group will receive ample resources from the SBTRC, *i.e.,* access to working capital, bonding assistance, business counseling, management assistance and direct referrals to DOT agencies at the state and local levels, and to prime contractors as effective subcontractor firms.

4. Identify regional, state and local conferences where a significant number of small businesses, with transportation related capabilities, are expected to be in attendance. Maintain and submit a list of those events to the SBTRC Program Manager for review and for posting on the OSDBU Web site on a monthly basis. Clearly identify the events designated for SBTRC participation and include recommendations for OSDBU participation.

5. Conduct outreach and disseminate information to small businesses at regional transportation-related conferences, seminars, and workshops. In the event that the SBTRC is requested to participate in an event, the SBTRC will send DOT materials, the OSDBU banner and other information that is deemed necessary for the event.

6. Submit a conference summary report to OSDBU no later than 5 business days after participation in the event or conference. The conference summary report must summarize activities, contacts, outreach results, and recommendations for continued or discontinued participation in future similar events sponsored by that organization.

7. Upon approval by OSDBU, coordinate efforts with DOT's grantees and recipients at the state and/or local levels to sponsor or cosponsor an OSDBU transportation related conference in the region.

(F) *Loan and Bond Assistance*

1. Work with STLP participating banks and if not available, other lending institutions, to deliver a minimum of five (5) seminars/workshops per year on the STLP financial assistance program to the transportation-related small business community. The seminar/workshop must cover the entire STLP process, from completion of STLP loan applications and preparation of the loan package to graduation from the STLP.

2. Provide direct support, technical support, and advocacy services to potential STLP applicants to increase the probability of STLP loan approval and generate a minimum of 5 approved STLP applications per year.

3. Work with local bond producers/agents in your region to deliver a minimum of five (5) seminars/workshops to DBEs on the DOT ARRA BAP and how the Reimbursable Fee Program works. A minimum of 10 DBE firms per workshop should participate.

4. Provide direct support, technical support, and advocacy services to potential Disadvantaged Business Enterprise American Reinvestment and Recovery Act of 2009 Bonding Assistance Reimbursable Fee Program (DBE ARRA BAP) applicants to increase the probability of reimbursement approval and generate a minimum of 5 approved DBE ARRA BAP applications until September 8, 2010 or until notice of cessation in the event the program is extended.

5. Provide direct support, technical support, and advocacy services to potential Provide direct support, technical support, and advocacy services to potential Bonding Assistance Program (BAP) applicants to increase the probability of guaranteed bond approval and generate a minimum of 5 approved BAP applications per year from inception of the BAP program.

(G) Furnish all labor, facilities and equipment to perform the services described in this announcement

2.2 Office of Small and Disadvantaged Business Utilization (OSDBU) Responsibilities

(A) Provide consultation and technical assistance in planning, implementing and evaluating activities under this announcement.

(B) Provide orientation and training to the applicant organization.

(C) Monitor SBTRC activities, cooperative agreement compliance, and overall SBTRC performance.

(D) Assist SBTRC to develop or strengthen its relationships with federal, state, and local transportation authorities, other technical assistance organizations, and DOT grantees.

(E) Facilitate the exchange and transfer of successful program activities and information among all SBTRC regions.

(F) Provide the SBTRC with DOT/OSDBU materials and other relevant

transportation-related information for dissemination.

(G) Maintain effective communication with the SBTRC and inform them of transportation news and contracting opportunities to share with small businesses in their region.

(H) Provide all required forms to be used by the SBTRC for reporting purposes under the program.

(I) Perform an annual performance evaluation of the SBTRC. Satisfactory performance is a condition of continued participation of the organization as an SBTRC and execution of all option years.

3. Submission of Proposals

3.1 Format for Proposals

Each proposal must be submitted to DOT's OSDBU in the format set forth in the application form attached as Appendix A to this announcement.

3.2 Address; Number of Copies; Deadlines for Submission

Any eligible organization, as defined in Section 1.6 of this announcement, will submit only one proposal per region for consideration by OSDBU. Eligible organizations may submit proposals for multiple regions.

Applications must be double spaced, and printed in a font size not smaller than 12 points. Applications will not exceed 35 single-sided pages, not including any requested attachments.

All pages should be numbered at the top of each page. All documentation, attachments, or other information pertinent to the application must be included in a single submission.

Grant application packages must be submitted electronically to OSDBU at *SBTRC@dot.gov.* The applicant is advised to turn on request delivery receipt notification for e-mail submissions.

Proposals must be received by DOT/OSDBU no later than August 13, 2010 5 p.m., EST.

4. Selection Criteria

4.1 General Criteria

OSDBU will award the cooperative agreement on a best value basis, using the following criteria to rate and rank applications:

Applications will be evaluated using a point system (maximum number of points = 100);

- Approach and strategy (25 points)
- Linkages (25 points)
- Organizational Capability (25 points)
- Staff Capabilities and Experience (15 points)
- Cost Proposal (10 points)

(A) *Approach and Strategy* (25 Points)

The applicant must describe their strategy to achieve the overall mission of the SBTRC as described in this solicitation and service the small business community in their entire geographic regional area. The applicant must also describe how the specific activities outlined in Section 2.1 will be implemented and executed in the organization's regional area. OSDBU will consider the extent to which the proposed objectives are specific, measurable, time-specific, and consistent with OSDBU goals and the applicant organization's overall mission. OSDBU will give priority consideration to applicants that demonstrate innovation and creativity in their approach to assist small businesses to become successful transportation contractors and increase their ability to access DOT contracting opportunities and financial assistance programs. Applicants must also submit the estimated direct costs, other than labor, to execute their proposed strategy. OSDBU will consider the quality of the applicant's plan for conducting program activities and the likelihood that the proposed methods will be successful in achieving proposed objectives at the proposed cost.

(B) *Linkages* (25 Points)

The applicant must describe their established relationships within their geographic region and demonstrate their ability to coordinate and establish effective networks with DOT grant recipients and local/regional technical assistance agencies to maximize resources. OSDBU will consider innovative aspects of the applicant's approach and strategy to build upon their existing relationships and established networks with existing resources in their geographical area. The applicant should describe their strategy to obtain support and collaboration on SBTRC activities from DOT grantees and recipients, transportation prime contractors and subcontractors, the SBA, U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Service Corps of Retired Executives (SCORE), Procurement Technical Assistance Centers (PTACs), Small Business Development Centers (SBDCs), State DOTs, and State highway supportive services contractors. In rating this factor, OSDBU will consider the extent to which the applicant demonstrates ability to be multidimensional. The applicant must demonstrate that they have the ability to access a broad range of supportive services to effectively serve a broad range of transportation-related small businesses within their respective geographical region. Emphasis will also be placed on the extent to which the applicant identifies a clear outreach strategy related to identified needs that can be successfully carried out within the period of this agreement and a plan for involving the Planning Committee in the execution of that strategy.

(C) *Organizational Capability* (25 Points)

The applicant must demonstrate that they have the organizational capability to meet the program requirements set forth in Section 2. The applicant organization must have sufficient resources and past performance experience to successfully outreach to the small business transportation resources in their geographical area and carry out the mission of the SBTRC. In rating this factor, OSDBU will consider the extent to which the applicant's organization has recent, relevant and successful experience in advocating for and addressing the needs of small businesses. Applicants will be given points for demonstrated past transportation-related performance. The applicant must also describe technical and administrative resources it plans to use in achieving proposed objectives. In their description, the applicant must describe their facilities, computer and technical facilities, ability to tap into volunteer staff time, and a plan for sufficient matching alternative financial resources to fund the general and administrative costs of the SBTRC. The applicant must also describe their administrative and financial management staff. OSDBU will place an emphasis on capabilities of the applicant's financial management staff.

(D) *Staff Capability and Experience* (15 Points)

The applicant organization must provide a list of proposed personnel for the project, with salaries, fringe benefit burden factors, educational levels and previous experience clearly delineated. The applicant's project team must be well-qualified, knowledgeable, and able to effectively serve the diverse and broad range of small businesses in their geographical region. The Executive Director and the Project Director shall be deemed key personnel. Detailed resumes must be submitted for all proposed key personnel and outside consultants and subcontractors. Proposed key personnel must have detailed demonstrated experience providing services similar in scope and nature to the proposed effort. The proposed Project Director will serve as the responsible individual for the program. 100% of the Project Director's time must be dedicated to the SBTRC. Both the Executive Director and the

Project Director must be located on-site. In this element, OSDBU will consider the extent to which the applicant's proposed Staffing Plan; (a) clearly meets the education and experience requirements to accomplish the objectives of the cooperative agreement; (b) delineates staff responsibilities and accountability for all work required and; (c) presents a clear and feasible ability to execute the applicant's proposed approach and strategy.

(E) *Cost Proposal* (10 Points)

Applicants must submit the total proposed cost of establishing and administering the SBTRC in the applicant's geographical region for a 12 month period, inclusive of costs funded through alternative matching resources. The applicant's budget must be adequate to support the proposed strategy and costs must be reasonable in relation to project objectives. The portion of the submitted budget funded by OSDBU can not exceed the ceiling outlined in Section 1.3 Description of Competition per fiscal year. Applicants are encouraged to provide in-kind costs and other innovative cost approaches.

4.2 Scoring of Applications

A review panel will score each application based upon the evaluation criteria listed above. Points will be given for each evaluation criteria category, not to exceed the maximum number of points allowed for each category. Proposals which are deemed non-responsive, do not meet the established criteria, or incomplete at the time of submission will be disqualified.

OSDBU will perform a responsibility determination of the prospective winning recipient in each region, which may include a site visit, before awarding the cooperative agreement.

4.3 Conflicts of Interest

Applicants must submit signed statements by key personnel and all organization principals indicating that they, or members of their immediate families, do not have a personal, business or financial interest in any DOT-funded transportation projects, nor any relationships with local or state transportation agencies that may have the appearance of a conflict of interest.

Appendix A

Format for Proposals for the Department of Transportation Office of Small and Disadvantaged Business Utilization's Small Business Transportation Resource Center (SBTRC) Program

Submitted proposals for the DOT, Office of Small and Disadvantaged Business Utilization's Small Business Transportation Resource Center Program must contain the following 12 sections and be organized in the following order:

1. Table of Contents

Identify all parts, sections and attachments of the application.

2. Application Summary

Provide a *summary overview* of the following:

- The applicant's proposed SBTRC region and city and key elements of the plan of action/strategy to achieve the SBTRC objectives.
- The applicant's relevant organizational experience and capabilities.

3. Understanding of the Work

Provide a narrative which contains specific project information as follows:

- The applicant will describe its understanding of the OSDBU's SBTRC program mission and the role of the applicant's proposed SBTRC in advancing the program goals.
- The applicant will describe specific outreach needs of transportation-related small businesses in the applicant's region and how the SBTRC will address the identified needs.

4. Approach and Strategy

- Describe the applicant's plan of action/strategy for conducting the program in terms of the tasks to be performed.
- Describe the specific services or activities to be performed and how these services/activities will be implemented.
- Describe innovative and creative approaches to assist small businesses to become successful transportation contractors and increase their ability to access DOT contracting opportunities and financial assistance programs.
- Estimated direct costs, other than labor, to execute the proposed strategy.

5. Linkages

- Describe established relationships within the geographic region and demonstrate the ability to coordinate and establish effective networks with DOT grant recipients and local/regional technical assistance agencies.
- Describe the strategy to obtain support and collaboration on SBTRC activities from DOT grantees and recipients, transportation prime contractors and subcontractors, the SBA, U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Service Corps of Retired Executives (SCORE), Procurement Technical Assistance Centers (PTACs), Small Business Development Centers (SBDCs), State DOTs, and State highway supportive services contractors.
- Describe the outreach strategy related to the identified needs that can be successfully carried out within the period of this agreement and a plan for involving the Planning Committee in the execution of that strategy.

6. Organizational Capability

- Describe recent and relevant past successful performance in addressing the needs of small businesses, particularly with respect to transportation-related small businesses.
- Describe internal technical, financial management, and administrative resources.
- Propose a plan for sufficient matching alternative financial resources to fund the general and administrative costs of the SBTRC.

7. Staff Capability and Experience

- List proposed key personnel, their salaries and proposed fringe benefit factors.
- Describe the education, qualifications and relevant experience of key personnel. Attach detailed resumes.
- Proposed staffing plan. Describe how personnel are to be organized for the program and how they will be used to accomplish program objectives. Outline staff responsibilities, accountability and a schedule for conducting program tasks.

8. Cost Proposal

- Outline the total proposed cost of establishing and administering the SBTRC in the applicant's geographical region for a 12 month period, inclusive of costs funded through alternative matching resources. Clearly identify the portion of the costs funded by OSDBU.
- Provide a brief narrative linking the cost proposal to the proposed strategy.

9. Proof of Tax Exempt Status

10. Assurances Signature Form

Complete Standard Form 424B ASSURANCES–NON–CONSTRUCTION PROGRAMS identified as Attachment 1. SF424B may be downloaded from *http://www.grants.gov/techlib/SF424B–V1.1.pdf.*

11. Certification Signature Forms

Complete form DOTF2307–1 DRUG–FREE WORKPLACE ACT CERTIFICATION FOR A GRANTEE OTHER THAN AN INDIVIDUAL and Form DOTF2308–1 CERTIFICATION REGARDING LOBBYING FOR CONTRACTS, GRANTS, LOANS, AND COOPERATIVE AGREEMENTS identified as Attachment 2. The forms may be downloaded from *http://www.osdbu.dot.gov/financial/docs/Cert Drug-Free DOT F 2307-1.pdf* and *http://www.osdbu.dot.gov/financial/docs/Cert Lobbying DOT F 2308-1.pdf.*

12. Signed Conflict of Interest Statements

The statements must say that they, or members of their immediate families, do not have a personal, business or financial interest in any DOT-funded transportation projects, nor any relationships with local or state transportation agencies that may have the appearance of a conflict of interest.

13. Standard Form 424

Complete Standard Form 424 Application for Federal Assistance identified as Attachment 3. SF424 can be downloaded from *http://www.grants.gov/techlib/SF424-V2.0.pdf.*

PLEASE BE SURE THAT ALL FORMS HAVE BEEN SIGNED BY AN AUTHORIZED OFFICIAL WHO CAN LEGALLY REPRESENT THE ORGANIZATION.

Issued in Washington, DC on July 13, 2010.

Brandon Neal,

Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary, U.S. Department of Transportation.

[FR Doc. 2010–17633 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–31]

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.

DATE: Comments on this petition must identify the petition docket number involved and must be received on or before August 9, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2008–0348 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: Kenna Sinclair, ANM–113, (425) 227–1556, Federal Aviation Administration, 1601 Lind Avenue, SW, Renton, WA 98057–3356, or Katherine Haley, (202) 493–5708, Office of Rulemaking (ARM–203), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on July 15, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2008–0348.

Petitioner: The Boeing Company.

Section of 14 CFR Affected: Sections 25.783(g), 25.8057(a)(1), 25.809(a) and 25.813(a).

14 CFR Part 25.

Description of Relief Sought: Boeing requests an amendment to an existing exemption to allow the main deck entry door of the Model 747–8F airplane to be used for access to the upper deck supernumerary seating area.

[FR Doc. 2010–17638 Filed 7–19–10; 8:45 am]

BILLING CODE 4910–13–P

Federal Register

Tuesday,
July 20, 2010

Part II

Department of Education

34 CFR Parts 600, 668, and 682

Foreign Institutions—Federal Student Aid Programs; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600, 668, and 682

RIN 1840–AD03

[Docket ID ED–2010–OPE–0009]

Foreign Institutions—Federal Student Aid Programs

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to implement provisions related to the eligibility of foreign institutions for participation in the Federal student aid programs that were added to the Higher Education Act of 1965, as amended (HEA), by the Higher Education Opportunity Act of 2008 (HEOA), as well as other provisions related to the eligibility of a foreign institution by amending the regulations for Institutional Eligibility Under the Higher Education Act of 1965, the Student Assistance General Provisions, and the Federal Family Education Loan (FFEL) Program.

DATES: We must receive your comments on or before August 19, 2010.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for finding a regulation, submitting a comment, finding a comment, and signing up for e-mail alerts, is available on the site under "How To Use Regulations.gov" in the Help section.
- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Wendy Macias, U.S. Department of Education, 1990 K Street, NW., room 8017, Washington, DC 20006–8502.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet

FOR FURTHER INFORMATION CONTACT: For general information or information related to nonprofit status for foreign institutions, public foreign institutions and financial responsibility, eligibility of training programs at foreign institutions, and foreign graduate medical schools, Wendy Macias. *Telephone:* (202) 502–7526 or via the Internet at: *Wendy.Macias@ed.gov.*

For information related to audited financial statements and compliance audits, Anthony Gargano. *Telephone:* (202) 502–7519, or via the *Internet at: Anthony.Gargano@ed.gov.*

For information related to the definition of a foreign institution, Gail McLarnon. *Telephone:* (202) 219–7048, or via the *Internet at: Gail.McLarnon@ed.gov.*

For information related to single legal authorization for groups of foreign institutions, foreign veterinary schools, foreign nursing schools and certification of foreign institutions, Brian Smith. *Telephone:* (202) 502–7551, or via the Internet at *Brian.Smith@ed.gov.*

If you use a telecommunications device for the deaf, call the Federal Relay Service, 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 one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

As outlined in the section of this notice entitled *Negotiated Rulemaking,* significant public participation, through three public hearings and three negotiated rulemaking sessions, has occurred in developing this notice of proposed rulemaking (NPRM). In accordance with the requirements of the Administrative Procedure Act, we invite you to submit comments regarding these proposed regulations on or before August 19, 2010. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866, including its overall requirements to assess both the costs and the benefits of the proposed regulations and feasible alternatives, and to make a reasoned determination that the benefits of these proposed regulations justify their costs. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the programs.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 8031, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT**.

Negotiated Rulemaking

Section 492 of the HEA requires the Secretary, before publishing certain proposed regulations for programs authorized by Title IV of the HEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from the public, including individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary in many cases must subject the proposed regulations to a negotiated rulemaking process. Proposed regulations that the Department publishes on which the negotiators reached consensus must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process can be found at: *http://www.ed.gov/policy/highered/leg/hea08/index.html.*

On May 26, 2009, the Department published a notice in the **Federal Register** (74 FR 24728) announcing our intent to establish two negotiated rulemaking committees to prepare proposed regulations. One committee would focus on issues related to

program integrity (Team I—Program Integrity Issues). A second committee would focus on issues related to the eligibility of foreign institutions for participation in the Title IV, HEA programs (Team II—Foreign School Issues). On September 9, 2009, the Department published a second notice in the **Federal Register** (74 FR 46399) listing the topics the committees were likely to address and requested nominations of individuals for membership on the committees who could represent the interests of key stakeholder constituencies on each committee.

Team II—Foreign School Issues (Team II) met to develop proposed regulations during the months of November 2009, January 2010, and February 2010.

The Department developed a list of proposed regulatory provisions based on the provisions contained in the HEOA and from advice and recommendations submitted by individuals and organizations as testimony to the Department in a series of three public hearings held on—

- June 15–16, 2009, at the Community College of Denver in Denver, Colorado;
- June 18–19, 2009, at the University of Arkansas in Little Rock, Arkansas;
- June 22–23, 2009, at the Community College of Philadelphia in Pennsylvania.

In addition, the Department accepted written comments on possible regulatory provisions submitted directly to the Department by interested parties and organizations. A summary of all comments received orally and in writing is posted as background material in the docket for this NPRM. Transcripts of the regional meetings can be accessed at *http://www.ed.gov/policy/highered/leg/hea08/index.html.*

Staff within the Department also identified issues for discussion and negotiation.

At its first meeting, Team II reached agreement on its protocols. The agenda included the issues identified for the Committee's consideration.

Team II included the following members:

- Harrison Wadsworth, representing the International Education Council.
- Yvonne Oberhollenzer and John Hayton (alternate), Australian Education International North America, representing the Embassy of Australia, the Embassy of New Zealand, the British Council and the German Academic Exchange Service.
- Judy Stymest, McGill University, and Alexander Leipziger (alternate), Canadian Embassy, representing the Canadian Association of Student Financial Aid Administrators.
- Warren Ross and Jerry Thornton (alternate), representing the International University of Nursing and the University of Medicine and Health Sciences.
- Cynthia Holden, American University of the Caribbean, and James McIntyre (alternate), McIntyre Law Firm, PLLC, representing American University of the Caribbean.
- Nancy Perri, Ross University School of Medicine, and William Clohan (alternate), DeVry Inc., representing Ross University School of Medicine.
- Steven Rodger, and Patrick Donnellan (alternate) representing R3 Education Inc.
- Ronald Blumenthal and Rebecca Campoverde (alternate) representing Kaplan, Inc.
- Charles Modica, representing St. George's University.
- Betsy Mayotte, American Student Assistance, and Jacqueline Fairbairn (alternate), Great Lakes Higher Education Guaranty Corporation, representing guaranty agencies.
- David Bergeron and Gail McLarnon (alternate), U.S. Department of Education, representing the Federal Government.

The Committee's protocols provided that the Committee would operate by consensus, meaning there must be no dissent by any member. Under the protocols, if the Committee reaches consensus on all issues, the Department will use the consensus-based language in the proposed regulations and Committee members and the organizations whom they represent will refrain from commenting negatively on the package, except as provided for in the agreed upon protocols.

During the meetings, Team II reviewed and discussed drafts of proposed regulations. At the final meeting in February 2010, Team II reached consensus on the proposed regulations in this document.

More information on the work of Team II can be found at *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/negreg-summerfall.html.*

Summary of Proposed Changes

These proposed regulations would implement provisions related to the eligibility of foreign institutions to participate in the Title IV, HEA programs including—

- Establishing submission requirements for compliance audits and audited financial statements specific to foreign institutions;
- Clarifying and revising the definition of a foreign institution;
- Establishing a definition of nonprofit status specific to foreign institutions;
- Establishing a financial responsibility standard for foreign public institutions that is comparable to the financial responsibility standard for domestic public institutions;
- Permitting a single legal authorization for groups of foreign institutions under the purview of a single government entity;
- Establishing eligibility of training programs at foreign institutions;
- Establishing institutional eligibility criteria specific to foreign graduate medical schools, foreign veterinary schools, and foreign nursing schools; and
- Revising the maximum certification period for some foreign institutions.

Significant Proposed Regulations

We group major issues according to subject, with appropriate sections of the proposed regulations referenced in parentheses. We discuss other substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

Until amended effective July 1, 2010, section 102(a)(1)(C) of the HEA provided that foreign institutions may participate in the Title IV, HEA programs "only for purposes of part B of Title IV." Part B of Title IV contains the statutory requirements for the FFEL Program. With the enactment of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (HCERA) on March 30, 2010, as of July 1, 2010, there will be no new originations of FFEL Program loans. All new originations with a first disbursement on or after July 1, 2010, will be made via the William D. Ford Federal Direct Loan (Direct Loan) Program, including loans for students attending foreign institutions. At the time these proposed regulations were negotiated, it was unclear whether the proposed legislation that would end the FFEL Program would be enacted. As a result, these proposed regulations reference participation in the FFEL Program, except as noted. When the Department publishes final regulations to implement these proposed regulations, it will correct those references in the regulations resulting from these proposed regulations to indicate participation in the Direct Loan Program, rather than the FFEL Program. Any substantive or technical changes to the Title IV, HEA program regulations

resulting from the HCERA will be addressed through future rulemaking efforts. For more information about the transition of foreign institutions to the Direct Loan Program, contact the Office of Federal Student Aid's Foreign Schools Team at *fsa.foreign.schools@ed.gov* or (202) 377–3168.

Part 600 Institutional Eligibility Under the Higher Education Act of 1965, as Amended.

Nonprofit Status for Foreign Institutions (§ 600.2)

Statute: Section 102(a)(2)(A) of the HEA directs the Secretary to establish criteria by regulation for the determination that foreign institutions are comparable to an institution of higher education as defined in section 101 of the HEA—which specifies that an institution of higher education must be a public or other nonprofit institution—except that foreign graduate medical schools, foreign veterinary schools, and foreign nursing schools may be for-profit. Sections 101(a)(4) and 101(b)(2) of the HEA identify nonprofit institutions as one type of institution that may be an institution of higher education and, therefore, may be eligible to apply to participate in the Title IV, HEA programs.

Current Regulations: Section 600.54 provides that, to participate in the Title IV, HEA programs, a foreign institution must be a public or private nonprofit educational institution. Foreign graduate medical schools, foreign veterinary schools, and foreign nursing schools are excepted from this requirement by section 102(a)(2)(A) of the HEA. Section 600.2 defines a nonprofit institution as an institution that—

- Is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;
- Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and
- Is determined by the U.S. Internal Revenue Service (IRS) to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Proposed Regulations: Under proposed § 600.2, a new paragraph (2) of the definition of a nonprofit institution would provide that if a recognized tax authority of a foreign institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for Title IV, HEA purposes, the Secretary would automatically accept that tax authority's determination of nonprofit educational status for any institution located in that country. If a recognized tax authority of the institution's home country is not recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for Title IV, HEA program purposes, a foreign institution would have to demonstrate to the satisfaction of the Secretary that it is a nonprofit educational institution. The proposed regulations would also make clear that a nonprofit foreign institution may not be owned by a for profit entity, directly or indirectly. A foreign institution that did not meet this definition of a nonprofit foreign institution would not be eligible to participate in the Title IV, HEA programs unless it was a medical, veterinary, or nursing school.

Reasons: As foreign institutions must be nonprofit institutions to participate in the Title IV, HEA programs, unless they are medical, veterinary, or nursing schools, the Department believes it is necessary to delineate in regulations the requirements for demonstrating nonprofit status for foreign institutions. Some non-Federal negotiators originally suggested that the Department should always defer to any determination by a foreign country that an institution is nonprofit. The Department pointed out that a domestic institution must be determined by the U.S. IRS to be a nonprofit organization in order to be eligible as a nonprofit institution for participation in the Title IV, HEA programs. The Department also noted that certain countries may not have standards for the determination of nonprofit status that are comparable to those used in the United States, and may not ensure that the institution's net earnings do not benefit any private shareholder or individual. Therefore, to make the proposed regulations as comparable as possible to those applicable to domestic institutions, the Department proposed, and the Committee agreed, that a determination that an institution is nonprofit by an entity in the institution's foreign country would qualify an institution as nonprofit only if the determination is made by a recognized tax authority of the country, and the Secretary has recognized that tax authority as one that can make a determination using criteria that are similar to those used by the IRS. In response to non-Federal negotiators pointing out that some countries may have more than one recognized entity for the purpose of making determinations of the nonprofit status of its institutions, the Department made clear during the negotiations that under the language proposed, the Secretary may recognize more than one tax authority in a country. Some non-Federal negotiators suggested that the Department allow a determination of nonprofit status to be made by an entity other than a recognized tax authority of the country. The Department noted that, as the proposed language was written, information submitted by such entities would be taken into account by the Department; however, this would be done as part of an individual determination of the eligibility of an institution. The Department believes that the only entities it should recognize across the board for making determinations of nonprofit status are those that are responsible for administering the country's tax laws.

Definition of a Foreign Institution (§§ 600.51, 600.52, 600.54, 682.200 and 682.611)

Statute: Section 102(a)(1)(C) of the HEA provides that an "institution of higher education," only for the purposes of part B of Title IV, includes an institution outside the United States that is comparable to an institution of higher education as that term is defined in section 101 of the HEA and is an institution that has been approved by the Secretary. Section 102(a)(2)(A) of the HEA requires the Secretary to establish regulatory criteria for the approval of such institutions and for the determination that they are comparable.

Current Regulations: Subpart E of 34 CFR part 600 (§§ 600.51 through 600.57) contains the eligibility requirements that a foreign institution must meet to participate in the FFEL Program. Current § 600.51 explains the purpose and scope of subpart E and provides that a foreign institution is eligible to participate in the FFEL Program if it is comparable to an eligible institution of higher education located in the United States and has been approved by the Secretary. Implementing a statutory provision in section 481(b)(4) of the HEA, current § 600.51 also provides that a program offered by a foreign school through any use of a telecommunications or correspondence course or through a direct assessment program is not an eligible program.

Current § 600.52 contains the definitions associated with subpart E and defines *foreign institution* as an institution that is not located in a State. *State* is defined in § 600.2 as a State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Commonwealth of the

Northern Mariana Islands, the Republic of the Marshall Islands, the Federal States of Micronesia, and the Republic of Palau.

Current § 600.54 contains the criteria the Secretary uses to determine whether a foreign institution is eligible to apply to participate in the FFEL Program. A public or private nonprofit foreign institution may apply to participate in the FFEL Program if the institution—

- Admits as regular students only those students with a secondary school completion credential or its recognized equivalent;
- Is legally authorized by an appropriate authority to provide an eligible program beyond the secondary school level in the country in which the institution is located; and
- Provides eligible programs for which the institution is legally authorized to award the equivalent of an associate, baccalaureate, graduate, or professional degree awarded in the United States; provides an eligible program that is at least a two-academic year program acceptable for full credit toward the equivalent of a baccalaureate degree awarded in the United States; or, provides an eligible program that is equivalent to at least a one-academic year training program in the United States that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation.

Currently, §§ 668.2 and 682.200 do not contain a reference to the definition of *foreign institution* in the list of definitions set forth in 34 CFR part 600.

Lastly, current § 682.611 provides that a foreign school is required to comply with the provisions of part 682 unless the regulations or other official Department of Education publications or documents state otherwise.

Proposed Regulations: The proposed regulations would remove and reserve § 682.611, remove the definition of *foreign school* from § 682.200(b)(1), and add references to §§ 668.2(a)(2) and 682.200(a)(2) specifying that the definition of *foreign institution* is contained in regulations for Institutional Eligibility under the HEA, as amended, 34 CFR part 600. These proposed revisions would consolidate the requirements and definitions related to the eligibility of foreign institutions to apply for Title IV, HEA program participation in subpart E of 34 CFR part 600. The proposed regulations would revise § 600.51(c) to incorporate the provisions of removed § 682.611, *i.e.,* that a foreign institution must comply with all requirements for eligible and participating institutions except to the extent those provisions are inconsistent with the HEA, 34 CFR part 600, or other regulatory provisions specific to foreign institutions. Proposed § 600.51(c) would also exempt foreign institutions from requirements that the Secretary identifies through a notice in the **Federal Register**.

The proposed regulations would amend § 600.52 to include a detailed definition of *foreign institution.* Under the definition proposed, *foreign institution* would mean, for the purposes of students who receive Title IV, HEA program aid, an institution that—

- Is not located in a State;
- Except with respect to clinical training offered at foreign graduate medical, veterinary, and nursing schools, has no U.S. locations;
- Has no written arrangements, within the meaning of § 668.5, with institutions or organizations located in the U.S. for students at foreign institutions to take a portion of the program from institutions located in the U.S.;
- Does not permit students to enroll in any course offered by the foreign institution in the U.S. except for independent research under very limited circumstances;
- Is legally authorized by the education ministry, council, or equivalent agency of its home country to provide an education program beyond the secondary level;
- Awards degrees, certificates, or other recognized educational credentials in accordance with § 600.54(d) that are officially recognized by the institution's home country; and
- For any program designed to prepare the student for employment in a recognized occupation, provides a credential that satisfies the educational requirements in the institution's home country for entry into that occupation, including licensure; and satisfies the educational requirements for entry into that occupation in the U.S., including licensure.

The proposed definition of *foreign institution* would also require that if an educational enterprise enrolls students both within a State and outside a State, and the number of students who would be eligible to receive Title IV, HEA program funds attending locations outside a State is at least twice the number of students enrolled within a State, the locations outside a State must apply to participate as one or more foreign institutions and must meet all requirements of the definition of *foreign institution* and other requirements of 34 CFR part 600. Under the proposed regulations, *educational enterprise* would mean an enterprise consisting of two or more locations offering all or part of an educational program that are directly or indirectly under common control.

The proposed regulations would amend the threshold criteria in § 600.54 for determining whether a foreign institution is comparable to a domestic "institution of higher education" as that term is defined in the HEA, and eligible for Title IV, HEA program participation. Proposed § 600.54(a) states that to be eligible, a foreign institution that is not a freestanding foreign graduate medical, veterinary, or nursing school must be a public or private nonprofit educational institution (*i.e.,* a for-profit foreign institution may participate only if it is a freestanding foreign graduate medical, veterinary, or nursing school). Proposed § 600.54(c)(1) would prohibit an eligible foreign institution from entering into a written arrangement under which an ineligible institution or organization provides any portion of one or more of the eligible foreign institution's programs. Written arrangements would not include affiliation agreements for the provision of clinical training for foreign graduate medical, veterinary, and nursing schools under this proposed change. Proposed § 600.54(c)(2) would require that an additional location of a foreign institution must separately meet the proposed definition of *foreign institution* in § 600.52 if it is located outside of the country in which the main campus is located, except for clinical locations of foreign graduate medical, veterinary, and nursing schools, as provided for in § 600.55(h)(1), § 600.56(b), § 600.57(a)(2), § 600.55(h)(3), and except for locations at which independent research is conducted as part of a doctoral program as provided for in the definition of *foreign institution* in § 600.52. Under proposed § 600.52(c)(2), an additional location of a foreign institution would also have to meet separately the definition of *foreign institution,* even if that location is within the same country as the main campus, if it is not covered by the legal authorization of the main campus. Lastly, proposed § 600.54(e) would prohibit any portion of an eligible for-profit foreign graduate medical or veterinary program from being offered at what would be an undergraduate level in the U.S. and would deny Title IV, HEA program eligibility to any joint degree programs offered at for-profit foreign graduate medical, veterinary, or nursing schools.

Reasons: Proposed §§ 600.52 and 600.54, revising and adding detail to the

definition of *foreign institution,* are necessary to ensure that a foreign institution is comparable to institutions in the United States, in accordance with section 102(a)(1)(C) of the HEA, before the foreign institution is allowed to apply for Title IV, HEA program participation. The Department is concerned that a foreign institution that is not comparable to a domestic institution, especially in terms of the quality of its educational programs, may misuse Federal funds to the detriment of its students who may have to borrow heavily in order to attend the foreign institution. The proposed regulations also more fully implement the scheme of the HEA, which distinguishes between foreign and domestic institutions and includes provisions unique to each. For example, these regulations would prevent a domestic institution from claiming to be a foreign institution by virtue of the fact that it has established an offshore location, thereby avoiding the requirements applied to domestic institutions such as recognized accreditation, but that sends its students to the United States for the majority of the required coursework.

During the first round of negotiated rulemaking, the Federal negotiator explained the need for a more detailed definition of *foreign institution* and sought comments and feedback from the non-Federal negotiators. Several negotiators urged the Department to define *foreign institution* in a way that ensures quality control through high academic standards and avoids abuse of the Title IV, HEA programs. The non-Federal negotiators suggested requiring that foreign institutions be subject to accreditation by accreditors recognized by the Department as a means of ensuring comparability with domestic institutions. The Federal negotiator explained that the Department does not recognize U.S. accreditors for accreditation of institutions outside the United States. In light of this fact, the non-Federal negotiators suggested a requirement that foreign institutions be "legally authorized" by an appropriate authority in the country in which the institution is located, such as a Ministry of Education or other governmental agency. Other non-Federal negotiators also urged the Department to be flexible in this area because such authority could reside in different branches of government depending on the country. Recognizing that there might be pressure on some foreign governments to set minimal standards because educational institutions are an important part of their economy, several non-Federal negotiators suggested that the Department require foreign countries to recognize the degrees and licenses offered by a foreign institution.

In the second round of negotiations, the Department responded with draft language that addressed many of the non-Federal negotiators' suggestions from the first round of discussion. However, the Department's inclusion of provisions prohibiting foreign institutions from entering into written arrangements with institutions located in the United States and preventing foreign institution students from engaging in courses, research, work, and other pursuits within the United States drew objections from the non-Federal negotiators. The Federal negotiator explained that these provisions addressed abuses witnessed by the Department whereby an institution sets up an offshore campus to claim foreign institution status and thus avoids domestic requirements even though the institution is, for all intents and purposes, a domestic institution. The non-Federal negotiators felt the language prohibiting students from engaging in pursuits within the U.S. was too broad and urged the Department to make exceptions for research conducted in the United States by PhD students. The non-Federal negotiators also requested that the Department clarify what it meant by "written arrangements" in the provision that would prohibit foreign institutions from having written arrangements with U.S. institutions or organizations, noting that many foreign institutions have multiple types of written arrangements with institutions in the U.S.

Based on comments received from the non-Federal negotiators at the second round of negotiated rulemaking, the Department returned to the last round with language that added a cross-reference to § 668.5 in draft paragraph (1)(iii) of the definition of *foreign institution* to clarify the meaning of *written arrangements.* The proposed language also added an exception in draft paragraph (1)(iv) of the definition of *foreign institution* for independent research done under certain circumstances during the dissertation phase of a doctoral program from the general prohibition on enrolling students in courses offered by a foreign institution in the United States. In draft paragraph (2) of the definition of *foreign institution,* the Department sought to further distinguish between foreign and domestic institutions by prohibiting foreign locations of an educational enterprise from being considered additional locations of a domestic location of the educational enterprise if the enterprise has at least twice as many students enrolled in foreign locations as those enrolled in domestic locations. This provision would prevent a predominantly foreign educational enterprise from establishing a minor presence within the United States for the purpose of circumventing the statutory provision limiting foreign institution participation to the Direct Loan program (or, before July 1, 2010, to the FFEL program), so as to provide other Title IV grant, loan, and work-study funds to students at what are really foreign institutions. In addition, in response to requests by non-Federal negotiators, the Department added clarity to the paragraph by describing an "educational enterprise" as an entity that consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership. Locations are considered to be "indirectly" under common ownership if, at any level, the locations are owned and controlled by the same parties, or related parties, within the meaning of § 600.31. In draft § 600.54(c)(1), the Department clarified that written arrangements do not include affiliation agreements for the provision of clinical training.

The non-Federal negotiators were comfortable with the majority of the Department's proposed language but several non-Federal negotiators continued to raise concerns about the proposed language prohibiting U.S. locations of foreign institutions and written arrangements with institutions located in the United States. The Federal negotiator stated that foreign institutions are free to establish U.S. locations and have written arrangements with institutions located in the United States, but that such locations and institutions would need to be separately certified and meet the requirements applicable to domestic institutions in order for U.S. students attending them to receive Title IV, HEA program funds. In this regard, the Department does not want a foreign institution to send its U.S. students to a U.S. location of a foreign institution, or to a U.S. institution with which it has an agreement for their training, because students enrolled in a foreign institution are only eligible for Direct Loan program (or, before July 1, 2010, FFEL program) loans. Instead the Department wants U.S. students attending postsecondary institutions in the United States to be eligible for the full range of Title IV, HEA program funds available to domestic institutions. The Federal negotiator noted that it would be acceptable for a U.S. student to transfer officially from a foreign institution to an

institution in the U.S. that would be separately certified as a domestic institution. The non-Federal negotiators asked the Department to clarify that the proposed definition of *foreign institution* would apply only for the purposes of students who receive Title IV, HEA program funds. For example, a foreign institution would not be prohibited from having U.S. locations, but the locations would not be recognized as part of the institution for Title IV purposes, so no student attending the location, or enrolled in a program designed to be offered there in whole or in part, would be eligible to receive Title IV, HEA program funds. Similarly, a foreign institution may also maintain agreements with a U.S. institution or organization so that students of the foreign institution may continue to engage in exchange opportunities offered by U.S. institutions, but the agreement would not be recognized for Title IV, HEA purposes, so no student attending the U.S. institution, or enrolled in a program designed to be offered there in whole or in part, would be eligible to receive Title IV, HEA program funds. The Department noted that the Title IV, HEA program regulations are always applicable for Title IV, HEA program purposes only, but agreed to add the clarification.

Certification of Foreign Institutions (§§ 600.52 and 668.13)

Statute: Section 102(a)(5) of the HEA requires the Secretary to certify an institution's qualifications as an institution of higher education in accordance with subpart 3, part H of Title IV. Under section 498(g)(1) of the HEA, the Secretary is authorized to certify an institution's eligibility for purposes of participating in the Title IV, HEA programs for a period of up to six years.

Current Regulations: Section 600.52 of the Institutional Eligibility regulations defines *foreign graduate medical school* as a foreign institution that is listed in the most current edition of the World Directory of Medical Schools. *Foreign nursing school* and *foreign veterinary school* are not currently defined in § 600.52.

Section 668.13(b)(1) of the General Provisions regulations specifies that an institution's period of participation expires six years after the date of certification, except that the Secretary may specify a shorter period.

Proposed Regulations: The proposed regulations would modify the definition of *foreign graduate medical school* and add definitions for the terms *foreign nursing school* and *foreign veterinary school* in § 600.52. In addition, the proposed regulations would modify the regulations governing certification procedures in § 668.13.

The proposed definition of *foreign graduate medical school* in § 600.52 would be modified by removing the reference to the World Directory of Medical Schools (see the discussion under *Foreign Graduate Medical Schools* below) and replacing it with language specifying that a *foreign graduate medical school* is a foreign institution or component of a foreign institution that has, as its sole mission, providing an educational program that leads to a degree of medical doctor, doctor of osteopathy, or its equivalent. The proposed definition would clarify that references to a foreign graduate medical school as "freestanding" pertain solely to a school that qualifies by itself as a foreign institution, and not to a school that is a component of a larger university that qualifies as a foreign institution. Similar language is included in the proposed definitions for the terms *foreign nursing school* and *foreign veterinary school.*

The proposed regulations would amend § 668.13(b)(1) to specify that the period of participation for a private, for-profit foreign institution expires three years after the date the institution is certified by the Secretary, rather than the current six years.

Reasons: The National Committee on Foreign Medical Education and Accreditation (NCFMEA) recommended that a foreign graduate medical school that is a component of a larger foreign institution be certified as a separate institution of higher education from the larger institution (Recommendation 14(a)). The Department initially proposed implementing this recommendation and applying it to foreign nursing and veterinary schools as well. Under that proposal, a graduate medical, nursing, or veterinary school that is part of a larger institution would be given its own OPEID number. Cohort default rates for the graduate medical, nursing, or veterinary school would be calculated independently of the cohort default rate for the larger foreign institution.

After discussions with the non-Federal negotiators regarding the administrative burdens that separate certification of non-freestanding graduate medical, veterinary, and nursing schools would entail, the Department decided to withdraw this proposal. Instead, the Department will track such graduate medical, veterinary, and nursing schools separately from the larger institution. To facilitate this, the Department proposed regulations that clarify the distinction between "freestanding" graduate medical, veterinary, and nursing schools and graduate medical, veterinary, and nursing schools that are components of a larger foreign institution.

The NCFMEA also recommended that all foreign graduate medical schools be certified for a period of no more than three years (Recommendation 14(b)). The Department initially proposed reducing the certification period for all foreign institutions from six years to three years to provide the Department with more oversight over foreign institutions. Non-Federal negotiators noted that the Department's proposal to decrease the certification period would be administratively burdensome for institutions. Some non-Federal negotiators felt that the increased administrative burden might lead foreign institutions that enroll small numbers of Title IV borrowers to reconsider participating in the Title IV, HEA programs. Non-Federal negotiators also noted that for-profit foreign institutions might have difficulty raising capital based on three-year certifications rather than six-year certifications.

Non-Federal negotiators also contended that the reduction in the certification period would not provide much benefit to the Department. They felt that the relevant information for an institution would not be likely to change significantly in three years. The non-Federal negotiators also pointed out that this change would increase the workload for the Department staff who review and approve institutional eligibility applications for foreign institutions.

The Department continues to believe that reducing the certification period will give the Department better oversight over foreign institutions, particularly over institutions that enroll large numbers of Title IV borrowers. However, the Department acknowledges that decreasing the certification period from six to three years would be unnecessary for certain types of institutions. Therefore, the Department revised its proposal by limiting the three-year certification period to private, for-profit medical, veterinary, and nursing schools. These institutions, among all participating foreign institutions, continue to receive by far the largest amounts of Title IV, HEA program funds. Under the revised proposal, public and nonprofit institutions would continue to be recertified every six years.

Single Legal Authorization for Groups of Foreign Institutions (§ 600.54)

Statute: Section 101(a)(2) of the HEA requires a domestic institution of higher education to be legally authorized by the State in which it is located to provide a program of postsecondary education. Section 102(a)(2)(A) of the HEA requires the Secretary, through regulation, to develop eligibility criteria for foreign institutions of higher education that are comparable to the eligibility criteria for U.S. institutions of higher education. Section 498(a) and (b) of the HEA require the Secretary to determine whether an institution is legally authorized and to prepare and prescribe an application form for purposes of determining that the requirements of eligibility, accreditation, financial responsibility, and administrative capability are met.

Current Regulations: Section 600.54(b) of the current regulations requires a foreign institution to be legally authorized by an appropriate authority to provide postsecondary education in the country where the institution is located.

Proposed Regulations: Proposed § 600.54(f) would provide three different methods for a foreign institution to prove that it is legally authorized to provide postsecondary education in the country where the institution is located. The documentation from a foreign country's education ministry, council, or equivalent agency may either be—

- A single legal authorization that covers all eligible foreign institutions in the country;
- A single legal authorization that covers all eligible foreign institutions in a jurisdiction within the country; or
- Separate legal authorizations for each eligible foreign institution in the country.

Reasons: To ease administrative burden for foreign institutions, the Department sought to determine if compliance with any of the foreign institution eligibility criteria could be demonstrated at a nationwide level, for all eligible institutions within a country, rather than at the individual institution level. After discussions with the non-Federal negotiators and our own internal review of the Title IV institutional eligibility criteria, the Department determined that the requirement for proof of legal authorization to provide postsecondary education could be provided this way.

Non-Federal negotiators were generally supportive of the Department's proposal. However, they did raise some concerns. Some non-Federal negotiators felt that institutions should not have to rely on a national government to develop a nationwide list of institutions legally authorized to provide postsecondary education in the country. They contended that some national governments might not have the resources to develop and maintain such a list. The non-Federal negotiators argued that for institutions in some countries, it might be cumbersome and time-consuming to obtain such a list from the national government. This would have the effect of slowing down the eligibility certification processes for some foreign institutions. These non-Federal negotiators recommended that institutions retain the option of providing the Department with their own individual legal authorizations, rather than relying on a nationwide list.

Other non-Federal negotiators believed that it was too constricting to limit the authority for developing the list of institutions to an agency of the national government. They noted that in some countries, such as Canada, legal authorization to provide postsecondary education is provided by the provincial governments, not by the national government. These non-Federal negotiators requested that the Department make provision for legal authorizations from government entities at a provincial level, not at the national level.

The Department agreed with these recommendations. In addition to allowing proof of legal authorization to be provided on a nationwide basis, the proposed regulations allow for proof of legal authorization to be provided for all eligible institutions in a jurisdiction within the country, and continue to allow proof of legal authorization to be provided separately for each eligible institution in a country.

Eligibility of Training Programs at Foreign Institutions (§ 600.54)

Statute: Section 101(b)(1) of the HEA provides, in part, that one type of educational program that a Title IV "institution of higher education" may provide to be eligible to apply to participate in the Title IV, HEA programs is a training program of at least one year that prepares students for gainful employment in a recognized occupation. Section 102(a)(2)(A) provides for participation in the Title IV, HEA programs by entities that are comparable to such institutions under regulations prescribed by the Secretary.

Current Regulations: Section 600.54 provides that, in order to be eligible to apply to participate in the Title IV, HEA programs, a foreign institution must provide an eligible educational program that leads to a degree that is equivalent to a U.S. degree, or be at least a two-academic-year program acceptable for full credit toward the equivalent of a U.S. baccalaureate degree, *or be equivalent to at least a one-academic-year training program that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation.*

Section 668.3 defines an academic year as—

- For a program offered in credit hours, a minimum of 30 weeks of instructional time and, for an undergraduate program, an amount of instructional time whereby a full-time student is expected to complete at least 24 semester or trimester credit hours or 36 quarter credit hours; or
- For a program offered in clock hours, a minimum of 26 weeks of instructional time and, for an undergraduate program, an amount of instructional time whereby a full-time student is expected to complete at least 900 clock hours.

Proposed Regulations: Under the proposed regulations, a foreign institution would have to demonstrate to the satisfaction of the Secretary (who would make program-by-program determinations of comparability) that the amount of academic work required by a program it seeks to qualify as eligible is at least a one-academic-year training program that is equivalent to—

- For a program offered in credit hours, a minimum of 30 weeks of instructional time and, for an undergraduate program, an amount of instructional time whereby a full-time student is expected to complete at least 24 semester or trimester credit hours or 36 quarter credit hours; or
- For a program offered in clock hours, a minimum of 26 weeks of instructional time and, for an undergraduate program, an amount of instructional time whereby a full-time student is expected to complete at least 900 clock hours.

Reasons: The Department believes the proposed regulations are necessary because many foreign institutions use educational measurements other than conventional U.S. semester, trimester, quarter credits and clock-hours. As the definition of an academic year—the program length measurement used here—specifically references these U.S. measurements, it is necessary to make some sort of comparability determination in order to determine the eligibility of these programs at foreign institutions, and the eligibility of those foreign institutions that do not offer any other type of Title IV, HEA eligible program. The non-Federal negotiators

provided the Department with information regarding the definition of non-degree programs by different countries, units of measurement for programs in other countries, and evaluation and comparability determinations made by private entities. The information provided consistently indicates that the assignment of credits or other measures of academic work by foreign institutions vary greatly. As a result, under the proposed regulations, the Secretary would make determinations of comparability on a program-by-program basis, based on information provided by a foreign institution to demonstrate that the amount of academic work required by a program it seeks to qualify as eligible is comparable to at least a one-academic-year training program that is equivalent to the academic work required for eligibility of these programs at domestic institutions.

Two of the issues under negotiation by the Team I negotiating committee (Program Integrity Issues)—the definition of what it means to "provide gainful employment in a recognized occupation" and the definition of a credit hour for Title IV, HEA program purposes—could impact the eligibility of all programs, offered at foreign and domestic institutions, that are eligible because they are at least one academic year in length and prepare students for gainful employment in a recognized occupation. These Team I issues are distinct from the issue negotiated here by Team II—*i.e.,* the translation of credits or other measures of academic work by foreign institutions for purposes of determining program length (a measure of both weeks and credit hours).

Foreign Graduate Medical Schools (§§ 600.20, 600.21, 600.52, 600.55)

Statute: Section 102(a)(2)(A) of the HEA provides that the Secretary shall establish criteria by regulation for the approval of institutions outside the United States and for the determination that such institutions are comparable to an "institution of higher education" as defined in section 101 of the HEA, except that a foreign graduate medical, veterinary or nursing school may be for-profit. That section also provides that, except for foreign graduate medical schools that had a clinical training program that was approved by a State as of January 1, 1992, at least 60 percent of students and graduates must not be persons described in section 484(a)(5) of the HEA in the year preceding the year for which students are seeking Title IV, HEA program loans, and that at least 60 percent of students and graduates taking the United States Medical Licensing Examination (USMLE) administered by the Educational Commission for Foreign Medical Graduates (ECFMG) must have received a passing score in that preceding year.

Effective July 1, 2010, the HEOA amended sections 102(a)(2)(A) and (B) of the HEA to (1) increase the pass rate threshold for the USMLE from 60 percent to 75 percent; (2) allow a foreign graduate medical school that was eligible based on having a clinical training program approved by a State as of July 1, 1992, to continue to be eligible as long as it has continuously operated a clinical training program in at least one State that approves the program; and (3) allow for the promulgation, through regulations, of new eligibility criteria for foreign graduate medical schools that have a clinical training program approved by a State prior to January 1, 2008, but that would not meet the otherwise—applicable requirement that at least 60 percent of their students and graduates not be persons described in section 484(a)(5) of the HEA in the year preceding the year for which students are seeking Title IV, HEA program loans. Section 102(a)(2)(B)(iii)(IV)(aa) of the HEA provides that such new eligibility criteria must be based on the recommendations contained in a report to be prepared by August 14, 2009, by the NCFMEA. The NCFMEA is a panel of medical experts that evaluates the medical school accrediting agency standards used in the foreign country where medical education is provided to determine comparability to the standards of accreditation applied to medical schools in the United States. The statute required the NCFMEA's report to address: entrance requirements; retention and graduation rates; successful placement of students in U.S. medical residency programs; passage rate of students on the USMLE; the assessment of program quality by State medical boards; the extent to which graduates would be unable to practice medicine in one or more States, based on the judgment of a State medical board; any areas recommended by the Comptroller General (*i.e.,* head of the Government Accountability Office (GAO)) under section 1101 of the HEOA; and any additional areas the Secretary may require. The statute provides that the regulations must, at a minimum, require a USMLE pass rate of at least 75 percent.

The HEOA also provides that the Department may issue an NPRM addressing the new eligibility criteria for foreign graduate medical schools no earlier than 180 days after the submission of the report, and may issue final regulations no earlier than one year after the issuance of the NPRM.

Current Regulations: Neither § 600.20, which addresses the application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification, nor § 600.21, which addresses when and how an institution must update application information, currently include any provisions specific to *foreign graduate medical schools.* Section 600.52 defines a foreign graduate medical school as a foreign institution that qualifies to be listed in, and is listed as a medical school in, the most current edition of the World Directory of Medical Schools published by the World Health Organization (WHO). The regulations do not currently include a definition of clinical training, the NCFMEA, or a post-baccalaureate/equivalent medical program. Section 600.55(a)(5) contains the additional criteria for determining whether a foreign graduate medical school is eligible to apply to participate in the Title IV, HEA programs. Currently, a foreign graduate medical school generally must, in addition to satisfying the criteria in § 600.54 for determining a foreign institution's eligibility (except the criterion that the institution be public or private nonprofit), satisfy all of the following criteria:

- Provide, and require its students to complete a program of clinical and classroom medical instruction of not less than 32 months that is supervised closely by members of the school's faculty and that is provided either (1) Outside the United States, in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom medical instruction; or (2) In the United States, through a training program for foreign medical students that has been approved by all medical licensing boards and evaluating bodies whose views are considered relevant by the Secretary.
- Have graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination.
- Employ only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at medical schools in the United States;
- Be approved by an accrediting body (1) that is legally authorized to evaluate the quality of graduate medical school educational programs and facilities in the country where the school is located; and (2) whose standards of accreditation

of graduate medical schools have been evaluated by the advisory panel of medical experts established by the Secretary and have been determined to be comparable to standards of accreditation applied to medical schools in the United States.

In addition, current regulations provide that foreign graduate medical schools that do not have a clinical training program that has been continuously approved by a State since January 1, 1992, must—

- During the academic year preceding the year for which any of the school's students seeks a FFEL program loan, have at least 60 percent of those enrolled as full-time regular students in the school and at least 60 percent of the school's most recent graduating class be persons who did not meet the citizenship and residency criteria contained in section 484(a)(5) of the HEA, 20 U.S.C. 1091(a)(5); and
- For a foreign graduate medical school outside of Canada, have at least 60 percent of the school's students and graduates who took any step of the USMLE administered by the ECFMG (including the ECFMG English test) in the year preceding the year for which any of the school's students seeks a FFEL program loan to have received passing scores on the exams. In performing the calculation, a foreign graduate medical school must count as a graduate each person who graduated from the school during the three years preceding the year for which the calculation is performed.

Proposed Regulations: Location of a graduate medical education program, affiliation agreements, and application and notification procedures for foreign graduate medical schools

Section 600.55(h)(2) of the proposed regulations would provide that no portion of the medical education program offered to U.S. students by a foreign graduate medical school, other than the clinical training portion of the program, would be allowed to be located outside of the country in which the main campus of the school is located.

For clinical training sites located outside the United States, proposed § 600.55(h)(1) would require that, with two exceptions, all portions of the medical education program offered to U.S. students must be located in a country whose medical school accrediting standards are comparable to standards used in the United States, as determined by the NCFMEA. Under proposed § 600.55(h)(3), with the same two exceptions, if any portion of the clinical training portion of the educational program is located in an approved comparable foreign country other than the country in which the main campus is located, the institution's medical accrediting agency must have conducted an on-site evaluation and specifically approved the clinical training sites in order for students attending the site to be eligible to borrow Title IV, HEA program funds. Furthermore, clinical instruction offered at a site in a foreign NCFMEA-approved country must be offered in conjunction with medical educational programs offered to students enrolled in accredited medical schools located in that approved foreign country. The two exceptions are that these criteria would not have to be met if the clinical training location is included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME), or if no individual student takes more than two electives at the clinical training location and the combined length of the electives does not exceed eight weeks.

Proposed § 600.55(e)(1) would require a foreign graduate medical school to have: (1) A formal affiliation agreement with any hospital or clinic at which all or a portion of the school's core clinical training or required clinical rotations are provided; and (2) either a formal affiliation agreement or other written arrangements with any hospital or clinic at which all or a portion of its clinical rotations that are not required are provided, except for those locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks.

The proposed regulations would require these affiliation agreements or other written arrangements to state how the following will be addressed at each site: (1) Maintenance of the school's standards; (2) appointment of faculty to the medical school staff; (3) design of the curriculum; (4) supervision of students; (5) provision of liability insurance; and (6) evaluation of student performance.

Proposed § 600.20(a)(3)(iii) and § 600.20(b)(3)(iii) would require a foreign graduate medical school (*i.e.,* a freestanding foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) to provide copies of the affiliation agreements with hospitals and clinics that it is required to have under proposed § 600.55(e)(2) as a part of any application for initial certification or recertification to participate in the Title IV, HEA programs.

Proposed § 600.20(a)(3)(i)(A) and § 600.20(b)(3)(i)(A) would provide that, for initial certification or for recertification, a foreign graduate medical school (*i.e.,* a freestanding foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) would be required to list on the application to participate all educational sites and where they are located, except for those locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks.

In § 600.52, the proposed regulations would add a definition of *clinical training.* Clinical training would be defined as the portion of a graduate medical education program that counts as a clinical clerkship for purposes of medical licensure. Proposed §§ 600.20(a)(3)(i)(B) and (b)(3)(i)(B) would require freestanding foreign graduate medical schools, and foreign institutions that include a foreign graduate medical school, to identify, for each clinical site reported in the certification or recertification application as required under §§ 600.20(a)(3)(i)(A) and (b)(3)(i)(A), the type of clinical training (core, required clinical rotation, not required clinical rotation) offered at that site.

Proposed § 600.20(c)(5) would require a foreign graduate medical school (*i.e.,* a freestanding foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) that adds a location that offers all or a portion of the school's core clinical training or required clinical rotations to apply to the Secretary and wait for approval if it wishes to provide Title IV, HEA program funds to the students at that location, except for those locations that are included in the accreditation of a medical program accredited by the LCME. If a foreign graduate medical school (*i.e.,* a freestanding foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) adds a location that offers all or a portion of the school's clinical rotations that are not required, proposed § 600.21(a)(10) would require the school to notify the Secretary no later than 10 days after the location is added, except for those locations that are included in the accreditation of a medical program accredited by the LCME, or that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks.

In addition, proposed § 600.20(a)(3)(ii) and § 600.20(b)(3)(ii) would require that, for initial certification or for recertification, a foreign graduate medical school (*i.e.,* a freestanding foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) indicate whether it offers (1) only post-baccalaureate/equivalent medical programs; (2) other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or (3) both. Proposed § 600.52 would define a *post-baccalaureate/equivalent medical program* as a program that consists solely of courses and training leading to employment as a doctor of medicine or doctor of osteopathic medicine, and is offered by a foreign graduate medical school that requires, as a condition of admission, that its students have already completed their non-medical undergraduate studies.

General

Proposed § 600.52 would replace the definition of a *foreign graduate medical school* and clarify that a *foreign graduate medical school* can be free-standing or a component of an eligible foreign institution.

Proposed § 600.55(a)(1) would continue to provide that, in addition to satisfying the general criteria for determining a foreign institution's eligibility (except the criterion that the institution be public or private nonprofit), a foreign graduate medical school would have to satisfy all applicable criteria in this section, except that the proposed regulations would clarify that the general criteria that must be satisfied are all applicable criteria in part 600, rather than just § 600.55.

Proposed § 600.55(a)(2) would require a foreign graduate medical school to provide, and require its students to complete, a program of clinical training and classroom medical instruction of not less than 32 months, that is supervised closely by members of the school's faculty, and that is both (1) provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom medical instruction; and (2) approved by all medical licensing boards and evaluating bodies whose views are considered relevant by the Secretary, regardless of whether it is located outside or inside the United States.

In addition, the proposed regulations would make clear that a foreign graduate medical school may offer, as part of its clinical training, no more than two electives consisting of a combined total of no more than eight weeks per student at a site located in a foreign country other than the country in which the main campus is located or in the United States, unless that location is included in the accreditation of a medical program that is accredited by the LCME.

Proposed § 600.55(a)(3) would require that a foreign graduate medical school appoint, rather than employ, only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at medical schools in the United States.

Finally, proposed § 600.55(a)(4) would continue to require that a foreign graduate medical school have graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination.

Accreditation

The proposed regulations would make no substantive changes to the accreditation requirements for foreign graduate medical schools.

Admission Criteria and Collection and Submission of Data

Section 668.55(c) would require a foreign graduate medical school with a post-baccalaureate/equivalent medical program to require students accepted for admission who are U.S. citizens, nationals, or permanent residents to have taken the Medical College Admission Test (MCAT) and to have reported their scores to the school. In addition, § 600.55(c) would require a foreign graduate medical school to determine the consent requirements for and require the necessary consents of all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents to enable the school to comply with the collection and submission requirements in proposed § 600.55(d) for MCAT scores, residency placement, and USMLE scores.

Proposed § 600.55(d) would require a foreign graduate medical school to obtain, at its own expense, and by September 30 of each year submit to its accrediting authority: (1) MCAT scores for all students who are U.S. citizens, nationals, or eligible permanent residents admitted during the preceding award year and the number of times each student took the exam; and (2) the percentage of students who are U.S. citizens, nationals, or eligible permanent residents graduating during the preceding award year who are placed in an accredited U.S. medical residency. A school would have to submit the data on MCAT scores and placement in a U.S. residency program to the Secretary only upon request. In addition, proposed § 600.55(d) would require a foreign graduate medical school to obtain, at its own expense and by September 30 of each year submit to the Secretary, unless the Secretary notifies schools that it will receive the information directly from the ECFMG, or other responsible third parties, USMLE scores earned during the preceding award year by at least each student who is a U.S. citizen, national, or eligible permanent resident, and each graduate who is a U.S. citizen, national, or eligible permanent resident who graduated during the three preceding years, and the date each student took each test, including any failed tests. The USMLE scores submitted would have to be disaggregated by step/test for Step 1, which assesses knowledge and application of basic science concepts; Step 2–Clinical Skills (Step 2–CS), which assesses knowledge of clinical science principles; and Step 2–Clinical Knowledge (Step 2–CK), which tests a student's ability to examine and interact with patients and colleagues, and by attempt. A school would not be required to submit data on the USMLE Step 3, which provides a final assessment of a physician's ability to assume independent delivery of general medical care. All foreign graduate medical schools would be required to submit these data, even those that are not required to meet the 60 percent/75 percent USMLE pass rate requirement.

Notification to Accrediting Body

Proposed § 600.55(e)(2) would require a foreign graduate medical school to notify its accrediting body within one year of any material changes in (1) the educational programs, including changes in clinical training programs; and (2) the overseeing bodies in the formal affiliation agreements with hospitals and clinics.

Citizenship and USMLE Pass Rate Percentages

Proposed § 600.55(f)(1)(i)(B) would allow a foreign graduate medical school to be exempt from the existing citizenship requirement (in proposed § 600.55(f)(1)(i)(A)) that at least 60 percent of the school's students and recent graduates not be U.S. citizens, nationals, or eligible permanent residents if it had a clinical training program approved by a State as of January 1, 2008, and continues to operate a clinical training program in at least one State that approves the program. In addition, proposed § 600.55(f)(2)(ii) would allow a foreign

graduate medical school that was eligible to participate in the Title IV, HEA programs and exempt from the USMLE pass rate requirement based on having a clinical training program approved by a State as of January 1, 1992, to continue to be eligible and exempt from the USMLE pass rate requirement as long as it continues to operate a clinical training program in at least one State that approves the program. Proposed § 600.55(f)(1)(ii) would make the following changes to the USMLE pass rate requirement:

- Increase the USMLE pass rate threshold from 60 percent to 75 percent (§ 600.55(f)(1)(ii)).
- Limit the pass rate requirement to Step 1, Step 2–CS, and Step 2–CK, excluding Step 3.
- Require a foreign graduate medical school to have at least a 75 percent pass rate on each step/test of the USMLE (limited to Step 1, Step 2–CS, and Step 2–CK), rather than a combined pass rate for all steps/tests.
- Require foreign graduate medical schools to include in the calculation only U.S. citizens, nationals, or eligible permanent residents, rather than all students taking the USMLE.
- Require foreign graduate medical schools to include only first time test takers in the calculation.

For example, the award year 2011–2012 pass rate for the USMLE–Step 1 would be calculated as follows:

Those from the denominator who passed Step 1.

All U.S. citizens, nationals, and eligible permanent residents who are students during award year 2010–2011, or who graduated in award year 2008–2009, 2009–2010, or 2010–2011, and took Step 1 of the exam for the first time in award year 2010–2011.

Under proposed § 600.55(f)(4), if the result of any step/test pass rate would be based on fewer than eight students, a single pass rate would be determined for the school based on the performance of U.S. citizens, nationals, and eligible permanent residents on Step 1, Step 2–CS and Step 2–CK combined. If that combined pass rate would be based on fewer than eight step/test results, the school would be deemed to have no pass rate for that year, and the results for the year would be combined with each subsequent year until a pass rate based on at least eight step/test results could be derived.

Other Criteria

Proposed § 600.55(g)(1) would require a foreign graduate medical school to apply existing § 668.16(e)(2)(ii)(B), (C), and (D) for establishing a quantitative satisfactory academic progress policy and require that a student complete his or her educational program within 150 percent of the published length of the educational program. In addition, proposed § 600.55(g)(2) would require a foreign graduate medical school to document the educational remediation it provides to assist students in making satisfactory academic progress. Finally, proposed § 600.55(g)(3) would require a foreign graduate medical school to publish all the languages in which instruction is offered.

Reasons: As required by statute, the recommendations of the 2009 *Report to the U.S. Congress by the National Committee on Foreign Medical Education and Accreditation Recommending Institutional Eligibility Criteria for Participation by Certain Foreign Medical Schools in the Federal Family Education Loan Program* (NCFMEA report) that could be implemented through regulations were taken into consideration in the development of these proposed regulations. The report is available at *http://www2.ed.gov/about/bdscomm/list/ncfmea-dir/reporttocongress2009.pdf.* The Department determined that the following recommendations made by the NCFMEA could be addressed through regulatory change: 1(a), 1(b), 3, 4(a), 4(b), 4(c), 9(a), 9(b), 10, 12(a), 12(b), 14(a) and 14(b). The Committee's consideration of these recommendations is discussed below in relation to the areas of the proposed regulations to which they pertain, except for Recommendations 14(a) and 14(b), which are discussed under *Certification of Foreign Institutions (§§ 600.52, and 668.13)* above.

Although the HEOA specified that the NCFMEA was to take into account in the development of their recommendations the results of the GAO report related to foreign graduate medical schools, the HEOA specified a later deadline for the issuance of the GAO report than for the NCFMEA recommendations. As a result, the GAO report was not completed in time for the NCFMEA to take it into account. The GAO report was published June 2010. The Department will take the GAO report into consideration as the rulemaking process continues. Although the statute directed the NCFMEA to make recommendations for a specific group of schools, the NCFMEA stated on page seven of its report, "It also suggests the recommendations contained within the report be applied to all foreign graduate medical schools participating in the FFEL program. The NCFMEA does not believe that two sets of criteria should be applied, given the millions of dollars in Federal student loans disbursed annually to foreign graduate medical schools that are already participating in the FFEL program. If performance levels are set to ensure quality, they should apply to all." The Department in general agrees with this recommendation; thus, these proposed regulations for foreign graduate medical schools would apply to all foreign graduate medical schools, except where noted. Some non-Federal negotiators believed the NCFMEA report contains a contradictory statement indicating the NCFMEA's desire to limit its recommendations for change to a specific group of schools ("The foreign medical schools that are subject to the recommendations contained within this report are identified as * * * having American citizens/permanent residents constitute more than 40 percent of its fulltime enrollment and/or graduates from the preceding year." page five). These non-Federal negotiators were concerned about the large overall administrative burden that the proposed regulations as a whole would have on foreign graduate medical schools with small numbers of U.S. students with Title IV, HEA program loans. The Department made clear during the negotiations that it believes the statement identified by the non-Federal negotiators is merely a restating of the statute. Regardless, the Department believes that these proposed regulations are important to the integrity of the Title IV, HEA programs and should apply to all foreign graduate medical schools, except where noted.

Location of a Graduate Medical Education Program, Affiliation Agreements, and Application and Notification Procedures for Foreign Graduate Medical Schools

Under section 102(a)(2)(B) of the HEA, a foreign graduate medical school must be accredited or preaccredited by an accrediting agency recognized by the Secretary, or approved under foreign accrediting standards found comparable by the NCFMEA to standards applied in the United States. In order for this provision to have effect, and as the Department's implementing regulations have always provided, an accrediting body approved by NCFMEA must be legally authorized to evaluate the quality of the medical school educational programs and facilities in the country in which those schools are located. The Department generally construes this requirement for comparable accreditation to mean that (except for clinical training locations in the U.S. that are provided for in the statute) the graduate medical program

must be located in the country in which the main campus of the school is located. Although a medical accrediting body may accredit locations of institutions in other countries, the Department believes this is the best interpretation of the statute because, with limited exceptions, an accrediting body's actual authority does not extend beyond the country in which it is established. The Department currently does not approve for participation in the Title IV, HEA programs any educational program in which a portion of what is commonly referred to as the basic science part of the program is located outside of the country in which the main campus is located. However, the Department has allowed for the clinical training part of the program to be located in an approved comparable foreign country other than the country in which the main campus is located, if the site is located in an NCFMEA approved country, the institution's medical accrediting agency has conducted an on-site evaluation and specifically approved the site, and the clinical instruction is offered in conjunction with medical educational programs offered to students enrolled in accredited medical schools located in that foreign country. The Department's initial proposal reflected this policy, which is also the approach recommended by NCFMEA Recommendation 12(a).

Several non-Federal negotiators felt this initial proposal was too limiting. The Committee discussed at length the different parts of a graduate medical program and the characteristics of each part that might justify different treatment. In addition to distinguishing between the basic science and the clinical training parts of the program, the Committee discussions distinguished between the different parts of clinical training referred to in these proposed regulations as the core rotations, the required clinical rotations (the electives that students are required to take), and the not required clinical rotations (the electives that students can choose).

In general, some non-Federal negotiators felt that matriculating in different countries as part of a graduate medical program would benefit students by exposing them to medical education and practice in different environments and cultures. One non-Federal negotiator argued that allowing a portion of the basic science part of the program to be located in the United States would assist in providing a smooth transition to clinical training in the United States. The negotiator also proposed a way of achieving what some non-Federal negotiators felt was sufficient oversight to permit a portion of the basic science part of the program to be located in a non-NCFMEA approved foreign country other than the country in which the main campus is located: Limiting a school to the establishment of one such site, limiting the amount of the program that could be offered there, requiring a visit and approval by the school's accrediting body, setting cohort default rate and USMLE pass rate thresholds, requiring specific evaluations by the school's accrediting body, requiring a formal agreement/recognition of the accrediting body's authority by the country in which the site was located, and requiring an NCFMEA determination that the accrediting body has demonstrated its capacity to conduct off-site and on-site reviews of the site that are comparable to the reviews conducted of the main campus and additional locations within the country in which the main campus is located. Others suggested that a portion of the basic science part of the program be allowed to be located in a country other than the country in which the main campus is located if the location is accredited by a comparable accrediting agency.

Non-Federal negotiators also argued for more leniency regarding the offering of the clinical training part of the program in countries other than the country in which the main campus is located. While some felt that all clinical training should be permitted to be located in another country without as much oversight as the Department proposed, others felt that leniency was appropriate only for the clinical rotation part because exposure to different medical environments and cultures was most important during the hospital-based part of the clinical training where the students are in direct contact with patients and medical residents. Other non-Federal negotiators felt that leniency was appropriate only for the not-required-clinical-rotation part, because that is when a student will most benefit from the exposure without the program losing coherence. The Committee discussed how the not-required-clinical-rotation part of the program may be very individualized, with numerous sites, sometimes suggested by students, at which students study for short periods of time. They pointed out that, as a result, some sites are only used for a short period of time. They noted that an accrediting body would not have the time or resources to visit and approve these short-term sites. Non-Federal negotiators suggested various ways of achieving what they felt was sufficient oversight of these locations: e.g., limiting the amount of the program that could be offered there, limiting the amount of the program an individual student could take at the location, and limiting the number of students who could attend the location. The non-Federal negotiators pointed to language in the September 2009 *NCFMEA Guidelines for Requesting a Comparability Determination* (page 17) that omits any mention of non-core portions of a clinical training program in its discussion of the site visits that the school's accrediting body is required to make (the document is available at *http://www2.ed.gov/about/bdscomm/list/ncfmea-dir/ncfmea-guidelines.pdf*).

In addition, some non-Federal negotiators felt that locations that are included in the accreditation of a medical program accredited by the LCME, such as locations of some Canadian schools, should be exempt because the LCME accrediting standards are those that are applied to medical schools in the United States. The Department agreed.

Because of the lack of direct authority of accrediting bodies from different countries, the Department held firm on limiting the location of the basic science portion of the program to the institution's home country. The Department reiterated its belief that the basic sciences part of a graduate medical program should be located in the same country as the main campus so that the majority of the classroom instruction part of the program will be under the direct authority of the school's accrediting body. In one draft of the proposed regulations, the Department referred to this part of the program as the "didactic components." A non-Federal negotiator pointed out that this term could be construed to include lectures and other instruction that take place during the clinical training portion of the program. The non-Federal negotiator argued that blurring the line between the "basic science" and the "clinical training" portions of the programs could lead to an interpretation of the regulations whereby a foreign graduate medical school would offer parts of what is really the basic science portion of the program in the United States. As a result, the Committee agreed to add a definition of *clinical training* to the proposed regulations to make clear that only parts of the program that meet that definition may be located in the United States. The definition was also added to clarify the terminology that the proposed regulations are using for the

components of clinical training, as provisions both here and elsewhere in the proposed regulations differentiate among these components.

The Department agreed that it was acceptable to balance less oversight of a short-term location at which individual students were taking a small portion of the not-required-clinical-rotation part of the program, with the benefits of exposure to other medical environments and cultures. The Department believes this is warranted because of the individualized nature of the not-required-clinical-rotation part of the program, when individual sites are often used for short periods of time. The Department also agreed that locations in countries other than the country in which the main campus is located that are included in the accreditation of a medical program accredited by the LCME should also be exempt from meeting the three criteria (*i.e.,* required to be located in an approved comparable country, required on-site evaluation and specific approval of the site by the institution's medical accrediting agency, and the requirement that instruction must be offered in conjunction with medical educational programs offered to students enrolled in accredited medical schools located in that approved foreign country) because the LCME accrediting standards are those that are applied to medical schools in the United States. Therefore, the Department's final proposal, which was agreed to by the Committee, provided that clinical training may be offered outside the United States and the country in which the main campus is located without the site meeting the three criteria, if the location is included in the accreditation of a medical program accredited by the LCME, or if no individual student takes more than two electives at the location and the combined length of the electives does not exceed eight weeks.

Because of the importance and more standardized nature of core and required clinical rotations, proposed § 600.55(e)(1) would require a foreign graduate medical school to have a formal affiliation agreement with any hospital or clinic at which all or a portion of the school's core clinical training or required clinical rotations are provided. However, for any hospital or clinic at which only clinical rotations that are not required are provided, a school would be permitted to have other written arrangements instead of a formal affiliation agreement, and the proposed regulations would not require a school to have any written arrangements for those locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks. Also, in accordance with NCFMEA Recommendation 12(b), proposed § 600.20(a)(3)(iii) and § 600.20(b)(3)(iii) would require a foreign graduate medical school to provide as a part of any application for initial certification or recertification to participate in the Title IV, HEA programs, copies of the affiliation agreements that it is required to have for locations that offer the core and required-clinical-rotation parts of the clinical training, but not copies of written arrangements for locations offering the not-required-clinical-rotation part of the program. The Department was persuaded by the non-Federal negotiators who noted that it would be quite burdensome for institutions to execute formal affiliation agreements with the sites of rotations that are not required, because there are often so many of them and use is often for the short-term. They assured the Department that other written arrangements, such as letters of good standing, insurance arrangements, and other documents specific to a particular student, are made with these locations that cover the elements of formal affiliation agreements. Because of the multitude of documentation comprising the written arrangements with these often short-term sites, the Department did not believe it was necessary to require a regular submission to the Department. In accordance with NCFMEA Recommendation 12(b), to ensure continuity of the eligible program from the main campus to remote locations, the proposed regulations would require that all required affiliation agreements or other written arrangements address maintenance of the school's standards, appointment of faculty, design of the curriculum, provision of liability insurance, and supervision and evaluation of student performance.

Although an institution would not be required to have formal affiliation agreements with locations that offer the not-required-clinical-rotation part of the clinical training, proposed § 600.20(a)(3)(i) and § 600.20(b)(3)(i) would provide that, for initial certification or for recertification, a foreign graduate medical school would be required to list these locations and where they are located on the application to participate, along with the sites at which the non-clinical, core clinical, and required-clinical-rotation parts of the program are offered, except that those not-required-clinical-rotation locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks, do not have to be listed. The Department believes it is essential for the Department to be aware of all locations of an institution to which Title IV, HEA program funds are provided, and agreed to make an exception only for sites that are not used regularly and, therefore, would be difficult and burdensome to track. Some non-Federal negotiators indicated that most institutions can and do track the locations the proposed regulations would require them to report to the Department, so providing this information to the Department would not be unduly burdensome.

Consistent with these proposed regulations, proposed § 600.20(c)(5) would require a foreign graduate medical school that adds a location that offers all or a portion of the school's core clinical training or required clinical rotations to apply to the Secretary and wait for the Secretary's approval before providing Title IV, HEA program funds to the students at the location. In proposed 600.21(a)(10), they would allow a foreign graduate medical school that adds a location that offers all or a portion of the school's clinical rotations that are not required to provide Title IV, HEA program funds to the students at the location without waiting for approval from the Secretary, provided the school notifies the Secretary no later than 10 days after the location is added. As with the proposed exceptions to the requirements for offering a portion of the clinical training portion of the program outside of the country in which the main campus of the school is located, and the proposed regulations specifying when affiliation agreements would be required, an exception from the prior approval requirement for adding locations offering core/required rotations would be allowed for those locations that are included in the accreditation of a medical program accredited by the LCME. No notification to the Department would be required for adding LCME locations, or locations offering only non-core, non-required rotations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks.

So that the Department may track and enforce provisions specific to post-baccalaureate/equivalent medical programs, proposed §§ 600.20(a)(3)(ii) and 600.20(b)(3)(ii) would require that, for initial certification or for recertification, a foreign graduate medical school (*i.e.,* a freestanding

foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) indicate whether it offers only post-baccalaureate/equivalent medical programs, other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine, or both.

Finally, a proposed definition of *NCFMEA* was added to make clear that the NCFMEA is the operational committee of medical experts established by the Secretary to determine whether the medical school accrediting standards used in other countries are comparable to those applied to medical schools in the U.S., for purposes of evaluating the eligibility of accredited foreign graduate medical schools to participate in the Title IV, HEA programs.

General

Proposed § 600.52 would remove from the definition of a foreign graduate medical school the requirement that a foreign graduate medical school be a foreign institution that qualifies to be listed in, and is listed as a medical school in, the most current edition of the World Directory of Medical Schools published by the World Health Organization (WHO) as the Department believes it is no longer a needed measure of comparability in light of the proposed new criteria for foreign graduate medical schools as well as the proposed changes to the definition of a foreign institution.

Proposed § 600.55(a)(1) would clarify that the general criteria that must be satisfied is all applicable criteria in part 600, rather than just § 600.54, to make clear that, unless otherwise specified, all the provisions of part 600 apply to foreign institutions, including foreign graduate medical schools. Current regulations require only instruction that is offered outside of the United States to be provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom medical instruction, and require only the training located in the United States to be approved by all medical licensing boards and evaluating bodies whose views are considered relevant by the Secretary. Proposed § 600.55(a)(2) would apply these provisions to all portions of the medical program, regardless of whether the program is located outside or inside the United States, as the Department believes they are good requirements regardless of location. To provide consistency with the proposed provisions addressing the location of clinical training (see the discussion of *Location of a graduate medical education program, affiliation agreements, and application and notification procedures for foreign graduate medical schools* above), the proposed regulations would make clear that a foreign graduate medical school may offer, as part of its clinical training, no more than two electives consisting of a combined total of no more than eight weeks per student at a site located in a foreign country other than the country in which the main campus is located or in the United States, unless that location is included in the accreditation of a medical program that is accredited by the LCME. Non-Federal negotiators noted that foreign graduate medical schools do not necessarily directly employ faculty for the clinical training portion of the program, but rather appoint them and the individuals are usually employed by the hospital or clinic at which the clinical training takes place. The Committee agreed the regulations should be changed to reflect actual practice.

Admission Criteria and Collection and Submission of Data

The Department initially proposed that, consistent with NCFMEA Recommendations 1(a) and 1(b), a foreign graduate medical school would have to require students who it admits to have a specific educational background (*e.g.,* for a post-baccalaureate equivalent medical program, students must have a baccalaureate degree, or at least 90 semester credit hours or the equivalent, in general education that includes, but is not limited to, coursework in the social sciences, history, and languages). Several of the non-Federal negotiators felt that such provisions were unduly limiting. The Committee, including the Department, ultimately agreed it would be more appropriate for the NCFMEA to establish these provisions as guidelines for accrediting bodies. The Department had also included as a part of its initial proposal, that a school having an integrated program for a first professional program leading to a Doctor of Medicine (M.D.) degree, or its equivalent, must require students who are U.S. citizens, nationals, or permanent residents to take the MCAT no later than three years after admission to the program. Although this provision was consistent with NCFMEA Recommendation 1(b), the Department was ultimately persuaded to remove the provision by non-Federal negotiators who pointed out that requiring students to take the MCAT early in the program would distract them from the education that was preparing them to take the USMLE.

Ultimately, the Department agreed to retain from Recommendations 1(a) and 1(b) only the provision that would require U.S. students who are admitted to a school having a post-baccalaureate equivalent medical program to have taken the MCAT and to report the score. This provision would not require a foreign graduate medical school to give weight to a U.S. student's score on the MCAT as part of its admission requirements. Although some non-Federal negotiators expressed concern that the MCAT would not be readily available to U.S. students who are residing outside of the United States prior to enrolling in a foreign graduate medical school, it was determined that the MCAT is administered several times during the year in countries around the world.

The inclusion of the requirement that a foreign graduate medical school determine the consent requirements for, and require the necessary consents of, all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents to enable the school to comply with the collection and submission requirements for MCAT scores, residency placement, and USMLE scores reflects NCFMEA Recommendations 9(a), 3, and 4(a), but limits the requirement to U.S. citizens, nationals, or eligible permanent residents. These proposed regulations would not establish eligibility thresholds for MCAT scores or residency placement. As indicated in the discussion of these recommendations in the NCFMEA report, the NCFMEA believes, and the Department agrees, that successful performance by an institution in these three areas may be valuable for the evaluation of the quality of education being provided to students attending foreign graduate medical schools. The data will facilitate the NCFMEA's further study of the issues, strengthen the accreditation process, and allow for the potential development of additional recommendations for regulatory change, and/or the NCFMEA standards for evaluating accrediting bodies of foreign graduate medical schools. Non-Federal negotiators argued, and the Department agreed, that the Department's main concern is how well students from the United States, who represent potential borrowers of Title IV, HEA funds, are doing at these schools. The non-Federal negotiators felt that it was inappropriate to include non-U.S. students who may not have as much at stake when they take the United States' MCAT or USMLE, or attempt to be placed in a

U.S. residency, and, thus, may skew the data.

Some non-Federal negotiators expressed concern that requiring foreign institutions to obtain student consent for the release of information may be in violation of certain countries' privacy laws. In response to the Department's request for specific information, the Department was provided with an analysis of the privacy laws and requirements of one country that had been identified as one that could have problems in this area. After analyzing the information, the Department concluded that there would be several ways that institutions in that country could legally obtain the required information from students, and committed to working with those schools and schools in any country that have concerns to facilitate compliance. The Department noted, however, that the Department cannot waive statutory or regulatory requirements used to determine institutional eligibility and that if a foreign country's privacy laws did preclude obtaining the information and materials necessary for establishing compliance the institutions located in those countries would not be able to qualify for participation in the Title IV, HEA programs.

The proposed regulations state that collection and submission of data must be done at the institution's own expense to emphasize that the institution is ultimately responsible for providing this information. In the future, the Department may be able to obtain the necessary USMLE pass rates directly from the ECFMG. However, unless and until the Secretary notifies institutions that this is the case, an institution would be required to take whatever steps are necessary to obtain and provide the data to its accrediting agency and the Secretary. Currently, an institution can obtain a student's consent for USMLE pass rate data on Steps 1 and 2 by requiring students to sign ECFMG's Institutional Request for an Official USMLE Transcript Form 173. The form and information on its use are available at the ECFMG's Web site at *http://www.ecfmg.org/usmle/transcripts/index.html*. We also note that the ECFMG has established an online procedure by which schools can obtain data on Steps 1 and 2 directly from the ECFMG (*see* the ECFMG's Web site at *http://www.ecfmg.org/emswp.html*). As this procedure is still new, the Committee was not able to ascertain whether the data provided to schools in this manner would be sufficient for schools to meet the requirements of these proposed regulations. As information becomes available, the Department will evaluate the appropriateness of these data for meeting the proposed requirement.

Although the Department originally proposed requiring schools to submit data on all steps of the USMLE, non-Federal negotiators pointed out that it would be extremely difficult for schools to obtain data on Step 3. The non-Federal negotiators noted that this difficulty stems from the fact that Step 3, which is administered by the Federation of State Medical Boards (FSMB), is taken by students after they have graduated from the institution and a student cannot sign a consent to provide information on Step 3 to third parties until he or she is actually taking the test. Although the Department is continuing to explore the collection of data from the FSMB for evaluating its use in the future, the Department agrees that it would be unreasonable to require institutions to be responsible for its collection and submission at this time.

As one of the purposes of the data submission provision is to provide data for the evaluation of whether additional performance measures should be required of foreign graduate medical schools, all foreign graduate medical schools, even those that are exempt from meeting the 60 percent/75 percent USMLE pass rate requirement, would have to submit the data under proposed § 600.55(d).

The Department believes that the proposed periods for which data must be collected and the proposed annual September 30 submission deadline will provide for consistent submission of data by all schools, taking into consideration the timing of the events for which data must be obtained. As these data, other than the USMLE data, are to be collected for the use of the accrediting bodies and, indirectly, by the NCFMEA, schools would be required to make submissions of the data to their accrediting bodies but, except for data on the USMLE, would be required to submit such data to the Secretary only upon request. The Secretary would collect the USMLE data on a regular basis in support of the requirement in § 600.55(f)(1)(ii) that an institution have at least a 75 percent pass rate on the USMLE.

Notification to Accrediting Body

Proposed § 600.55(e)(2), which would require a foreign graduate medical school to notify its accrediting body within one year of any material changes in educational programs and the overseeing bodies in the formal affiliation agreements with hospitals and clinics, would reflect NCFMEA Recommendations 12(a) and 12(b) and would allow a school's accrediting body to assess any substantive impact the change would have on the school's operations.

Citizenship and USMLE Pass Rate Percentages

The proposed change in § 600.55(f)(1)(i)(B) would allow a foreign graduate medical school to be exempt from the existing citizenship rate requirement if it had a clinical training program approved by a State as of January 1, 2008, and continues to operate a clinical training program in at least one State that approves the program reflects the statutory change made by the HEOA. As a result, both foreign graduate medical schools that had a clinical training program approved by a State as of January 1, 1992, and those that had a clinical training program approved by a State as of January 1, 2008, are exempt from the citizenship rate provision, provided the school continues to operate a clinical training program in at least one State that approves the program. The increase in the USMLE pass rate threshold from 60 percent to 75 percent also reflects a change made by the HEOA, as does proposed § 600.55(f)(2)(ii), which would allow a foreign graduate medical school that was eligible and exempt from the USMLE pass rate requirement based on having a clinical training program approved by a State as of January 1, 1992, to continue to be eligible and exempt from the USMLE pass rate requirement as long as it continues to operate a clinical training program in at least one State that approves the program.

Although the Department originally proposed requiring pass rate information for all steps of the USMLE, as stated previously in the discussion of the submission of USMLE pass data under *Admission criteria and collection and submission of data* above, the Department believes that it would be unreasonable to require institutions to obtain data on Step 3 of the USMLE for inclusion in the pass rate at this time.

As suggested by NCFMEA Recommendations 4(b) and 4(c), the proposed regulations would require a foreign graduate medical school to have at least a 75 percent pass rate on each step/test of the USMLE (limited to Step 1, Step 2–CS, and Step 2–CK), rather than a combined pass rate for all steps/tests. This approach would provide an assessment of the sequential performance of students on the USMLE, which the NCFMEA and the Department believe provides a better measure of a medical program's effectiveness by evaluating how well it prepares students

for each step/test of the USMLE and, in particular, will allow for the judgment of the performance of each institution in preparing students for future clinical performance.

The Committee decided to limit the USMLE pass rate calculation to U.S. citizens, nationals, and eligible permanent residents for the reasons discussed for limiting the collection and submission of data related to MCAT scores, placement in a U.S. medical residency program, and the USMLE in the same manner (*see Admission criteria and collection and submission of data* above). That is, the Committee desired to focus the pass rate on the students the Department is most concerned about, students from the United States, who represent potential borrowers of Title IV, HEA funds, and to prevent a school's rate from being lowered by non-U.S. students who may not be as invested in passing the USMLE as U.S. students.

As for the actual calculation used to determine the pass rate for each step/test of the USMLE, the Department had suggested a rate that would have required an institution to count an individual student in the denominator for each time the student took Step 1, Step 2–CS and Step 2–CK. The Department believed this approach was consistent with NCFMEA Recommendation 4(b) and was a better measure of how well prepared students were by the medical education program because it would reflect failures on repeated attempts. Some non-Federal negotiators felt that this approach was too burdensome and not an appropriate means of achieving the Department's goal. They argued that the pass rates of students in subsequent attempts is typically quite low; thus, such a measure would be redundant and not more indicative of the quality of the institution's instruction. Eventually, the non-Federal negotiators suggested that the calculation be limited to first time test takers only. The non-Federal negotiators noted that reports issued in other contexts about pass rates for domestic schools have included only first time test takers. Ultimately, the Department was persuaded that a proposed regulation that would require foreign graduate medical schools to include only first time test takers in the calculation provided a better evaluation of an institution's performance than that required under current regulations, and had the benefit of being comparable to rates published for domestic schools.

The non-Federal negotiators raised strong concerns about the pass rate's applicability to schools with small numbers of U.S. students. They pointed out that such a school's eligibility for participation could be put at risk by the failure of just a small number of students, or even one student, for those with fewer than four students who would be included in the cohort for the calculation. The non-Federal negotiators felt that schools with small numbers of students should be exempt from this requirement or, at the very least, the regulations should provide an alternative way for these institutions to comply. The Department noted that the statute does not provide for exempting institutions from this requirement. However, in response to these concerns, the Department proposed an alternative way to comply in § 600.55(f)(4) to allow for the use of a rate that would combine the performance of U.S. students on Step 1, Step 2–CS and Step 2–CK, if the result of any step/test pass rate would be based on fewer than eight students. If that combined pass rate would be based on fewer than eight step/test results, the school would be deemed to have no pass rate for that year, and the results for the year would be combined with each subsequent year until a pass rate based on at least eight step/test results could be derived. The Department believes that this approach applies the pass rate provision to all institutions, while appropriately mitigating the unduly harsh effect a small number of failures could have on the pass rate calculation for schools with small numbers of U.S. students.

Other Criteria

The proposed requirements in § 600.55(g)(1) and (g)(2) that would require a foreign graduate medical school to include in its satisfactory academic progress standards a requirement that a student complete his or her educational program within 150 percent of the published length of the educational program and document the educational remediation it provides to assist students in making satisfactory academic progress adopts NCFMEA Recommendation 9(b), but requires schools to document, rather than submit to the Department as the NCFMEA recommended, any educational remediation provided.

For consistency with current regulations, in adopting NCFMEA Recommendation 9(b), suggesting that a student's enrollment prior to graduation must not exceed 150 percent of the normal length of the program, the proposed regulations refer to existing §§ 668.16(e)(2)(ii)(B), (C), and (D). These regulations, currently applicable to undergraduate programs, provide additional requirements as to the quantitative aspect of a foreign graduate medical school's institutional satisfactory academic progress standards.

Although the Committee agreed with the NCFMEA that there is merit to requiring institutions to document the remediation it provides to assist students in making satisfactory academic progress so that, as needed, the Department, the NCFMEA, or the accrediting body may collect and examine the data to see if this is an area of concern that may need to be addressed, they did not believe it was necessary or cost effective to require the regular submission of these data to the Department.

Finally, proposed § 600.55(g)(3), which would require a foreign graduate medical school to publish all the languages in which instruction is offered, would provide information to students that could be essential to a student's success in the program. Although NCFMEA Recommendation 10 suggested requiring schools to publish the primary language of instruction, and if not English, identify any alternate language of instruction, the Committee agreed that requiring schools to publish all languages in which instruction is offered would be more beneficial and no more burdensome.

Foreign Veterinary Schools (§ 600.56)

Statute: Section 102(a)(2)(A)(ii) of the HEA stipulates that Title IV borrowers attending a foreign for-profit veterinary school must complete clinical training at an approved veterinary school located in the United States. The HEA does not establish additional eligibility criteria specific to foreign veterinary schools. Section 102(a)(2)(A) of the HEA requires the Secretary, through regulations, to develop eligibility criteria for foreign institutions that are comparable to the eligibility criteria for domestic "institutions of higher education."

Current Regulations: Section 600.56 of the Institutional Eligibility regulations includes additional eligibility criteria for foreign veterinary schools. Under § 600.56(a)(1)(i), foreign veterinary school facilities outside the United States must be adequately equipped and staffed to provide students comprehensive clinical and classroom veterinary instruction. Under § 600.56(a)(1)(ii), foreign veterinary school programs provided inside the United States must be approved by all veterinary licensing boards and evaluating bodies that the Secretary considers to be relevant. Under § 600.56(a)(3), the credentials of faculty members employed by the foreign veterinary school must be equivalent to the credentials of faculty members

teaching the same or similar courses in the United States.

Proposed Regulations: The proposed regulations would combine the requirements in § 600.56(a)(1)(i) and § 600.56(a)(1)(ii) into one paragraph, eliminating the distinction in those sections between portions of veterinary programs provided inside and outside of the United States. Proposed § 600.56(a)(4) would require a foreign veterinary school to be accredited or provisionally accredited by an organization acceptable to the Secretary. Proposed § 600.56(a)(4) would also specify that the requirement for accreditation or provisional accreditation does not take effect until July 1, 2015. Finally, proposed § 600.56(b)(2)(i) would require that, for a for-profit veterinary school, the school's students must complete their clinical training at an approved veterinary school located in the United States. Under proposed § 600.56(b)(2)(ii), for a veterinary school that is public or private nonprofit, the school's students may complete their clinical training at an approved veterinary school located in the United States or in the home country, and may also take clinical training at a location outside of the United States or the home country if no individual student takes more than two electives at the location and the combined length of the elective(s) does not exceed eight weeks.

Reasons: The Department proposed revising the regulations governing eligibility criteria for foreign veterinary schools to improve the Department's process for making determinations of eligibility of foreign veterinary schools to participate in the Title IV, HEA programs. The Department's expertise with regard to making independent evaluations of the academic quality of veterinary programs is limited, and currently the Department relies heavily on information provided to us by the foreign veterinary school to make eligibility determinations. If the school has been accredited or reviewed by the American Veterinary Medical Association (AVMA), the Department considers reports provided by the AVMA to the school to assist in making eligibility determinations.

The Department initially proposed to build on the Department's current practice by requiring AVMA accreditation for foreign veterinary schools applying to participate in the Title IV, HEA programs. We believed that requiring AVMA accreditation would provide the Department with an assurance of the academic quality of the veterinary program. AVMA standards for accrediting veterinary schools are detailed and specific, and the AVMA has the expertise and resources to evaluate veterinary schools that the Department lacks. In addition, the AVMA has a history of accrediting foreign veterinary school academics. For example, veterinary schools in Canada, Australia, and the Netherlands are currently accredited by the AVMA.

Non-Federal negotiators generally acknowledged the high quality of the AVMA's accreditation standards and procedures. One non-Federal negotiator agreed that it was logical to require AVMA accreditation of foreign veterinary schools, as most U.S. students studying at those schools ultimately practice as veterinarians in the United States. However, several non-Federal negotiators had concerns about requiring AVMA accreditation as a condition for participation in the Title IV, HEA programs.

Some non-Federal negotiators pointed out that the process for receiving AVMA accreditation is lengthy and expensive. Non-Federal negotiators asserted that the standards of foreign accrediting agencies such as the Veterinary Schools Accreditation Advisory Committee (VSAAC), which accredits veterinary schools in Australia and New Zealand, and the Royal College of Veterinary Surgeons (RCVS), which accredits veterinary schools in the United Kingdom, are comparable to the AVMA's standards. These non-Federal negotiators contended that it would be unnecessarily burdensome to require a veterinary school that has already been accredited by an agency such as VSAAC to also obtain AVMA accreditation to participate in the Title IV, HEA programs. The non-Federal negotiators cautioned the Department that foreign veterinary schools that enroll small numbers of Title IV borrowers may determine that obtaining AVMA accreditation is not cost effective, and may choose to end their participation in the Title IV, HEA programs. This would have the effect of limiting the options of U.S. students considering attending foreign veterinary schools.

Other non-Federal negotiators contended that it is extremely difficult for for-profit veterinary schools to obtain AVMA accreditation. Although they felt that for-profit veterinary schools can meet AVMA's standards around facilities, curriculum, and faculty, the AVMA standards also require veterinary schools to have a strong research component. These negotiators stated that for-profit veterinary schools tend not to have the resources to pursue research to the extent required by AVMA. These negotiators pointed out that public veterinary schools often have State sources of funding for research programs, while for-profit veterinary schools do not. The expense of establishing a research program acceptable to AVMA could be prohibitive for most for-profit veterinary schools. These non-Federal negotiators contended that, for purposes of preparing students for employment as competent veterinarians in most non-research venues, it is not necessary to include a research component of the kind required by AVMA.

In addition, non-Federal negotiators expressed concerns that foreign veterinary schools without AVMA accreditation that currently participate in the Title IV, HEA programs might be forced out of the Title IV, HEA programs if the Department went forward with its proposal. The effective date for most of the regulations in this NPRM is expected to be July 1, 2011. As the accreditation process can take several years, even a school that ultimately receives AVMA accreditation might not be able to obtain AVMA accreditation before the regulations become effective. Although AVMA offers provisional accreditation for schools in the U.S. or Canada that are on track to become accredited, it currently does not offer provisional accreditation to other schools.

As an alternative, non-Federal negotiators recommended using other measures, such as pass rates on licensing exams, licensure rates, or default rates, to determine eligibility of a foreign veterinary school. In addition, non-Federal negotiators recommended that the Department delay the effective date for the accreditation provision of the proposed regulations for up to ten years, if the Department goes forward with the AVMA requirement.

The Department noted that using measures such as pass rates on licensing examinations can be operationally complicated, raising concerns over privacy rights, obtaining exam results, and calculating pass rates in ways that are not disadvantageous to schools with low numbers of Title IV students. In addition, pass rates would not necessarily be a reliable indicator of the academic credentials of the faculty at a foreign veterinary school, and would provide no indication that the facilities at the veterinary school are adequate and safe for the students or for the animals housed in the facilities.

Instead, the Department accepted the recommendation of some of the non-Federal negotiators to replace the proposed requirement that a foreign veterinary school be accredited or provisionally accredited by the AVMA,

with a requirement that the school be accredited or provisionally accredited by an agency acceptable to the Secretary. Although the Department continues to believe that AVMA accreditation is the most desirable standard for foreign schools that train students for veterinary practice in the United States, we recognize that other accrediting agencies may also be satisfactory for this purpose. Under the revised regulations, foreign veterinary schools must still be accredited or provisionally accredited by an agency with expertise in accrediting veterinary education programs, but the agency does not have to be the AVMA. This gives the Department some flexibility in evaluating schools' compliance with the accreditation requirement, and gives schools some flexibility with regard to obtaining accreditation.

In addition, the Department delayed the effective date of the accreditation requirement until July 1, 2015, giving foreign veterinary schools that are currently in the Title IV, HEA programs approximately five years after final regulations are published to obtain accreditation from an acceptable accrediting agency. The Department believes that five years should be sufficient time for a school to obtain accreditation or provisional accreditation from an acceptable accrediting agency. In addition, Title IV borrowers who are currently enrolled in a foreign veterinary school should be able to complete their education programs before the five years elapses. Newly enrolled Title IV borrowers coming into those schools after this NPRM is published should be advised by the school's financial aid officers that there is a possibility that the school could lose Title IV, HEA program eligibility after July 1, 2015, so those borrowers can plan accordingly.

The Department proposed combining the requirements in § 600.56(a)(1)(i) and in § 600.56(a)(1)(ii) into one paragraph to simplify the regulations, and to eliminate the distinction between veterinary school activities in the United States and outside the United States for purposes of these particular requirements. The Department did not believe that this distinction in the current regulations served any useful purpose. The non-Federal negotiators did not express concerns about this modification to the existing regulations.

Regarding the provisions addressing the location of a foreign veterinary school in proposed § 600.57(b), the Committee agreed to be consistent with provisions that would permit some clinical training locations of foreign graduate medical schools to be outside of the United States and of the country in which the main campus of the school is located. Proposed § 600.57(b) would permit students who attend a public or private nonprofit foreign veterinary school to take no more than two electives at the clinical training location per student, as long as the elective(s) have a combined length of not more than eight weeks. This provision could not be extended to for-profit veterinary schools because the statute requires students who attend these schools to complete their clinical training in the United States.

Foreign Nursing Schools (§ 600.57)

Statute: The HEOA amended section 102(a)(2)(A) of the HEA to provide specific standards for foreign nursing schools. The amendments are effective beginning July 1, 2010, except that, for nursing schools that were eligible for Title IV, HEA program participation on August 13, 2008 (the day before enactment of the HEOA), they are effective July 1, 2012.

The HEA, as amended by the HEOA and HCERA, provides that a foreign nursing school, including a for-profit nursing school, may not participate in the Title IV, HEA programs unless the school—

- Has an agreement with a hospital or accredited school of nursing (as those terms are defined in section 801 of the Public Health Service Act (42 United States Code 296)) located in the United States that requires the students of the nursing school to complete the students' clinical training at the hospital or accredited school of nursing;
- Has an agreement with an accredited school of nursing located in the United States providing that the students graduating from the foreign nursing school also receive a degree from the accredited U.S. school of nursing;
- Certifies only Federal Direct Stafford loans under section 455(a)(2)(A) of the HEA, Federal Direct Unsubsidized loans under section 455(a)(2)(D) of the HEA, or Federal Direct PLUS loans under section 455(a)(2)(B) of the HEA for students attending the school; and
- Reimburses the Secretary for the cost of any loan defaults for current and former students included in the calculation of the school's cohort default rate during the previous fiscal year.

In addition, the HEOA amendments to the HEA require that at least 75 percent of the individuals who were students or graduates of a foreign nursing school, and who took the National Council Licensure Examination for Registered Nurses (NCLEX–RN) in the year preceding the year for which the school is certifying a Title IV, HEA program loan, received a passing score on the NCLEX–RN.

Current Regulations: Current regulations do not define *foreign nursing school,* or specify Title IV eligibility criteria unique to foreign nursing schools.

Proposed Regulations: The proposed regulations would add several new definitions relating to foreign nursing schools to § 600.52, would redesignate current § 600.57 as § 600.58, and would add a new § 600.57 specifying additional Title IV eligibility criteria for foreign nursing schools. The proposed regulations would add definitions to § 600.52 for *associate degree school of nursing, collegiate school of nursing,* and *diploma school of nursing.* The proposed new definitions are derived from definitions relating to nursing schools in section 801 of the Public Health Service Act, as amended (42 U.S.C. 201 *et seq.*), as required by the HEA as amended by the HEOA.

Under the proposed definitions, the primary distinction between the three types of nursing schools is the type of degree offered by the school. For an associate degree school of nursing, the nursing program must lead to a degree equivalent to an associate degree in the U.S. For a collegiate school of nursing, the nursing program must lead to a degree equivalent to a bachelor of arts, a bachelor of science, or a bachelor of nursing in the U.S, or to a degree equivalent to a graduate degree in nursing in the U.S. For a diploma school of nursing, the nursing program must lead to the equivalent of a diploma in the U.S. or to other indicators equivalent to a diploma that demonstrate that the student has satisfactorily completed the program.

Proposed new § 600.57 would require a *foreign nursing school* to meet the applicable eligibility criteria elsewhere in part 600. In addition, a *foreign nursing school* must—

- Meet the definition of *associate degree school of nursing, collegiate school of nursing,* or *diploma school of nursing;*
- Have an agreement with a hospital located in the United States or an accredited school of nursing located in the United States that requires students of the nursing school to complete the student's clinical training at the hospital or accredited school of nursing;
- Have an agreement with an accredited school of nursing located in the United States providing that students graduating from the nursing school located outside of the United

States also receive a degree from the accredited school of nursing located in the United States;

• Only certify Federal Stafford Loan program loans or Federal PLUS program loans for students attending the nursing school;

• Reimburse the Secretary for the cost of any loan defaults for current and former students included in the calculation of the institution's cohort default rate during the previous fiscal year;

• Determine the consent requirements for, and require the necessary consents of, all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents, to enable the school to comply with the requirements for collection and submission of NCLEX–RN results or pass rates;

• Annually, at its own expense, obtain all results on the NCLEX–RN achieved by students and graduates who are U.S. citizens, nationals, or eligible permanent residents, together with the dates the student has taken the examination (including any failed examinations) and provide the results to the Secretary;

• As an alternative to obtaining the NCLEX results individually, the school may obtain a report or reports from the National Council of State Boards of Nursing (NCSB), or an NCSB affiliate or NCSB contractor, reflecting the percentage of the school's students and graduates taking the NCLEX–RN in the preceding year who passed the examination, or the data from which the percentage could be derived, and provide the report to the Secretary;

• Demonstrate at least a 75 percent pass rate on the NCLEX–RN for all of the U.S. citizens, nationals, or eligible permanent residents who were students or graduates of the school and who took the NCLEX–RN in the year preceding the year for which the institution is certifying Federal Stafford or Federal Plus loans;

• Provide a program of clinical and classroom nursing instruction, which students are normally required to complete, that is supervised closely by members of the school's faculty. The program, which includes programs provided through agreements with nursing schools in the United States, must be provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom nursing instruction, through a training program for foreign nursing students that has been approved by all nurse licensing boards and evaluating bodies whose views are considered relevant by the Secretary;

• Have graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination; and

• Employ only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at nursing schools in the United States.

In addition, the proposed regulations would specify that for purposes of reimbursing the Secretary for defaulted loans, the cost of a loan default is the sum of the defaulted loan's—

• Outstanding principal;

• Accrued interest;

• Unpaid late fees and collection costs;

• Special allowance payments;

• Reinsurance payments; and

• Any related or similar payments the Secretary is obligated to make on the loan.

The proposed regulations also would specify that after a school reimburses the Secretary for the cost of a loan default, the loan is assigned to the school. The borrower remains liable to the school for the outstanding balance of the loan, under the terms and conditions specified in the promissory note.

Finally, proposed § 600.57(d) would provide that no portion of the foreign nursing program offered to U.S. students may be located outside of the country in which the main campus of the foreign nursing school is located, except for clinical sites located in the United States.

Reasons: The Department modeled the proposed language in new § 600.57 on the provisions in the HEOA regarding foreign nursing schools, as well as on language in existing §§ 600.55 and 600.56, which provide additional eligibility criteria for foreign graduate medical schools and foreign veterinary schools. In addition, in an effort to alleviate some of the burden entailed in demonstrating compliance with the NCLEX–RN pass rate requirement, the Department provided leeway for the school to obtain and submit, if available, reports on NCLEX–RN results from the NCSB, or one of its affiliates or contractors, showing the percentage of students from the school who passed the NCLEX–RN.

In most cases, the non-Federal negotiators did not have concerns or questions regarding the proposed language in § 600.57 that was modeled on language in sections §§ 600.55 and 600.56. However, non-Federal negotiators did have concerns relating to several of the provisions unique to foreign nursing schools.

The non-Federal negotiators believed that the new requirements in §§ 600.57(a)(2) and 600.57(a)(3), requiring agreements between foreign nursing schools and U.S nursing schools and hospitals, would force many foreign nursing schools that currently participate in the Title IV, HEA programs out of the Title IV, HEA programs. The non-Federal negotiators stated that most foreign nursing schools do not currently have such agreements and could not revamp their nursing programs to provide clinical training in the U.S. for their Title IV students. This issue was of special concern with regard to foreign nursing schools that enroll relatively small numbers of Title IV borrowers. The Title IV loan amounts such schools receive might not be sufficient enough to justify the expense of revamping their nursing programs.

The Department noted that the proposed regulations reflect the statute, and that any regulations developed by the Department must be consistent with statutory requirements.

Non-Federal negotiators also had concerns about the statutory provision, reflected in proposed § 600.57(a)(5), requiring a foreign nursing school to reimburse the Secretary for the cost of loan defaults for loans included in the calculation of a school's cohort default rate. Discussion of the reimbursement requirement centered around two major topics: the cost of a loan default and the status of the loan after the school reimburses the Secretary. Proposed §§ 600.57(b) and 600.57(c) address these two issues.

At the time that these proposed regulations were being negotiated, it was unclear whether foreign institutions would continue to participate in the FFEL program or be required to switch over to the Direct Loan Program. Given this uncertainty, the Department drafted proposed §§ 600.57(b) and 600.57(c) in such a way that the regulations could apply to either a FFEL loan or a Direct Loan.

The cost of a loan default, as specified in proposed § 600.57(b), includes some items that only apply to FFEL loans, such as special allowance payments, reinsurance payments, and payments of other fees. For a Direct Loan, the calculation of cost of a loan default would not include such costs. The cost of loan default for a Direct Loan would include such items as outstanding principal, accrued interest, and unpaid late fees or collection costs.

Proposed § 600.57(c) would specify that after a school reimburses the Secretary for the cost of a loan default,

the loan would be assigned to the school. The borrower would be required to repay the loan to the school, under the terms and conditions of the promissory note. The reimbursement by the school would not change the school's official cohort default rate or exempt the school from the consequences of its cohort default rate.

In the initial discussions with the non-Federal negotiators, the non-Federal negotiators emphasized the importance of borrowers remaining liable for repayment of the loan after the school has reimbursed the Department for the loan default. The non-Federal negotiators stressed that if the reimbursement is deemed to have paid off the loan, the borrower's obligation to repay the loan would effectively be discharged. This would provide a perverse incentive for borrowers to default deliberately on their Title IV loans.

The Department agreed with the non-Federal negotiators. Initially we proposed that after the Secretary is reimbursed, the loan would remain with the loan holder, who would continue to collect on the loan. However, the Department determined that after it received the reimbursement payment, it would have no financial interest in the loan, and would have no statutory basis for collecting on the loan. Accordingly, the Department modified the proposed regulatory language to require that the loan to be assigned to the school.

Although non-Federal negotiators supported borrowers remaining liable for the loan, some non-Federal negotiators had concerns about how assigning the loan to the school would affect the borrower. One non-Federal negotiator asked how NSLDS reporting, loan rehabilitation, and total and permanent disability discharges would be handled for these loans.

The Department did not address in detail operational matters with regard to defaulted loans assigned to a school. Instead, the Department pointed out that currently a FFEL loan can fall out of the FFEL program, usually due to a due diligence failure. The terms and conditions on the promissory note remain in effect on these loans, and loan holders continue to collect on them. Procedures currently in place for FFEL loans that have lost their eligibility would apply to defaulted Title IV loans that are assigned to a foreign nursing school.

Non-Federal negotiators questioned how foreign schools could comply with proposed § 600.57(a)(8), which would require that the clinical training provided at a U.S. school or hospital be "supervised closely" by members of the foreign school's faculty, in light of the fact that that training would already be supervised by faculty of the U.S. school. The Department noted that faculty at the U.S. clinical training facility could be appointed as faculty of the foreign school as well, and that, in any event, the foreign graduate medical school needs to have its own faculty supervise its entire program. The Department emphasized that Title IV eligibility is based on a school offering an eligible program, not a portion of an eligible program. The foreign school would have to develop agreements with U.S. schools that ensure continuity between the training offered at the foreign school and at the U.S. school.

Non-Federal negotiators also questioned the provision in § 600.57(a)(8) requiring a training program to be approved "by all licensing boards and evaluating bodies whose views are considered relevant by the Secretary." Non-Federal negotiators asked how a nursing program could be expected to obtain approval from state licensing boards in all 50 states. The Department responded that the Department would focus on the licensing boards and evaluating bodies applicable to the state where the training program is located, not licensing boards and evaluating bodies for all of the states, in determining compliance with this eligibility requirement, although approval or disapproval decisions from other states would be considered if available.

Proposed § 600.57(d) would provide that no portion of the foreign nursing program offered to U.S. students may be located outside of the country in which the main campus of the foreign nursing school is located, except for clinical sites located in the United States, to protect the coherence of the educational program and ensure continuity of oversight by the foreign government. The statute requires these nursing programs to provide their clinical training in the United States.

As negotiated, proposed § 600.57(d) does not reflect the inapplicability, through June 30, 2012, to foreign nursing schools that were participating in a Title IV, HEA program as of August 13, 2008, of the HEOA's new eligibility requirements for foreign nursing schools. In the final regulations, the Department will specify that this section becomes effective on July 1, 2012, with respect to foreign nursing schools that were participating in a Title IV, HEA program as of August 13, 2008.

Part 668 Student Assistance General Provisions Audited Financial Statements (§ 668.23)

Statute: Section 487(c)(1)(A)(i) of the HEA was amended by the HEOA to give the Secretary the authority to modify the financial and compliance audit requirements for foreign institutions, and the authority to waive the audit requirements for foreign institutions that receive less than $500,000 in Title IV, HEA program funds in the preceding year.

Current Regulations: Currently, under § 668.23(a)(2), an annual submission of both a compliance audit and audited financial statements is required of all institutions participating in the Title IV, HEA programs. Section 668.23(d)(1) requires that an institution's audited financial statements must be prepared on an accrual basis in accordance with U.S. generally accepted accounting principles (U.S. GAAP), and audited by an independent auditor in accordance with U.S. generally accepted government auditing standards (U.S. GAGAS) and other guidance contained in the Office of Management and Budget Circular A–133 and A–128 regarding audits of States, Local Government and Non-Profit Organizations, or in audit guides developed by, and available from, the Department of Education's Office of Inspector General, whichever is applicable. Section 668.15(h) permits a foreign institution whose enrolled students received less than $500,000 in U.S. FFEL Program funds per fiscal year to have its required audited financial statements prepared according to the generally accepted accounting principles and auditing standards of the institution's home country. Current regulations notwithstanding, on May 15, 2009, the Department of Education published a Dear Colleague Letter (GEN–09–06) that announced that the Secretary was waiving the annual audited financial statements requirement for foreign institutions whose enrolled students received less than $500,000 in U.S. FFEL Program funds during the award year preceding the audit period. The waiver applies to any audited financial statements for such a foreign institution due on or after August 14, 2008, the effective date of the HEOA amendment described previously, and renders unnecessary § 668.15(h), providing for submission of audits prepared under home country standards.

Proposed Regulations: Proposed § 668.23 would establish new financial audit submission requirements for foreign institutions as follows:

• For a public or nonprofit foreign institution that received less than $500,000 in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year, the audited financial statements submission would be waived, unless the institution is in its initial provisional period of participation and received Title IV, HEA program funds during that year, in which case the institution must submit, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country.

• For a public or nonprofit foreign institution that received at least $500,000 but less than $3,000,000 in U.S. Title IV, HEA program funds during its most recently completed fiscal year, the institution would be allowed to submit for that year, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP.

• For a public or nonprofit foreign institution that received at least $3,000,000 but less than $5,000,000 in U.S. Title IV, HEA program funds during its most recently completed fiscal year, the institution would be required to submit once every three years audited financial statements prepared in accordance with the generally accepted accounting principles of both the institution's home country *and* U.S. GAAP, but for the two years in between would be allowed to submit, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP.

• For a public or nonprofit foreign institution that received $5,000,000 or more in U.S. Title IV, HEA program funds during its most recently completed fiscal year, and for any for-profit foreign institution, the institution would be required to submit for that year audited financial statements prepared in accordance with the generally accepted accounting principles of both the institution's home country *and* U.S. GAAP.

Proposed § 668.23(h)(3)(i) would allow the Secretary to issue a letter to a foreign institution that has been identified as having problems with its financial condition or financial reporting that would require the foreign institution to submit its audited financial statements in the manner specified by the Secretary.

In addition, the proposed regulations would: (1) Remove the superseded language in § 668.15 addressing submission of financial audits for foreign institutions; (2) make technical corrections to reflect the Office of Management and Budget's (OMB's) 2003 rescission of Circular A–128 and expansion of Circular A–133 to include State and local governments and (3) add "issued by the Comptroller General of the United States" to § 668.23(d)(1) to make clear that United States generally accepted government auditing standards must be used for all submitted financial statements, including those from foreign institutions. The removal of the superseded language in § 668.15(h) would not impact the Secretary's ability to make a determination of financial responsibility for any foreign institution. The Secretary would make such a determination on the basis of financial statements submitted under proposed § 668.23(h).

These proposed regulations would supersede the May 15, 2009, Dear Colleague Letter (GEN–09–06). The proposed regulations would apply the waiver of the annual audited financial statements requirement to public or nonprofit foreign institution that received less than $500,000 in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year, instead of applying it to foreign institutions that received less than $500,000 in U.S. Title IV, HEA Program funds during the award year preceding the audit period, as the Dear Colleague Letter does. This would match the Title IV, HEA program funds being administered by a foreign institution with the period of time covered in the audited financial statements of the institution. If this proposed provision becomes final, the Department will provide implementation guidance to institutions addressing the change in the period used to determine the amount of Title IV, HEA program funds received by a foreign institution.

Reasons: The negotiators reached agreement on the proposed regulatory language only after extensive negotiations and significant compromises.

The Department initially proposed to require audited financial statements prepared in accordance with U.S. GAAP, which is the requirement for domestic institutions, for public foreign institutions that received $1,000,000 or more in U.S. Title IV, HEA program funds, or private foreign institutions that received $500,000 or more in U.S. Title IV, HEA program funds, as well as for any institution in its initial provisional period of participation. For public foreign institutions, if an institution received at least $500,000 in U.S. Title IV, HEA program funds, but less than $1,000,000 in U.S. Title IV, HEA program funds during the institution's fiscal year preceding the audit period, the institution would have been allowed to submit audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP. If there was an unpaid liability due to the Secretary by any public institution controlled by the same government entity, all public institutions controlled by that government entity would be required to submit audited financial statements prepared in accordance with U.S. GAAP.

Upon hearing the Department's initial proposal, some non-Federal negotiators argued that nonprofit foreign institutions should be treated the same as public foreign institutions. Others opined that requiring the audited financial statements to be prepared in accordance with U.S. GAAP was cost prohibitive, and suggested that a non-U.S. GAAP financial statement such as the International Financial Reporting Standards (IFRS) would be comparable and provide the Department with the information it needs. Another non-Federal negotiator suggested that the cost of preparing audited financial statements would be paid by students in the form of higher tuition and fees. It was also suggested that a rating from a financial rating agency such as Moody's or Standard and Poor's could be used as an indicator of financial solvency. Several non-Federal negotiators suggested that the Department should accept audited financial statements prepared under the institution's home country accounting standards from nonprofit or public foreign institutions where the Department determined those home country standards were comparable to U.S. GAAP, regardless of the amount of U.S Title IV, HEA program funds that an institution may have received in the fiscal year preceding the audit. Non-Federal negotiators pointed out that no evidence had been presented during the negotiating sessions that international accounting principles are inferior to U.S. GAAP, and noted that an institution's compliance audit would continue to be used to demonstrate that

Title IV, HEA program funds are being handled appropriately.

Other suggestions made by the non-Federal negotiators included that the Department tie its requirement of U.S. GAAP financial statements to a foreign institution's cohort default rate, given that such rates are generally lower than those for domestic institutions, and that public foreign institutions be relieved from submitting U.S. GAAP financial statements if the total number of U.S. students enrolled at that entity was less than fifty, regardless of the amount of U.S. Title IV, HEA program funds received during the institution's fiscal year.

The Department responded that it believes there is a risk threshold of Title IV, HEA program dollars administered by foreign institutions where the audited financial statements for those institutions should be provided in the same format and at the level of testing required from domestic institutions. These submissions would be reviewed on an equal footing with domestic institutions, and allow the Department to evaluate efficiently and effectively the financial condition of those institutions. The Department explained that financial statements prepared under U.S. GAAP provide Department staff with detailed information about the financial condition and operation of an institution. The additional information comes from the analysis of the audited financial statements, the accompanying audit opinion letters and related disclosures, and items in the footnote disclosures. Although the Department explored the use of IFRS as an alternative to U.S. GAAP, the Department believes it is premature to consider doing so now because the adoption of IFRS by the U.S. and other countries is proceeding slowly and inconsistently within the different countries.

After consideration of the feedback from the non-Federal negotiators, the Department agreed to treat nonprofit and public foreign institutions alike, and removed the requirement that an unpaid liability due to the Secretary by related public institutions would require the submission of audited financial statements prepared in accordance with U.S. GAAP. In order to reach a compromise with the non-Federal negotiators, the Department agreed to raise the threshold for nonprofit and public foreign institutions that would be allowed to submit audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country from $1,000,000 to $3,000,000 in U.S. Title IV, HEA program funds.

The Department also clarified that a foreign institution required to submit audited financial statements prepared in accordance with U.S. GAAP would be required also to submit a copy of the institution's audited financial statements that were prepared under the institution's home country accounting standards for the same period. By doing so, the Department would be able to perform a comparative analysis between both sets of financial statements to determine if the requirement to provide U.S. GAAP financial statements could be changed in the future.

Upon hearing the revised regulatory proposals, several non-Federal negotiators suggested that, in lieu of a required annual submission of any audited financial statements, the Department could simply rely on applying the exception provided to the Secretary under § 668.23(h)(3)(i) and require an institution to submit audited financial statements on only an "as needed" basis. Some non-Federal negotiators suggested raising the threshold to as much as $10,000,000 in U.S. Title IV, HEA program funds. Others suggested that a threshold should be based on a percentage of U.S. Title IV, HEA program funds received against the total student generated revenues by an institution.

The Department responded to these concerns with a final modification for public and nonprofit institutions that receive at least $3,000,000 but less than $5,000,000 in U.S. Title IV, HEA program funds annually. The Department was unwilling to accept only audited financial statements prepared in the home country standards on an ongoing basis for these institutions due to the unknown comparability of these submissions to audited financial statements prepared under U.S. GAAP. However, the Department proposed having these institutions submit U.S. GAAP financial statements once every three years, rather than every year, which would allow the Department to achieve the appropriate level of monitoring while providing some burden relief to these institutions. This proposal was discussed in detail, and consensus was reached on this issue.

Compliance Audits (§ 668.23)

Statute: Section 487(c)(1)(A)(i) of the HEA was amended by the HEOA to give the Secretary the authority to modify the financial and compliance audit requirements for foreign institutions, and the authority to waive the audit requirements for foreign institutions that receive less than $500,000 in Title IV, HEA program funds in the preceding year.

Current Regulations: Section 668.23(a)(2) of the current regulations requires an annual submission of both a compliance audit and audited financial statements from all institutions participating in the Title IV, HEA programs.

Sections 668.23(b)(1) and (2) require that an institution's compliance audit must cover, on a fiscal year basis, all Title IV, HEA program transactions, and must cover all of those transactions that have occurred since the period covered by the institution's last compliance audit. They also require that the compliance audit under this section be conducted in accordance with the general standards for compliance audits contained in the U.S. GAO Government Auditing Standards and procedures for audits contained in audit guides developed by the Department of Education's Office of Inspector General.

The Inspector General's current Foreign School Audit Guide, as amended, includes an Alternative Compliance Engagement that may be used for foreign institutions whose enrolled students received less than the $500,000 threshold in U.S. Title IV, HEA program funds.

Proposed Regulations: The proposed regulations would separate foreign institutions into two groups, establishing new compliance audit requirements for foreign institutions based upon whether the institution received less than $500,000 or $500,000 or more in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year.

Under proposed § 668.23(h)(2)(ii) and (iii), foreign institutions that receive less than $500,000 per year in U.S. Title IV, HEA program funds would be required to submit compliance audits under an alternative compliance audit performed in accordance with the audit guide from the Department's Office of Inspector General. The proposed regulations would require an annual submission of the compliance audit, except that, under certain conditions as described in the following paragraphs, an institution would submit a compliance audit annually for two consecutive years, then, once notified by the Secretary, would be permitted to submit a cumulative compliance audit every three years thereafter.

In order to submit a cumulative compliance audit once every three years instead of annually, a foreign institution would be required to have received less than $500,000 U.S. in U.S. Title IV, HEA program funds for its most recently

completed fiscal year, be fully certified, have timely submitted and had accepted compliance audits for two consecutive fiscal years, and have no history of late submissions since then.

Under an alternative compliance audit, the auditor performs prescribed procedures and reports the findings, but, unlike a standard compliance audit, is not required to express an opinion of the reliability of the institution's assertions concerning the institution's compliance with the requirements. The alternative compliance audit is performed as an agreed-upon procedures attestation engagement, and the standard compliance audit is performed as an examination-level attestation engagement. An alternative compliance audit is an agreed-upon procedures attestation engagement, which consists of specific procedures performed on a subject matter and is substantially narrower in scope than a standard compliance audit, which is an examination-level attestation engagement.

Under proposed § 668.23(h)(2)(i), foreign institutions that receive $500,000 or more per year in U.S. Title IV, HEA program funds, as in the current regulations, would be required to submit annual compliance audits using the standard audit procedures for foreign institutions set out in the audit guide issued by the Office of Inspector General.

When an institution submits a standard compliance audit because it received more than $500,000 in U.S. Title IV, HEA program funds in its previous year, the institution must also submit any alternative compliance audit or audits for preceding years that were prepared in accordance with proposed § 668.23(h)(2)(ii) for any preceding fiscal year or years in which the foreign institution received less than $500,000 in U.S. Title IV, HEA program funds.

Section 668.23(h)(3)(ii) of the proposed regulations would provide the Secretary with the authority to require that a foreign institution's compliance audit must be performed at a higher level of engagement, and/or require that a compliance audit must be submitted to the Secretary annually, if the institution has been notified by the Secretary about problems with its administrative capability or compliance reporting.

Section 668.23(h)(2) of the proposed regulations would make clear that, as under current regulations, a foreign institution's compliance audit must be done on a fiscal year basis, and all Title IV, HEA program transactions that have occurred since the period covered by the institution's last compliance audit must be covered. For institutions that are permitted to submit one compliance audit every three years, this requirement ensures that the compliance audit is cumulative. Also, when an institution is required to submit a compliance audit, the compliance audit must be submitted no later than six months after the last day of the institution's preceding fiscal year.

Reasons: The Department believes that by allowing foreign institutions that receive $500,000 or less in U.S. Title IV, HEA program funds per year to make less frequent audit submissions, the proposed regulations would provide a basis to establish a streamlined set of compliance audit requirements that would provide flexibility and cost benefits to a large number of relatively small foreign institutions and would reduce the reporting burden for the majority of foreign institutions that currently participate in the Title IV, HEA programs.

The proposed regulations would also allow the Department to concentrate its resources on reviewing compliance audits from larger volume institutions and institutions that have demonstrated Title IV, HEA program problems, which represent the Department's greatest financial risk. It would also be more efficient to review the cumulative audit submissions from lower-volume foreign institutions. Approximately 75% of the foreign institutions that participate in the Title IV, HEA programs are in this lower-volume group, and these institutions account for less than 7.5% of total Title IV, HEA program funds received by foreign institutions. Where problems are identified with a foreign institution, § 668.23(h)(3)(ii) of the proposed regulations provides that the Secretary may require the compliance audit to be performed at a higher level of engagement and may require the compliance audit to be submitted annually.

Public Foreign Institutions and Financial Responsibility (§ 668.171)

Statute: Section 487(c)(1)(B) of the HEA provides that the Secretary shall prescribe regulations, as necessary, to provide for the establishment of reasonable standards of financial responsibility for institutions that participate in the Title IV, HEA programs. Section 102(a)(2)(A) of the HEA provides that the Secretary shall prescribe regulations for determining the comparability of foreign institutions to Title IV "institutions of higher education."

Current Regulations: Section 668.171(c) provides that an institution is financially responsible if the institution—

- Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and
- Provides a letter from an official of that State or other government entity confirming that the institution is a public institution. In addition, the institution may not be in violation of any past performance requirement.

Proposed Regulations: The proposed regulations would permit a foreign public institution to meet the financial responsibility requirements in a manner similar to domestic public institutions. That is, the Secretary would consider a public foreign institution to be financially responsible if the institution: (1) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and (2) provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity. As with domestic public institutions, a foreign public institution would not meet this standard of financial responsibility if it was in violation of any past performance requirement.

If a foreign public institution did not meet the new requirements, its financial responsibility would be determined under the general requirements of financial responsibility, including the application of the equity, primary reserve, and net income ratios. Although the full faith and credit provision would provide an alternate way of meeting the financial responsibility standards for public foreign institutions, it would not excuse the institution from required submissions of audited financial statements (*see* the discussion under *Audited Financial Statements* above). If a government entity provided full faith and credit backing, the entity would be held liable for any Title IV, HEA program liabilities that were not paid by the institution.

Reasons: Current § 668.171(c) is not addressed to foreign institutions. Therefore, the proposed regulations would establish a financial responsibility standard for public foreign institutions that is comparable to public domestic institutions that participate in the Title IV, HEA programs. Although the Department has not identified specific countries that would be willing to provide the

proposed full faith and credit backing, and one non-Federal negotiator reported that a particular country with several public institutions that participate in the Title IV, HEA programs did not think that it would be willing to provide such backing, the Committee agreed that it was a good idea to make this alternative available.

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 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 this proposed regulatory action would not have an annual effect on the economy of more than $100 million. Therefore, this action is not "economically significant" and 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

These proposed regulations are needed to implement provisions of the HEA, as amended by the HEOA, particularly related to audit requirements for foreign institutions, the USMLE pass rate for foreign graduate medical schools, clinical training programs of foreign graduate medical schools, eligibility criteria for foreign graduate medical schools that have a clinical training program approved by a State prior to January 1, 2008, clinical training programs for foreign veterinary schools, provisions for participation by for-profit foreign nursing schools, and eligibility restrictions applicable to for-profit (and, later, all) foreign nursing schools. A brief description of the proposed rules, the reasons for adopting them, and an analysis of their effects is presented in the following sections of this NPRM:

Definition of a Foreign Institution (§§ 600.51, 600.52, 600.54, 682.200, 682.611): Section 102(a)(2)(A) of the HEA requires the Secretary to establish regulatory criteria for the approval of foreign institutions and for the determination that they are comparable to an institution of higher education within the United States. Proposed §§ 600.52 and 600.54 would include a more detailed definition of *foreign institution* to ensure that a foreign institution is comparable to institutions in the United States, in accordance with HEA section 102(a)(1)(C), before allowing a foreign institution to participate in the Title IV, HEA programs. The Department is concerned that a foreign institution that is not comparable to a domestic institution, especially in terms of the quality of its educational programs, may misuse Federal funds to the detriment of its students who may have to borrow heavily in order to attend the foreign institution. The proposed regulations also more fully implement the scheme of the HEA, which distinguishes between foreign and domestic institutions and includes provisions unique to each. For example, these regulations would prevent a domestic institution from claiming to be a foreign institution by virtue of the fact that it has established an offshore location, thereby avoiding the requirements applied to domestic institutions such as recognized accreditation, but that sends its students to the United States for the majority of the required coursework.

As described in the preamble section related to this provision, under current regulations a foreign institution is eligible to participate if it is comparable to an institution of higher education located in the United States; has been approved by the Secretary; does not offer its programs through any use of telecommunications, correspondence course, or direct assessment program; is not located in a State as defined in § 600.2; admits as regular students only those with a secondary school credential or recognized equivalent; and is legally authorized by an appropriate authority to provide an eligible program beyond the secondary level in the country in which it is located. The foreign institution must also provide eligible programs for which the institution is authorized to award the equivalent of an associate, baccalaureate, graduate, or professional degree in the United States; or a two-year program acceptable for full credit towards the equivalent of a baccalaureate degree awarded in the United States; or a program equivalent to a one-academic year training program that leads to a certificate, degree, or other credential and prepares a student for gainful employment in a recognized occupation.

The proposed regulations would consolidate the definitions and requirements related to the eligibility of foreign institutions to apply for Title IV, HEA program eligibility in subpart E of 34 CFR 600. As is the current practice, foreign institutions would be required to comply with all other requirements for eligible and participating institutions except to the extent the provisions are inconsistent with the HEA, 34 part CFR 600, or other regulatory provisions specific to foreign institutions. Proposed § 600.51(c) would also exempt foreign institutions from requirements that the Secretary identifies through a notice in the **Federal Register**. The proposed regulations would amend § 600.52 to include a detailed definition of *foreign institution.* Under the definition proposed, *foreign institution* would mean, for the purposes of students who receive Title IV, HEA program aid, an institution that is not located in a State; has no U.S. locations except with respect to clinical training for foreign graduate medical, veterinary, and nursing schools; has no written agreements with institutions or organizations located in the United States for students to take a portion of the program in the United States; does not permit students to enroll in any course offered by the foreign institution in the United States except for independent research under very limited circumstances; is legally authorized by an agency of its home country to provide an education program beyond its secondary level; awards degrees that are officially recognized by the institution's home country; and, for a program designed to prepare a student for gainful employment in a recognized occupation, provides a credential that satisfies the education requirements in the institution's home country for entry into that occupation and satisfies the educational requirements for entry into that occupation in the United States, including licensure. Proposed § 600.54(a) clarifies that, with the exception of freestanding foreign

graduate medical, veterinary, or nursing schools that may be for-profit, foreign institutions must be public or private nonprofit education institutions to be eligible.

Nonprofit Status for Foreign Institutions (§ 600.2): As foreign institutions must be public or private nonprofit institutions to participate in the Title IV, HEA programs, unless they are medical, veterinary, or nursing schools, the Department believes it is necessary to delineate in regulations the requirements for demonstrating nonprofit status for foreign institutions. Current section 600.2 defines a nonprofit institution as an institution that—

- Is owned and operated by one or more nonprofit corporations or associations, no parts of the net earnings of which benefits any private shareholder or individual;
- Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and
- Is determined by the U.S. Internal Revenue Service (IRS) to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Under proposed § 600.2, a new paragraph (2) of the definition of a nonprofit institution would provide that if a recognized tax authority of a foreign institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for Title IV, HEA purposes, the Secretary would automatically accept that tax authority's determination of nonprofit educational status for any institution located in that country. If a recognized tax authority of the institution's home country is not recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for Title IV, HEA program purposes, a foreign institution would have to demonstrate to the satisfaction of the Secretary that it is a nonprofit educational institution. The proposed regulations would also make clear that a nonprofit foreign institution may not be owned by a for profit entity, directly or indirectly. A foreign institution that did not meet this definition of a nonprofit foreign institution would not be eligible to participate in the Title IV, HEA programs unless it was a medical, veterinary, or nursing school.

The proposed regulations should increase comparability in the determination of nonprofit status between domestic and foreign institutions. A domestic institution must be determined by the IRS to be a nonprofit organization in order to be eligible as a nonprofit institution for participation in the Title IV, HEA programs. Additionally, certain countries may not have standards for the determination of nonprofit status that are comparable to those used in the United States, and may not ensure that the institution's net earnings do not benefit any private shareholder or individual. Therefore, to make the proposed regulations as comparable as possible to those applicable to domestic institutions, the Department proposed, and the Committee agreed, that a determination that an institution is nonprofit by an entity in the institution's foreign country would qualify an institution as nonprofit only if the determination is made by a recognized tax authority of the country, and the Secretary has recognized that tax authority as one that can make a determination using criteria that are similar to those used by the U.S. IRS. The Secretary may recognize more than one tax authority in a country. Information submitted by entities other than recognized tax authorities would be taken into account by the Department; however, this would be done as part of an individual determination of the eligibility of an institution.

Foreign Graduate Medical Schools (§§ 600.20, 600.21, 600.52, 600.55): As discussed in the section of the preamble related to this provision, the proposed regulations reflect amendments made to the sections 102(a)(2)(A) and (B) of the HEA by the HEOA and the requirement in 102(a)(2)(B)(iii)(IV)(aa) of the HEA that the regulations be based on the recommendations of the 2009 NCFMEA report. The NCFMEA is a panel of medical experts that evaluates the medical school accrediting agency standards used in the country where medical education is provided to determine comparability to the standards of accreditation applied to medical schools in the United States.

Current section 600.52 defines a foreign graduate medical school as a foreign institution that qualifies to be listed in, and is listed as a medical school in, the most current edition of the World Directory of Medical Schools published by the World Health Organization. The regulations do not define clinical training, the NCFMEA, or a post-baccalaureate/equivalent medical degree. Neither section 600.20, which addresses the application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification, nor § 600.21, which addresses when and how an institution must update application information, currently include any provisions specific to foreign graduate medical schools. Foreign graduate medical schools generally must meet the criteria in § 600.54 for determining a foreign institution's eligibility (except the criterion that the institution be public or private nonprofit), as well as the additional criteria in § 600.55(a)(5). The additional criteria include the following: (1) Providing and requiring students to complete a program of clinical and classroom medical instruction of not less than thirty-two months that is supervised closely by faculty and that is provided (a) outside the United States in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom medical instruction, or (b) in the United States, through a training program for foreign medical students that has been approved by all medical licensing boards and evaluating bodies whose views are considered relevant by the Secretary; (2) having graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination; (3) employing only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at medical schools in the United States; and (4) being approved by an accrediting body that is legally authorized to evaluate graduate medical schools in the country where the school is located and whose standards of accreditation have been evaluated by the advisory panel of medical experts established by the Secretary and have been determined to be comparable to standards of accreditation applied to medical schools in the United States. In addition, current regulations provide that foreign graduate medical schools that do not have a clinical training program that has been continuously approved by a State since January 1, 1992, must: (1) During the academic year preceding the year for which any of the school's students seeks a FFEL program loan, have at least 60 percent of those enrolled as full-time regular students in the school and at least 60 percent of the school's most recent graduating class be persons who did not meet the citizenship and residency criteria contained in section 484(a)(5) of the HEA, 20 U.S.C. 1091(a)(5); and (2) for a foreign graduate medical school outside of Canada, have at least 60 percent of the school's students and graduates who took any step of the USMLE administered by the

ECFMG (including the ECFMG English test) in the year preceding the year for which any of the school's students seeks a FFEL program loan to have received passing scores on the exams.

The proposed regulations would deal with location requirements for foreign medical education programs, affiliation agreements, application and notification procedures, accreditation, admission criteria, collection and submission of data, citizenship and USMLE pass rate percentages, maximum timeframes for program completion, required documentation related to educational remediation a school provides as part of a satisfactory academic progress policy, and publication of the languages in which instruction is offered.

Proposed § 600.55(h) contains regulations concerning the locations where a foreign graduate medical school can establish its program. No portion of the medical education program offered to United States students by a foreign graduate medical school, other than the clinical training portion of the program, would be allowed to be offered outside the country where the main campus of the school is located. In addition to distinguishing between the basic science and the clinical training parts of the program, the Committee discussions distinguished between the different parts of clinical training; referred to in these proposed regulations as the core, the required clinical rotation (the electives that students are required to take), and the not required clinical rotation (the electives that students can choose). The proposed regulations set three criteria for clinical training sites outside the United States—the requirement to be located in an approved comparable country; required on-site evaluation and specific approval of the site by the institution's medical accrediting agency if a location is in a comparable foreign country outside the country of the program's main campus; and the requirement that instruction be offered in conjunction with medical educational programs offered to students enrolled in accredited medical schools located in that approved foreign country—but allow two exceptions. The two exceptions would permit a foreign graduate medical school to have a clinical training program in a foreign country other than the country in which the main campus is located or in the United States without meeting these three criteria if the clinical training location is included in the accreditation of a medical program accredited by the LCME, or if no individual student takes more than two electives at the clinical training location and the combined length of the electives does not exceed eight weeks.

Proposed § 600.55(e)(1) would require a foreign graduate medical school to have: (1) A formal affiliation agreement with any hospital or clinic at which all or a portion of the school's core clinical training or required clinical rotations are provided; and (2) either a formal affiliation agreement or other written arrangements with any hospital or clinic at which all or a portion of its clinical rotations that are not required are provided, except for those locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks. The proposed regulations would require these affiliation agreements or other written arrangements to state how the following will be addressed at each site: (1) Maintenance of the school's standards; (2) appointment of faculty to the medical school staff; (3) design of the curriculum; (4) supervision of students; (5) provision of liability insurance; and (6) evaluation of student performance. In addition, the proposed regulations would require a foreign graduate medical school to do the following in its application for participation in Title IV, HEA programs: (1) To provide copies of the affiliation agreements with hospitals and clinics that it is required to have under proposed § 600.55(e)(2); (2) to list all educational sites associated with its program on its application for participation, except those not used regularly that are chosen by individual students who take no more than two electives there for no more than a combined total of eight weeks; (3) to apply for certification and wait for approval before dispensing Title IV, HEA program funds at any additional location that offers core clinical training, except for those locations included in the accreditation of a medical program accredited by the LCME; and (4) to indicate whether it offers only post-baccalaureate/equivalent medical programs, other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine, or both. The Department believes that distinguishing between the parts of the medical education program allows a balance between effective oversight and exposure to other medical environments and cultures for short-term elective training.

Other proposed regulations address general definitions and requirements related to foreign graduate medical programs. The proposed regulations would change the definition of a *foreign graduate medical school,* removing the requirement that a school qualify for listing in the World Directory of Medical Schools and clarifying that schools would have to meet all applicable criteria for foreign institution's Title IV, HEA program eligibility in part 600, not just the criteria in § 600.55. In its place, the definition proposed would clarify that a foreign graduate medical school can be free-standing or a component of an eligible foreign institution. Current regulations require only clinical training and classroom instruction that is offered outside of the United States to be provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom medical instruction, and require only the clinical training and classroom instruction located in the United States to be approved by all medical licensing boards and evaluating bodies whose views are considered relevant by the Secretary. Proposed § 600.55(a)(2) would apply these provisions to the entire medical program, regardless of whether a particular portion is located outside or inside the United States, as the Department believes both are good requirements for medical education regardless of location. In § 600.52, the proposed regulations would add a definition of clinical training. Clinical training would be defined as the portion of a graduate medical education program that counts as a clinical clerkship for purposes of medical licensure. Proposed §§ 600.20(a)(3)(i)(B) and (b)(3)(i)(B) would require freestanding foreign graduate medical schools, and foreign institutions that include a foreign graduate medical school, to identify, for each clinical site reported in the certification or recertification application as required under §§ 600.20(a)(3)(i)(A) and (b)(3)(i)(A), the type of clinical training (core, required clinical rotation, not required clinical rotation) offered at that site. Proposed § 600.55(a)(3) would require foreign graduate medical schools to appoint, rather than employ, faculty members with comparable academic credentials to those teaching similar courses at U.S. medical schools. The proposed regulations make no substantive changes to existing accreditation requirements for foreign graduate medical schools.

The proposed regulations also address admission criteria and collection and submission of data in order to provide data for the evaluation of whether additional performance measures should be required of foreign graduate medical schools. Proposed § 668.55(c)

would require foreign graduate medical school with a post-baccalaureate/equivalent medical program to require U.S. citizens, nationals, or permanent residents accepted as students to have taken the MCAT and have reported the scores to the school. To provide information valuable for the future evaluation of the quality of education being provided to students attending foreign graduate medical schools, foreign graduate medical schools must determine consent requirements, obtain necessary consents from U.S. citizens, nationals, or eligible permanent residents, and comply with the collection and submission requirements in proposed § 600.55(d) for MCAT scores, residency placement, and USMLE examination scores. Proposed § 600.55(d) requires that schools obtain the required information at their own expense, submit MCAT scores and medical residency data to their accrediting agency by September 30 of each year, and submit the USMLE scores for Step 1, Step 2—Clinical Skills, and Step 2—Clinical Knowledge to the Department annually by September 30 unless the Department informs the school that it will get the USMLE scores from ECFMG. The provision in proposed § 600.55(e)(2) would require a foreign graduate medical school to notify its accrediting body within one year of any material changes in educational programs, and the overseeing bodies and in the formal affiliation agreements with hospitals and clinics would reflect NCFMEA Recommendations 12(a) and 12(b) and would allow a school's accrediting body to assess any substantive impact the change would have on the school's operations.

The proposed change in § 600.55(f)(1)(i)(B) to allow a foreign graduate medical school to be exempt from the existing citizenship requirement if it had a clinical training program approved by a State as of January 1, 2008, and continues to operate a clinical training program in at least one State that approves the program, reflects a change made by the HEOA. As a result, both foreign graduate medical schools that had a clinical training program approved by a State as of January 1, 1992, and those that had a clinical training program approved by a State as of January 1, 2008, are exempt from the citizenship rate provision, provided the school continues to operate a clinical training program in at least one State that approves the program.

The increase in the USMLE pass rate threshold from 60 percent to 75 percent also reflects a change made by the HEOA, as does proposed § 600.55(f)(2)(ii), which would allow a foreign graduate medical school that was eligible to participate in the Title IV, HEA programs and exempt from the USMLE pass rate requirement based on having a clinical training program approved by a State as of January 1, 1992, to continue to be eligible and exempt from the USMLE pass rate requirement as long as it continues to operate a clinical training program in at least one State that approves the program. Proposed § 600.55(f)(1)(ii) would make the following changes to the USMLE pass rate requirement: (1) Increase the USMLE pass rate threshold from 60 percent to 75 percent (§ 600.55(f)(1)(ii)); (2) limit the pass rate requirement to Step 1, Step 2—CS, and Step 2—CK, excluding Step 3; (3) require a foreign graduate medical school to have at least a 75 percent pass rate on each step/test of the USMLE (limited to Step 1, Step 2—CS, and Step 2—CK), rather than a combined pass rate for all steps/tests; (4) require foreign graduate medical schools to include in the calculation only U.S. citizens, nationals, or eligible permanent residents, rather than all students taking the USMLE; and (5) require foreign graduate medical schools to include only first time test takers in the calculation. As described in the preamble section related to this provision, under proposed § 600.55(f)(4), pass rates must be based on at least eight step/test results.

Proposed § 600.55(g)(1) would require a foreign graduate medical school to follow existing regulations currently applicable to undergraduate programs for establishing a maximum timeframe in which a student must complete his or her program of medical education and require that a student complete his or her program within 150 percent of the published length of the program. This adopts NCFMEA Recommendation 9(b). In addition, proposed § 600.55(g)(2) would require a foreign graduate medical school to document the educational remediation it provides to assist students in making satisfactory academic progress. In the future, the Department or the NCFMEA may collect and examine the data to see if this is an area of concern that may need to be addressed, but they did not believe it was currently necessary or cost effective to require the regular submission of these data to the Department. Finally, proposed § 600.55(g)(3) would require a foreign graduate medical school to publish all the languages in which instruction is offered. Although NCFMEA Recommendation 10 suggested requiring schools to publish the primary language of instruction, and if not English, identify any alternate language of instruction, the Committee agreed that requiring schools to publish all languages in which instruction is offered would be more beneficial and no more burdensome.

Foreign Veterinary Schools (§ 600.56): Section 102(a)(2)(A)(ii) of the HEA stipulates that Title IV borrowers attending a foreign for-profit veterinary school must complete clinical training at an approved veterinary school located in the United States. The HEA does not establish additional eligibility criteria specific to foreign veterinary schools, and requires the Secretary to develop, through regulation, eligibility criteria for foreign institutions that are comparable to the eligibility criteria for domestic institutions of higher education. Under current regulations, foreign veterinary school facilities outside the United States must be adequately equipped and staffed to provide students comprehensive clinical and classroom veterinary instruction, foreign veterinary school programs provided inside the United States must be approved by all veterinary licensing boards and evaluating bodies that the Secretary considers to be relevant, and the credentials of faculty members employed by the foreign veterinary school must be equivalent to the credentials of faculty members teaching the same or similar courses in the United States.

The Department proposed revising the regulations governing eligibility criteria for foreign veterinary schools to improve the Department's process for making determinations of eligibility of foreign veterinary schools to participate in the Title IV, HEA programs. The proposed regulations would apply the current regulatory standards regarding facilities, approvals and faculty credentials without distinguishing between portions of veterinary programs provided inside and outside of the United States, and, as of July 1, 2015, would require a foreign veterinary school to be accredited or provisionally accredited by an organization acceptable to the Secretary. As required by the HEA, the proposed regulations also distinguish between for-profit foreign veterinary schools and those that are public or private nonprofit. Students from a for-profit foreign veterinary school must complete their clinical training at an approved veterinary school located in the United States. Students from public or private nonprofit foreign veterinary schools may complete their clinical training at an approved veterinary school located

in the United States or in the home country, and may also take clinical training outside the United States or the home country if no individual student takes more than two electives at the location and the combined length of the elective does not exceed eight weeks. The Department agreed to be consistent with medical school provisions that would permit some clinical training locations of foreign graduate medical schools to be outside of the United States and the country in which the main campus of the school is located. This provision could not be extended to for-profit veterinary schools because the statute requires students who attend these schools to complete their clinical training in the United States.

Foreign Nursing Schools (§ 600.57): The HEOA amended section 102(a)(2)(A) of the HEA to provide specific standards for foreign nursing schools. The amendments are effective beginning July 1, 2010, except that, for nursing schools that were eligible for Title IV, HEA program participation on August 13, 2008 (the day before enactment of the HEOA), they are effective July 1, 2012. The HEA, as amended by the HEOA and HCERA, provides that a foreign nursing school, including a for-profit nursing school, may not participate in the Title IV, HEA programs unless the school: (1) Has an clinical training agreement with a hospital or accredited school of nursing located in the United States; (2) has an agreement with an accredited school of nursing located in the United States providing that the students graduating from the foreign nursing school also receive a degree from the accredited U.S. school of nursing; (3) certifies only Federal Direct Stafford Loans under section 455(a)(2)(A) of the HEA, Federal Direct Unsubsidized Stafford Loans under section 455(a)(2)(D) of the HEA, or Federal Direct PLUS loans under section 455(a)(2)(B) of the HEA for students attending the school; and (4) reimburses the Secretary for the cost of any loan defaults for current and former students included in the calculation of the school's cohort default rate during the previous fiscal year. In addition, the HEOA amendments to the HEA require that at least 75 percent of the individuals who were students or graduates of a foreign nursing school, and who took the National Council Licensure Examination for Registered Nurses (NCLEX–RN) in the year preceding the year for which the school is certifying a Title IV, HEA program loan, received a passing score on the NCLEX–RN. Current regulations do not define the term "foreign nursing school", or specify Title IV, HEA program eligibility criteria unique to foreign nursing schools.

The proposed regulations would add several new definitions relating to foreign nursing schools to § 600.52, and would add a new § 600.57 specifying additional Title IV eligibility criteria for foreign nursing schools. The proposed regulations would add definitions to § 600.52 for the terms *associate degree school of nursing, collegiate school of nursing,* and *diploma school of nursing,* with the primary distinction between the three types of nursing schools being the type of degree offered by the school. For an associate degree school of nursing, the nursing program must lead to a degree equivalent to an associate degree in the U.S. For a collegiate school of nursing, the nursing program must lead to a degree equivalent to a bachelor of arts, a bachelor of science, or a bachelor of nursing in the U.S., or to a degree equivalent to a graduate degree in nursing in the U.S. For a diploma school of nursing, the nursing program must lead to the equivalent of a diploma in the U.S. or to other indicia equivalent to a diploma that demonstrates that the student has satisfactorily completed the program. These definitions are drawn from the Public Health Service Act, as required by the foreign nursing school provisions of the HEOA amendments to the HEA.

Proposed new § 600.57 would require a *foreign nursing school* to meet the applicable eligibility criteria elsewhere in part 600. In addition, a foreign nursing school must meet the statutory requirements described above as well as the following eligibility criteria: (1) Meet the definition of *associate degree school of nursing, collegiate school of nursing,* or *diploma school of nursing;* (2) reimburse the Department for the cost of any loan defaults for current and former students included in the calculation of the institution's cohort default rate during the previous fiscal year; (3) determine the consent requirements for, and require the necessary consents of, all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents, to enable the school to comply with the requirements for collection and submission of NCLEX–RN results or pass rates; (4) annually, at its own expense, obtain all results on the NCLEX–RN achieved by students and graduates who are U.S. citizens, nationals, or eligible permanent residents, together with the dates the student has taken the examination (including any failed examinations) and provide the results to the Secretary; (5) as an alternative to obtaining the NCLEX results individually, the school may obtain a report or reports from the National Council of State Boards of Nursing (NCSB), or an NCSB affiliate or NCSB contractor, reflecting the percentage of the school's students and graduates taking the NCLEX–RN in the preceding year who passed the examination, or the data from which the percentage could be derived, and provide the report to the Secretary; (6) provide, a program of clinical and classroom nursing instruction, which students are normally required to complete, that is supervised closely by members of the school's faculty. The program, which includes programs provided through agreements with nursing schools in the United States, must be provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom nursing instruction, through a training program for foreign nursing students that has been approved by all nurse licensing boards and evaluating bodies whose views are considered relevant by the Secretary; (7) have graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination; and (8) employ only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at nursing schools in the United States.

The proposed regulations also would specify that after a school reimburses the Secretary for the cost of a loan default, the loan is assigned to the school. The borrower remains liable to the school for the outstanding balance of the loan, under the terms and conditions specified in the promissory note.

Proposed § 600.56(b) would provide that no portion of the foreign nursing program offered to U.S. students may be located outside of the country in which the main campus of the foreign nursing school is located, except for clinical sites, which by statute must be located in the United States.

Single Legal Authorization for Groups of Foreign Institutions (§ 600.54)

To ease administrative burden for foreign institutions, the Department sought to determine if compliance with any of the foreign institution institutional eligibility criteria could be demonstrated at a nationwide level, for all eligible institutions within a country, rather than at the individual institution level. After discussions with the non-Federal negotiators and our own

internal review of the Title IV institutional eligibility criteria, the Department determined that the requirement for proof of legal authorization to provide postsecondary education could be provided this way. Section 600.54(b) of the current regulations requires a foreign institution to be legally authorized by an appropriate authority to provide postsecondary education in the country where the institution is located. Proposed § 600.54(f) would provide three different methods for a foreign institution to prove that it is legally authorized to provide postsecondary education in the country where the institution is located. The documentation from a foreign country's education ministry, council, or equivalent agency may either be: (1) A single legal authorization that covers all eligible foreign institutions in the country; (2) a single legal authorization that covers all eligible foreign institutions in a jurisdiction within the country; or (3) separate legal authorizations for each eligible foreign institution in the country.

The proposed regulations reflect recommendations made in response to concerns raised by non-Federal negotiators about reliance on national governments to produce lists of institutions legally authorized to provide postsecondary education because of efficiency and provincial level regulation of educational providers in some countries. In addition to allowing proof of legal authorization to be provided on a nationwide basis, the proposed regulations allow for proof of legal authorization to be provided for all eligible institutions in a jurisdiction within the country, and continue to allow proof of legal authorization to be provided separately for each eligible institution in a country.

Eligibility of Training Programs at Foreign Institutions (§ 600.54): Section 101(b)(1) of the HEA provides, in part, that one type of educational program that a Title IV "institution of higher education" may provide to be eligible to apply to participate in the Title IV, HEA programs, is a training program of at least one year that prepares students for gainful employment in a recognized occupation. Section 102(a)(2)(A) provides for participation in the Title IV, HEA programs by entities that are comparable to such institutions under regulations prescribed by the Secretary. Current regulations provide that, in order to be eligible to apply to participate in the Title IV, HEA programs, a foreign institution must provide an eligible educational program that leads to a degree that is equivalent to a U.S. degree, or be at least a two-academic year program acceptable for full credit toward the equivalent of a U.S. baccalaureate degree, or be equivalent to at least a one-academic-year training program that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation.

Under the proposed regulations, a foreign institution would have to demonstrate to the satisfaction of the Secretary (who would make program-by-program determinations of comparability) that the amount of academic work required by a program it seeks to qualify as eligible as at least a one-academic-year training program is equivalent to—

- For a program offered in credit hours, a minimum of 30 weeks of instructional time and, for an undergraduate program, an amount of instructional time whereby a full-time student is expected to complete at least 24 semester or trimester credit hours or 36 quarter credit hours; or
- For a program offered in clock hours, a minimum of 26 weeks of instructional time and, for an undergraduate program, an amount of instructional time whereby a full-time student is expected to complete at least 900 clock hours.

The Department believes the proposed regulations are necessary because many foreign institutions use educational measurements other than conventional U.S. semester, trimester, quarter credits and clock-hours. The non-Federal negotiators provided the Department with information regarding the definition of non-degree programs by different countries, units of measurement for programs in other countries, and evaluation and comparability determinations made by private entities. The information provided consistently indicates that the assignment of credits or other measures of academic work by foreign institutions vary greatly. As the definition of an academic year—the program length measurement used here—specifically references these U.S. measurements, it is necessary to make some sort of comparability determination in order to determine the eligibility of these programs at foreign institutions, and in some cases to determine the eligibility of the foreign institution itself. Under the proposed regulations, the Secretary would make determinations of comparability on a program-by-program basis, based on information provided by a foreign institution to demonstrate that the amount of academic work required by a program it seeks to qualify as eligible as comparable to at least a one-academic-year training program is equivalent to the academic work required for eligibility of these programs at domestic institutions.

Audited Financial Statements (§ 668.23): Section 487(c)(1)(A)(i) of the HEA was amended by the HEOA to give the Secretary the authority to modify the financial and compliance audit requirements for foreign institutions and the authority to waive the audit requirements for foreign institutions that receive less than $500,000 in Title IV, HEA program funds in the preceding year. Currently, under § 668.23(a)(2), an annual submission of both a compliance audit and audited financial statements is required of all institutions participating in the Title IV, HEA programs. Section 668.23(d)(1) requires that an institution's financial statements must be prepared on an accrual basis in accordance with U.S. GAAP, and audited by an independent auditor in accordance with U.S. GAGAS, or in compliance with guidance in Office of Management and Budget Circular A–133 and A–128 or in audit guides developed by, and available from, the Department of Education's Office of Inspector General.

The proposed regulations categorize foreign institutions by control and amount of Title IV, HEA program funds received during the institution's most recently completed fiscal year and establish new financial audit submission requirements. For a public or nonprofit foreign institution that received less than $500,000 in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year, the audited financial statements submission normally would be waived. However, if the institution is in its initial provisional period of participation, and received Title IV, HEA program funds during that year, the institution must submit, in English, audited financial statements prepared in accordance with generally accepted accounting principles of the institution's home country. For a public or nonprofit foreign institution that received at least $500,000 but less than $3,000,000 in U.S. Title IV, HEA program funds during its most recently completed fiscal year, the institution would be allowed to submit for that year, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP. For a public or nonprofit foreign institution that received at least $3,000,000 but less than $5,000,000 in

U.S. Title IV, HEA program funds during its most recently completed fiscal year, the institution would be required to submit once every three years audited financial statements prepared in accordance with the generally accepted accounting principles of both the institution's home country and U.S. GAAP, but, for the two years in between, would be allowed to submit in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP. Foreign institutions that receive more than $5,000,000 or more annually would remain subject to current requirements for audited financial statements prepared in accordance with U.S. GAAP.

The proposed regulations also allow the Secretary to issue a letter to a foreign institution that has been identified as having problems with its financial condition or financial reporting that requires the foreign institution to submit its audited financial statements in the manner specified by the Secretary.

Compliance Audits (§ 668.23): Current regulations require an annual submission of both a compliance audit and audited financial statements from all institutions participating in the Title IV, HEA programs. An institution's compliance audit must cover on a fiscal year basis, all Title IV, HEA program transactions, and must cover all of those transactions that have occurred since the period covered by the institution's last compliance audit and be conducted in compliance with the general standards for compliance audits contained in the U.S. GAO Government Auditing Standards and procedures for audits contained in audit guides developed by the Department of Education's Office of Inspector General. The current Inspector General's Audit Guide concerning compliance audits for foreign institutions includes an Alternative Compliance Engagement that may be used for foreign institutions whose enrolled students received less than the $500,000 threshold in U.S. Title IV, HEA program funds.

The proposed regulations would separate foreign institutions into two groups, establishing new compliance audit requirements for foreign institutions based upon whether the institution received less than $500,000 or $500,000 or more in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year. For foreign institutions that receive less than $500,000 per year in U.S. Title IV, HEA program funds would be required to submit compliance audits under an alternative compliance audit performed in accordance with the audit guide from the Department's Office of Inspector General. Under an alternative compliance audit, the auditor performs prescribed procedures and reports the findings, but, unlike a standard compliance audit, is not required to express an opinion of the reliability of the institution's assertions concerning the institution's compliance with the requirements. The alternative compliance audit is performed as an agreed-upon procedures attestation engagement, and the standard compliance audit is performed as an examination-level attestation engagement. The proposed regulations would require an annual submission of the compliance audit, except that, in specified circumstances, an institution would submit a compliance audit annually for two consecutive years, then, once notified by the Department, would be permitted to submit a compliance audit every three years thereafter. To qualify for these less frequent submission requirements, a foreign institution would be required to have received less than $500,000 in the most recently completed fiscal year, be fully certified, have timely submitted and had accepted compliance audits for two consecutive fiscal years, and have no history of late submissions since then.

Foreign institutions that receive $500,000 or more in U.S. Title IV, HEA program funds would be required to submit an annual compliance audit using the standard audit procedures for foreign institutions in the audit guide issued by the Office of Inspector General. The compliance audit would be submitted along with any alternative compliance audits for any preceding fiscal years in which the institutions received less than $500,000 in U.S. Title IV, HEA program funds.

Section 668.23(h)(3)(ii) of the proposed regulations would provide the Secretary with the authority to require that a foreign institution's compliance audit be performed at a higher level of engagement, and/or require that a compliance audit must be submitted to the Secretary annually if it has been identified that the institution has problems with its administrative capability or compliance reporting. Section 668.23(h)(2) of the proposed regulations would make clear that, as under the current regulations, a foreign institution's compliance audit must be done on a fiscal year basis, and all Title IV, HEA program transactions that have occurred since the period covered by the institution's last compliance audit must be covered. Also, a compliance audit must be submitted no later than six months after the last day of the institution's fiscal year.

The Department believes the proposed regulations provide a basis to establish a streamlined set of compliance audit requirements that would provide flexibility and cost benefits to the large number of relatively small foreign institutions and reduce the reporting burden for the majority of foreign institutions. Approximately 75% of the foreign institutions that participate in the Title IV, HEA programs are in this lower-volume group, and these institutions account for less than 7.5% of total Title IV, HEA program funds received by foreign institutions. The proposed regulations should allow the Department to concentrate its resources on reviewing compliance audits from the larger volume institutions and institutions that have demonstrated Title IV, HEA program problems that represent the Department's greatest financial risk.

Public Foreign Schools and Financial Responsibility (§ 668.171)

Section 487(c)(1)(B) of the HEA provides that the Secretary shall prescribe regulations, as necessary, to provide for the establishment of reasonable standards of financial responsibility for institutions that participate in the Title IV, HEA programs. Section 102(a)(2)(A) provides that the Secretary shall prescribe regulations for determining the comparability of foreign schools to Title IV "institutions of higher education." Current section 668.171(c) provides that an institution is financially responsible if the institution notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation, and provides a letter from an official of that State or other government entity confirming that the institution is a public institution. In addition, the institution may not be in violation of any past performance requirement. Current § 668.171(c) is not addressed to foreign institutions. The proposed regulations would permit a foreign public institution to meet the financial responsibility in a manner similar to domestic public institutions as described above. If a foreign public institution did not meet the new requirements, its financial responsibility would be determined under the general requirements of financial responsibility, including the application of the equity, primary reserve, and net income ratios.

Although the full faith and credit provision would provide an alternate way of meeting the financial responsibility standards for public foreign institutions, it would not excuse the institution from required submissions of audited financial statements.

The following section addresses the alternatives that the Secretary considered in implementing these regulations. These alternatives are also discussed in more detail in the *Reasons* sections of this preamble related to the specific regulatory provisions.

Regulatory Alternatives Considered

Definition of a Foreign Institution (§§ 600.51, 600.52, 600.54, 682.200, 682.611): As described in the section of the preamble related to this provision, there were extensive comments and negotiations related to the definition of a foreign institution. In response to the Department's position that a more detailed definition of *foreign institution* is necessary and request for comments, several non-Federal negotiators urged the Department to define the term to ensure quality control through high academic standards and suggested subjecting foreign institutions to accreditation by accreditors recognized by the Department. When the Department indicated that it does not recognize U.S. accreditors for accreditation of institutions outside the United States, the non-Federal negotiators suggested a requirement that foreign institutions be "legally authorized" by an appropriate authority in the country in which the institution is located, with some negotiators urging the Department to be flexible in this area as such authority could reside in different branches of government depending on the country. Several non-Federal negotiators suggested that the Department require foreign countries to recognize the degrees and licenses offered by a foreign institution.

The Department drafted regulatory language that responded to these suggestions and also included provisions prohibiting foreign institutions from entering into written arrangements with institutions located in the United States and preventing foreign institution students from engaging in courses, research, work, and other pursuits within the United States that drew objections from the non-Federal negotiators. The Department included these provisions to address abuses whereby an institution sets up an offshore campus to claim foreign institution status and thus avoids domestic requirements even though the institution is, for all intents and purposes, a domestic institution, but the non-Federal negotiators felt the language was too broad and urged the Department to make exceptions for research conducted in the United States by PhD students. In responding to these comments, the Department clarified the meaning of the terms *written agreement* and *educational enterprise* and sought to further distinguish between foreign and domestic institutions by prohibiting foreign locations of an educational enterprise from being considered additional locations of a domestic location of the educational enterprise if the enterprise has at least twice as many students enrolled in foreign locations as those enrolled in domestic locations.

The non-Federal negotiators were comfortable with the majority of the Department's proposed language but several non-Federal negotiators continued to raise concerns about the proposed language prohibiting U.S. locations of foreign institutions and written arrangements with institutions located in the United States. The Department indicated that foreign institutions can establish locations in the United States, but that such locations and institutions would need to be separately certified and meet the requirements applicable to domestic institutions in order for U.S. students attending them to receive Title IV, HEA funds. The Department does not want a foreign institution to send its U.S. students to a U.S. location of a foreign institution or to a U.S. institution with which it has an agreement for their training because students enrolled in a foreign institution are only eligible for Direct Loan program (or, before July 1, 2010, FFEL program) loans. Instead, the Department wants U.S. students attending postsecondary institutions in the United States to be eligible for the full range of Title IV, HEA program funds available to domestic institutions.

Foreign Graduate Medical Schools (§§ 600.20, 600.21, 600.52, 600.55): The Department's initial proposal related to the location of foreign graduate medical schools reflected the approach recommended by NCFMEA Recommendation 12(a) and the Department's current policy of allowing clinical training sites outside of the program's main country if the site is located in an NCFMEA approved country, the institution's medical accrediting agency has conducted an on-site evaluation and specifically approved the site, and the clinical instruction is offered in conjunction with medical educational programs offered to students enrolled in accredited medical schools located in that foreign country. Several non-Federal negotiators felt this initial proposal was too limiting and that matriculating in different countries as part of a graduate medical program would benefit students by exposing them to medical education and practice in different environments and cultures. After negotiations involving possible locations for the basic science portion of the program as well as accreditation requirements for clinical training sites, the proposed framework that distinguishes the basic science, required clinical training, and elective clinical training was established. The Department reiterated its belief that the basic sciences part of a graduate medical program should be located in the same country as the main campus so that the classroom instruction part of the program will be under the direct authority of the school's accrediting body. In addition, the Department agreed to the position of some non-Federal negotiators who felt that clinical locations that are included in the accreditation of a medical program accredited by the LCME, such as locations of some Canadian schools, should be eligible regardless of locale because the LCME accrediting standards are those that are applied to medical schools in the United States.

The Department initially proposed that, consistent with NCFMEA Recommendations 1(a) and 1(b), a foreign graduate medical school would have to require students who it admits to have a specific educational background (*e.g.,* for a post-baccalaureate/equivalent medical program, students must have a baccalaureate degree, or at least 90 semester credit hours or the equivalent, in general education that includes, but is not limited to, coursework in the social sciences, history, and languages). Several of the non-Federal negotiators felt that such provisions were unduly limiting, and ultimately the negotiators agreed it would be more appropriate for the NCFMEA to establish these provisions as guidelines for accrediting bodies. The Department had also included as a part of its initial proposal, that a school having an integrated program for a first professional program leading to a Doctor of Medicine (M.D.) degree, or its equivalent must require students who are U.S. citizens, nationals, or permanent residents to take the MCAT no later than three years after admission to the program. The Department was ultimately persuaded to remove the provision by non-Federal negotiators who pointed out that requiring students to take the MCAT early in the program would distract

them from the education that was preparing them to take the USMLE. Ultimately, the Department agreed to retain from Recommendations 1(a) and 1(b) only the provision that would require U.S. students who are admitted to a school having a post-baccalaureate/equivalent medical program to have taken the MCAT and to report the score. This provision would not require a foreign graduate medical school to give weight to a U.S. student's score on the MCAT as part of its admission requirements.

The Department originally proposed requiring schools to submit data on all steps of the USMLE, but non-Federal negotiators pointed out that it would be extremely difficult for schools to obtain data on Step-3 as it is taken by students after they have graduated from the institution and a student cannot sign a consent to provide information on Step 3 to third parties until he or she is actually taking the test. Although the Department is continuing to explore the collection of data from the FSMB for evaluating its use in the future, the Department agrees that it would be unreasonable to require institutions to be responsible for its collection and submission at this time. To focus the USMLE pass rate on the students the Department is most concerned about and allow comparability to domestic schools, the USMLE pass rate calculation was limited to U.S. citizens, nationals, and eligible permanent residents taking the tests for the first time.

Some non-Federal negotiators expressed concern that requiring foreign institutions to obtain student consent for the release of information may be in violation of certain countries' privacy laws. After reviewing an analysis of the privacy laws and requirements of one country that had been identified as one that could have problems in this area, the Department concluded that there would be several ways that institutions in that country could legally obtain the required information from students, and committed to working with those schools and schools in any country that have concerns to facilitate compliance. The Department noted, however, that the Department cannot waive statutory or regulatory requirements used to determine institutional eligibility and that if a foreign country's privacy laws did preclude obtaining the information and materials necessary for establishing compliance, the institutions located in those countries unfortunately would not be able to qualify for participation in the Title IV, HEA programs.

Foreign Veterinary Schools (§ 600.56): The Department's initial proposal built on current practice by requiring AVMA accreditation for foreign veterinary schools applying to participate in Title IV, HEA programs. The AVMA's standards are detailed and specific, it has the expertise to evaluate foreign veterinary programs that the Department lacks, and it has a history of accrediting foreign veterinary programs as veterinary schools in Australia, Canada, the Netherlands and other foreign countries are currently accredited by the AVMA. Non-Federal negotiators acknowledged the quality of the AVMA's accreditation standards and the logic of requiring it for foreign veterinary schools as most U.S. students at those schools eventually practice in the United States. However, several non-Federal negotiators had concerns about requiring AVMA accreditation as it is a lengthy and expensive process, many foreign accrediting agencies have comparable standards, some schools with a small number of U.S. students would opt out of receiving Title IV, HEA program funds thus limiting the options for U.S. students, and it is difficult for for-profit veterinary schools to obtain AVMA accreditation because of the research component. The non-Federal negotiators suggested using other measures such as pass rates on licensing exams, licensure rates, or default rates to determine eligibility of foreign veterinary schools. The Department noted that using measures such as pass rates on licensing examinations can be operationally complicated, raising concerns over privacy rights, obtaining exam results, and calculating pass rates in ways that are not disadvantageous to schools with low numbers of Title IV, HEA program students. In addition, pass rates would not necessarily be a reliable indicator of the academic credentials of the faculty at a foreign veterinary school, and would provide no indication that the facilities at the veterinary school are adequate and safe for the students or for the animals housed in the facilities. Instead, the Department accepted the recommendation of some of the non-Federal negotiators to replace the proposed requirement that a foreign veterinary school be accredited or provisionally accredited by the AVMA, with a requirement that the school be accredited or provisionally accredited by an agency acceptable to the Secretary. This gives the Department some flexibility in evaluating school's compliance with the accreditation requirement, and gives schools some flexibility with regard to obtaining accreditation. In addition, the Department delayed the effective date of the accreditation requirement until July 1, 2015, giving foreign veterinary schools that are currently in the Title IV, HEA programs approximately five years after final regulations are published to obtain accreditation from an acceptable accrediting agency.

Foreign Nursing Schools (§ 600.57): As described in the preamble section related to this provision, the Department modeled the proposed language on portions of the HEOA related to foreign nursing schools and on existing regulatory language related to foreign medical and veterinary schools. For the most part, the non-Federal negotiators accepted this approach, but had some concerns about the provisions specific to foreign nursing programs. In particular, the requirement for clinical training to be provided in the United States, the requirement that a foreign nursing school reimburse the Department for the cost of loan defaults for loans included in the calculation of a school's cohort default rate, and the status of loans post-default were subject to extensive discussion.

Audited Financial Statements (§ 668.23): The negotiators reached agreement on the proposed regulatory language on financial audits only after extensive negotiations and significant compromise. As detailed in the section of the preamble related to this provision, the Department initially proposed to require audited financial statements prepared in accordance with the same requirements for domestic institutions (U.S. GAAP) for public institutions that received $1,000,000 or more in U.S. Title IV, HEA program funds, or private foreign institutions that received $500,000 or more in U.S. Title IV, HEA program funds, as well as for any institution in its initial provisional period of participation. For public foreign institutions, if an institution received at least $500,000 in U.S. Title IV, program funds, but less than $1,000,000 in U.S. Title IV, HEA program funds during the institution's fiscal year preceding the audit period, the institution would have been allowed to submit audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP. If there was an unpaid liability due to the Secretary by any public institution controlled by the same government entity, all public institutions controlled by that government entity would be required to submit audited financial statements prepared in accordance with U.S. GAAP. Non-Federal negotiators argued

that foreign nonprofit institutions should be treated the same as foreign public institutions, the requirement to submit audited financial statements prepared in accordance with U.S. GAAP was cost prohibitive, a non-U.S. GAAP financial statement such as one prepared in accordance with International Financial Reporting Standards (IFRS) would be comparable and provide any information the Department with the information it needs, or that the audited financial statement requirement should be tied to cohort default rates.

After consideration of the feedback from the non-Federal negotiators, the Department revised its initial proposal to treat nonprofit and public foreign institutions alike, and eliminated the provision that would have required all public institutions controlled by the same government entity to submit audited financial statements prepared in accordance with the same requirements for domestic institutions if there is an unpaid liability due to the Secretary by any public institution controlled by the same government entity. In addition, the Department raised the threshold for nonprofit and public foreign institutions that would be allowed to submit audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country from $1,000,000 to $3,000,000 in U.S. Title IV, program funds. The Department also clarified that it would require that foreign institutions that would be required to submit audited financial statements prepared in accordance with U.S. GAAP would also be required to submit a copy of an institution's audited financial statements for the same period that were prepared under the institution's home country standards, allowing a comparative analysis to determine if the requirement to provide U.S. GAAP financial statements could be changed in the future.

Non-Federal negotiators responded to this revised proposal with additional comments on the thresholds for audit requirements and a suggestion to eliminate the $3,000,000 cap and rely entirely upon "exceptions" that would permit the Secretary to require U.S. GAAP financial statements on a case-by-case basis. The Department reiterated its view that did not view the matter in terms of rigor of accounting standards of other countries, but a level of risk that justified requiring submission of U.S. GAAP financial statements. The Department offered a final revised proposal that modified the audit submission requirements for public and nonprofit institutions that receive at least $3,000,000 but less than $5,000,000 in U.S. Title IV, HEA program funds annually. Pursuant to the revised proposal, institutions in this group would submit financial statements prepared in accordance with home country accounting standards and U.S. GAAP for one year, and then, if no problems were identified, submit financial statements prepared in accordance with the home country standards for the next two years and once every three years, rather every year, U.S. GAAP financial statements.

Benefits

Benefits provided in these regulations include submission requirements for compliance audits and audited financial statements specific to foreign institutions; a revised definition of a *foreign institution* and a definition of nonprofit status specific to foreign institutions; the creation of a financial responsibility standard for foreign public institutions that is comparable to the financial responsibility standard for domestic public institutions; permission for a single legal authorization for groups of foreign institutions under the purview of a single government entity; the establishment of program eligibility requirements specific to training programs at foreign institutions; institutional eligibility criteria specific to foreign graduate medical schools, foreign veterinary schools, and foreign nursing schools; and revised maximum certification periods for some foreign institutions. The revised requirements for audited financial statements improve comparability between foreign and domestic institutions and enhance the security of Title IV, HEA program funds while taking into account the burden on foreign institutions of different sizes. The specific eligibility criteria for foreign graduate medical schools allow students to benefit from exposure to other medical environments and cultures while ensuring a comparable education to that available in domestic institutions. It is difficult to quantify benefits related to the new institutional and other third-party requirements, as there is little specific data available on the effect of the provisions on borrowers, institutions, or the Federal taxpayer. The Department is interested in receiving comments or data that would support a more rigorous analysis of the impact of these provisions.

As discussed in greater detail under *Net Budget Impacts* below, these proposed provisions result in net costs to the government of $0.0 million over 2011–2015.

Costs

Several of the provisions implemented though this NPRM would require regulated entities to update existing policies and procedures related to financial and compliance audits. Other proposed regulations generally would require discrete changes in specific parameters associated with existing requirements—such as changes to clinical training programs, application procedures, USMLE pass rates, and notification requirements—rather than wholly new requirements. Accordingly, entities wishing to continue to participate in the student aid programs have already absorbed many of the administrative costs related to implementing these proposed regulations. Marginal costs over this baseline are primarily due to new procedures that, while possibly significant in some cases, are an unavoidable cost of continued program participation. As discussed above, foreign nursing schools would be required to reimburse the Department for the costs of defaults for loans included in the calculation of the school's cohort default rate for the previous year. This is estimated to cost the participating schools approximately $3.1 to $3.9 million a year in gross default costs. As the subsequent holders of the loans, the schools would be able to pursue recovery of those funds, reducing the anticipated net costs to approximately $1.7 to $2.2 million. Some foreign institutions could choose to withdraw from participation in the Title IV, HEA programs as a result of these provisions. However, the Department believes the flexibility and targeting of the negotiated provisions should allow institutions to remain in the programs while enhancing the security of Title IV, HEA program funds and ensuring compliance with statutory requirements.

In assessing the potential impact of these proposed regulations, the Department recognizes that certain provisions are likely to increase workload for some program participants, as described below. (This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of this preamble.) Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or independent auditors or opportunity costs related to the reassignment of existing staff from other activities. In total, these changes are estimated to increase burden on entities participating in the Federal Student Assistance

programs by 18,684 hours. Of this increased burden, 18,364 hours are associated with foreign institutions and 320 hours are associated with borrowers, generally reflecting the time required to read new disclosures or submit required information. Approximately 95 percent of this burden is associated with the financial and compliance audit requirements in proposed § 668.23. As described in the *Paperwork Reduction Act* section of this NPRM, if the regulatory changes had not been proposed, the burden associated with the financial statement and compliance audit requirements would be significantly higher. The monetized cost of this additional burden, using loaded wage data developed by the Bureau of Labor Statistics and used for domestic institutions, is $466,569 of which $461,321 is associated with foreign institutions and $5,248 with individuals. The wage data for foreign institutions was assumed to be comparable to domestic institutions as many are located in developed economies with wages similar to those in the United States, institutions located in countries with lower wage scales have to compete for employees familiar with the lending programs, and substituting U.S. wage rates for those in lower wage countries results in a conservative estimate. For institutions, an hourly rate of $24.88 was used to monetize the burden of these provisions. This was a blended rate based on wages of $15.51 for office and administrative staff and $36.33 for managers and financial professionals, assuming that office staff would perform 55 percent of the work affected by these regulations. Given the limited data available, the Department is particularly interested in comments and supporting information related to possible burden stemming from the proposed regulations. Estimates included in this notice will be reevaluated based on any information received during the public comment period.

Net Budget Impacts

The provisions implemented by these proposed regulations are estimated to have a net budget impact of −$2.6 million over FY 2011–2015, from savings associated with the assignment of defaulted loans from foreign nursing schools. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. (A cohort reflects all loans originated in a given fiscal year.)

These estimates were developed using the Office of Management and Budget's Credit Subsidy Calculator. This calculator will also be used for re-estimates of prior-year costs, which will be performed each year beginning in FY 2009. The OMB calculator takes projected future cash flows from the Department's student loan cost estimation model and produces discounted subsidy rates reflecting the net present value of all future Federal costs associated with awards made in a given fiscal year. Values are calculated using a "basket of zeros" methodology under which each cash flow is discounted using the interest rate of a zero-coupon Treasury bond with the same maturity as that cash flow. To ensure comparability across programs, this methodology is incorporated into the calculator and used government-wide to develop estimates of the Federal cost of credit programs. Accordingly, the Department believes it is the appropriate methodology to use in developing estimates for these proposed regulations. That said, however, in developing the following Accounting Statement, the Department consulted with OMB on how to integrate our discounting methodology with the discounting methodology traditionally used in developing regulatory impact analyses.

Absent evidence on the impact of these proposed regulations on student behavior, budget cost estimates were based on behavior as reflected in various Department data sets and longitudinal surveys listed under *Assumptions, Limitations, and Data Sources.* Program cost estimates were generated by running projected cash flows related to each provision through the Department's student loan cost estimation model. Student loan cost estimates are developed across five risk categories: two-year proprietary institutions, two-year public and private institutions, not-for-profit; freshman and sophomore at four-year institutions, junior and senior at four-year institutions, and graduate students. Risk categories have separate assumptions based on the historical pattern of behavior—for example, the likelihood of default or the likelihood to use statutory deferment or discharge benefits—of borrowers in each category.

Estimates indicate that three foreign graduate medical schools may become eligible under these provisions in the next few years but that this would potentially shift volume among schools but not significantly increase the total volume of loans. The Department estimates no budgetary impact for most of the proposed regulations included in this NPRM as there is no data indicating that the provisions will have any impact on the volume or composition of Federal student aid programs. The provision requiring foreign nursing schools to reimburse the Secretary for defaulted loans is expected to generate approximately $2.6 million in savings for the Department between 2011 and 2015.

Assumptions, Limitations, and Data Sources

Impact estimates provided in the preceding section reflect a pre-statutory baseline in which the HEOA changes implemented in these proposed regulations do not exist. Costs have been quantified for five years. In general, these estimates should be considered preliminary; they will be reevaluated in light of any comments or information received by the Department prior to the publication of the final regulations. The final regulations will incorporate this information in a revised analysis.

In developing these estimates, a wide range of data sources were used, including data from the National Student Loan Data System; operational and financial data from Department of Education systems, including especially the Fiscal Operations Report and Application to Participate (FISAP); and data from a range of surveys conducted by the National Center for Education Statistics such as the 2008 National Postsecondary Student Aid Survey, the 1994 National Education Longitudinal Study, and the 1996 Beginning Postsecondary Student Survey. Data from other sources, such as the U.S. Census Bureau, were also used. Data on administrative burden at participating institutions are extremely limited; accordingly, as noted earlier in this discussion, the Department is particularly interested in receiving comments in this area.

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

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in Table 2, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in Federal student aid payments as a result of these proposed regulations. Expenditures are

classified as transfers from the Federal government to student loan borrowers.

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

Category	Transfers
Annualized Monetized Costs.	$3.9.
	Cost of defaults for foreign nursing schools and cost of compliance with paperwork requirements.
Annualized Monetized Transfers.	$0.
From Whom To Whom?	Federal Government To Student Loan Borrowers.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 601.30.)
- Could the description of the proposed regulations in the "Supplementary Information" section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would affect foreign institutions that participate in Title IV, HEA programs and loan borrowers. The definition of "small entity" in the Regulatory Flexibility Act encompasses "small businesses," "small organizations," and "small governmental jurisdictions." The definition of "small business" comes from the definition of "small business concern" under section 3 of the Small Business Act as well as regulations issued by the U.S. Small Business Administration. The SBA defines a "small business concern" as one that is "organized for profit; has a place of business in the U.S.; operates primarily within the U.S. or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor * * *" "Small organizations," are further defined as any "not-for-profit enterprise that is independently owned and operated and not dominant in its field." For the purposes of the Regulatory Flexibility Act analysis, the foreign institutions would not fall within the definition of small businesses or small organizations based upon this definition of "small business concern."

The definition of "small entity" also includes "small governmental jurisdictions," which includes "school districts with a population less than 50,000." The definition of "small governmental jurisdictions" is not applicable to this rule. The Secretary invites comments from small institutions and other affected entities as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

Paperwork Reduction Act

Sections 600.20, 600.21, 600.54, 600.55, 600.56, 600.57, 668.13, 668.23, and 668.171 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 600.20—Application Procedures for Establishing, Reestablishing, Maintaining, or Expanding Institutional Eligibility and Certification

Proposed § 600.20(a)(3) and § 600.20(b)(3) would provide that, for initial certification or for recertification, a foreign graduate medical school (*i.e.,* a freestanding foreign graduate medical school or a foreign institution that includes a foreign graduate medical school) be required to—

- List on the application to participate all educational sites and where they are located, except for those locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks;
- Identify, for each clinical site reported in the certification or recertification application, the type of clinical training (core, required clinical rotation, not required clinical rotation) offered at that site;
- Indicate whether it offers only post-baccalaureate/equivalent medical programs, other types of programs that lead to employment as a doctor of osteopathic medicine, doctor or medicine, or both;
- Provide copies of the affiliation agreements with hospitals and clinics that it is required to have as a part of any application for initial certification or recertification to participate in the Title IV, HEA programs.

Proposed § 600.20(c)(5) would require a foreign graduate medical school that adds a location that offers all or a portion of the school's core clinical training or required clinical rotations, to apply to the Secretary and wait for approval if it wishes to provide Title IV, HEA program funds to the students at that location, except for those locations that are included in the accreditation of a medical program accredited by the LCME.

While we recognize that there would be burden assessed under §§ 600.20(a)(3) and 600.20(c)(5), we do not anticipate either an initial eligibility application or an application to expand eligibility at this time.

We estimate that 58 public institutions would take .58 hours (35 minutes) per institution to submit a reapplication, which would increase burden by 34 hours. We estimate that 10 private nonprofit institutions would take .58 hours (35 minutes) per institution to submit a reapplication, which would increase burden by 6 hours. We estimate that 3 for-profit institutions would take .58 hours (35 minutes) per institution to submit a reapplication, which would increase burden by 2 hours. There would be a total 42 hours of burden associated with § 600.20(b)(3) in OMB Control Number 1845–0012.

Section 600.21—Updating Application Information

Proposed § 600.21(a)(10) would require, if a foreign graduate medical school adds a location that offers all or a portion of the school's clinical rotations that are not required, that the

school notify the Department no later than 10 days after the location is added, except for those locations that are included in the accreditation of a medical program accredited by the LCME, or those that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a combined total of eight weeks. This requirement mirrors the requirement of proposed § 600.20(c)(5).

We estimate that 6 public institutions would take .17 hours (10 minutes) per institution to fulfill the reporting requirement, which would increase burden by 1 hour. We estimate that 1 private nonprofit institution would take .17 hours (10 minutes) to fulfill the reporting requirement, which would increase burden by 10 minutes. We estimate 1 for-profit institution would take .17 hours (10 minutes) to fulfill the reporting requirement, which would increase burden by 10 minutes. Therefore, the proposed total increase in burden would be 1 hour and 20 minutes associated with § 600.21(a)(10) in OMB Control Number 1845–0012.

Section 600.54—Criteria for Determining Whether a Foreign Institution Is Eligible To Apply To Participate in the FFEL Programs

Under proposed § 600.54(d)(3)(ii), a foreign institution would have to demonstrate to the satisfaction of the Secretary (who would make program-by-program determinations of comparability) that the amount of academic work required by a program it seeks to qualify as eligible as at least a one-academic-year training program is equivalent to an academic year as defined in § 668.3.

We estimate that 93 public institutions would take .17 (10 minutes) to demonstrate the comparability of the academic work and would increase burden by 16 hours. We estimate that 33 private institutions would take .17 (10 minutes) to demonstrate the comparability of the academic work and would increase burden by 6 hours. Therefore, the proposed total increase in burden would be 22 hours associated with § 600.54(d)(3)(ii) in OMB 1845–NEWA.

Section 600.55—Additional Criteria for Determining Whether a Foreign Graduate Medical School Is Eligible To Apply To Participate in the Title IV, HEA Programs

Proposed § 668.55(c)(2) would require a foreign graduate medical school to determine the consent requirements for, and require the necessary consents of, all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents to enable the school to comply with the collection and submission requirements in proposed § 600.55(d) for Medical College Admission Test (MCAT) scores, residency placement, and U.S. Medical Licensing Examination (USMLE) scores.

We estimate that 58 public institutions would take .50 hours (30 minutes) to develop this consent form and would increase burden by 29 hours. We estimate that 5 private nonprofit institutions would take .50 hours (30 minutes) to develop this consent form and would increase burden by 5 hours. We estimate that 3 for-profit institutions would take .50 hours (30 minutes) to develop this consent form and would increase burden by 2 hours. We estimate that 2,800 individuals would take .08 hours (5 minutes) to complete this consent form and would increase burden by 224 hours. Therefore, the total proposed burden increase would be 260 hours associated with § 600.55(c)(2) in OMB 1845–NEWA.

Proposed § 600.55(d) would require a foreign graduate medical school to obtain, at its own expense, and by September 30 of each year submit to its accrediting authority for all students who are U.S. citizens, nationals, or eligible permanent residents: (1) MCAT scores for students admitted during the preceding award year and the number of times each student took the exam; and (2) the percentage of students graduating during the preceding award year who are placed in an accredited U.S. medical residency. A school would have to submit the data on MCAT scores and placement in a U.S. residency program to the Department only upon request. In addition, proposed § 600.55(d) would require a foreign graduate medical school to obtain, at its own expense and by September 30 of each year submit to the Department, unless the Department notifies schools that it will receive the information directly from the ECFMG, or other responsible third parties, USMLE scores earned during the preceding award year on the first attempt by at least each student, and each student who graduated during the three preceding years, and the date each student/graduate took each test, including any failed tests. The USMLE scores submitted would have to be disaggregated by step/test for Step 1, Step 2–Clinical Skills (Step 2–CS), and Step 2–Clinical Knowledge (Step 2–CK), and by attempt. A school would not be required to submit data on the USMLE Step 3.

We estimate that 58 public institutions would require 1.25 hours (1 hour 15 minutes) to create this annual report and would increase burden by 73 hours. We estimate that 10 private nonprofit institutions would require 1.25 hours (1 hour 15 minutes) to create this annual report and would increase burden 13 hours. We estimate that 3 for-profit institutions would require 1.25 hours (1 hour 15 minutes) to create this annual report and would increase burden by 4 hours. Therefore, the total proposed burden increase would be 90 hours associated with § 600.55(d) in OMB 1845–NEWA.

Proposed § 600.55(e)(2) would require a foreign graduate medical school to notify its accrediting body within one year of any material changes in (1) the educational programs, including changes in clinical training programs; and (2) the overseeing bodies and (3) the formal affiliation agreements with hospitals and clinics.

We estimate that 15 public institutions would require .82 hours (50 minutes) to complete the accrediting agency clinical training notifications and would increase burden by 12 hours. We estimate that 3 private nonprofit institutions would require .82 hours (50 minutes) to complete the accrediting agency clinical training notifications and would increase burden by 3 hours. We estimate that 1 for-profit institution would require .82 hours (50 minutes) to complete the accrediting agency clinical training notifications and would increase burden by 1 hour. Therefore, the total proposed burden increase would be 16 hours associated with § 600.55(e) in OMB 1845–NEWA.

Proposed § 600.55(g)(1) would require a foreign graduate medical school to apply the existing satisfactory academic progress regulations in § 668.16(e) for establishing a maximum timeframe in which a student must complete their educational program and require that a student complete their educational program within 150 percent of the published length of the educational program. In addition, proposed § 600.55(g)(2) would require a foreign graduate medical school to document the educational remediation it provides to assist students in making satisfactory academic progress.

We estimate that 58 public institutions would require 2.5 hours (2 hours 30 minutes) to update the satisfactory academic policy and document remediation provided to student and would increase burden by 145 hours. We estimate that 10 for private nonprofit institutions would require 2.5 hours (2 hours 30 minutes) to update the satisfactory academic policy and document remediation provided to student and would increase burden by 25 hours. We estimate that 3

for-profit institutions would require 2.5 hours (2 hours 30 minutes) to update the satisfactory academic policy and document remediation provided to student and would increase burden by 7 hours and 30 minutes. The total proposed burden for increase would be 177 hours and 30 minutes associated with § 600.55(g)(1) and (2) in OMB 1845–NEW2.

Finally, proposed § 600.55(g)(3) would require a foreign graduate medical school to publish all the languages in which instruction is offered.

We estimate that 58 public institutions would require .33 hours (20 minutes) to publish the languages in which instruction is provided increasing burden by 19 hours. We estimate that 10 private nonprofit institutions would require .33 hours (20 minutes) to publish the languages in which instruction is provided increasing burden by 3 hours. We estimate that 3 for-profit institutions would require .33 hours (20 minutes) to publish the languages in which instruction is provided increasing burden by 1 hour. Therefore, the total proposed burden increase would be 23 hours associated with § 600.55(g)(3) in OMB 1845–NEWA.

In total, we estimate that proposed § 600.55 would increase by 389 hours in OMB 1845–NEWA, and 177 hours and 30 minutes in OMB 1845–NEW2.

Section 600.56—Additional Criteria for Determining Whether a Foreign Veterinary School Is Eligible To Apply To Participate in the FFEL Programs

Proposed § 600.56(a)(4) would require a foreign veterinary school to be accredited or provisionally accredited by an organization acceptable to the Secretary. Proposed § 600.56(a)(4) would also specify that the requirement for accreditation or provisional accreditation does not take effect until July 1, 2015.

The Department has delayed the effective date of the accreditation requirement until July 1, 2015. This allows foreign veterinary schools that are currently in the Title IV, HEA programs approximately five years after final regulations are published to obtain accreditation from an acceptable accrediting agency. Therefore, no burden assessment has been made at this time, but the issue will be reviewed closer to the effective date of this section of the regulations thereby enabling the Department to use a more accurate number of participating veterinary schools in its assessment.

Section 600.57—Additional Criteria for Determining Whether a Foreign Nursing School Is Eligible To Apply To Participate in the FFEL Program

The proposed regulations would add a new § 600.57 specifying additional Title IV, HEA program eligibility criteria for foreign nursing schools. These criteria include § 600.57(a)(6)(i), where the school must determine the consent requirements for, and require the necessary consents of, all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents, to enable the school to comply with the requirements for collection and submission of National Council Licensure Examination for registered Nurses (NCLEX–RN) results or pass rates.

We estimate that 3 new nursing institutions would require .50 hours (30 minutes) to develop the consent form increasing burden by 1 hour and 30 minutes. We estimate that 1,200 individuals would require .08 hours (10 minutes) to respond to this consent form and increasing burden by 96 hours in OMB Control Number 1845–NEWA.

The foreign nursing school eligibility also includes § 600.57(a)(6)(ii) where an institution must annually, at its own expense, obtain all results on the NCLEX–RN achieved by students and graduates who are U.S. citizens, nationals, or eligible permanent residents, together with the dates the student has taken the examination (including any failed examinations) and provide the results to the Department. As an alternative to obtaining the NCLEX results individually, the school may obtain a report or reports from the National Council of State Boards of Nursing (NCSB), or an NCSB affiliate or NCSB contractor, reflecting the percentage of the school's students and graduates taking the NCLEX–RN in the preceding year who passed the examination, or the data from which the percentage could be derived, and provide the report to the Department.

We estimate that 3 new nursing institutions would require 1.5 hours (1 hour 30 minutes) to compile this annual report submission increasing burden by 4 hours 30 minutes in OMB Control Number 1845–NEWA. In total, we estimate there would be 102 hours of burden associated with § 600.57(a)(6) in OMB Control Number 1845–NEWA.

In addition, proposed § 600.57(c) would specify that after a school reimburses the Department for the cost of a loan default, the loan would be assigned to the school. The borrower would remain liable to the school for the outstanding balance of the loan, under the terms and conditions specified in the promissory note.

While burden would normally be associated with notification and collection activity, because there is no history of Federal borrowing for attendance at these schools and due to the extended period of time prior to a student borrower defaulting on a Title IV, HEA loan at a newly approved foreign nursing school during the first year after the implementation of the final regulations, we believe that it would be inappropriate to project burden to schools and individuals at this time.

Section 668.13—Certification Procedures

The proposed regulations would amend § 668.13(b)(1) to specify that the period of participation for a private, for-profit foreign institution expires three years after the date the institution is certified by the Department, rather than the current six years.

While the duration of the approval process is reduced from six years to three years and, therefore, the time associated with the submission for recertification will be filed more often, this proposed change in the regulations does not represent a substantive impact on the amount of annual burden generated by these regulations. We do not estimate a change in the burden as a result of the proposed regulations to OMB 1845–0022.

Section 668.23—Compliance Audits and Audited Financial Statements

The proposed regulation in § 668.23(h)(1) would revise financial statement submission requirements for foreign institutions receiving Title IV, HEA program funds in the most recently completed fiscal year.

- In § 668.23(h)(1)(i)—For a public or nonprofit foreign institution that received less than $500,000 in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year, the audited financial statements submission would be waived, unless the institution is in its initial provisional period of participation and received Title IV, HEA program funds during that year, in which case the institution must submit, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country.
- In § 668.23(h)(1)(iii)(A)—For a public or nonprofit foreign institution that received $500,000 or more in U.S. Title IV, HEA program funds, but less than $3,000,000 in U.S. Title IV, HEA

program funds during its most recently completed fiscal year, the institution would be allowed to submit for that year, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP.

• In § 668.23(h)(1)(iii)(B)—For a public or nonprofit foreign institution that received at least $3,000,000 but less than $5,000,000 in U.S. Title IV, HEA program funds during its most recently completed fiscal year, the institution would be required to submit once every three years audited financial statements prepared in accordance with the generally accepted accounting principles of both the institution's home country *and* U.S. GAAP, but for the two years in between would be allowed to submit, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country in lieu of financial statements prepared in accordance with U.S. GAAP.

• In § 668.23(h)(1)(ii)—For a public or nonprofit foreign institution that received $5,000,000 or more in U.S. Title IV, HEA program funds during its most recently completed fiscal year, and for any for-profit foreign institution, the institution would be required to submit for that year audited financial statements prepared in accordance with the generally accepted accounting principles of both the institution's home country *and* U.S. GAAP.

We estimate that 15 public institutions would require 35 hours for the translation of financial statements to English increasing burden by 525 hours. We estimate that 15 private institutions would require 35 hours for the translation of financial statements to English increasing burden by 525 hours for a total of 1,050 hours.

We estimate 20 public institutions would require 100 hours for the preparation of the U.S. GAAP financial statement increasing burden by 2,000 hours. We estimate that 8 private nonprofit institutions would require 100 hours for the preparation of the U.S. GAAP financial statement increasing burden by 800 hours. We estimate that four for-profit institutions require 100 hours for the preparation of the U.S. GAAP financial statement increasing burden by 400 hours for a total of 3,200 hours. Collectively, we estimate that there would be 4,250 hours of burden associated with proposed § 668.23(h)(1) in OMB Control Number 1845–0038.

Proposed § 668.23(h)(2) would separate foreign institutions into two groups, establishing new compliance audit requirements for foreign institutions based upon whether the institution received less than $500,000 or $500,000 or more in U.S. Title IV, HEA program funds during the institution's most recently completed fiscal year.

For foreign institutions that receive less than $500,000 per year in U.S. Title IV, HEA program funds, under proposed § 668.23(h)(2)(ii) and (iii) they would be required to submit compliance audits under an alternative compliance audit performed in accordance with the audit guide from the Department's Office of Inspector General. The alternative compliance audit is performed as an agreed-upon procedures attestation engagement, and the standard compliance audit is performed as an examination-level attestation engagement. An alternative compliance audit is an agreed-upon procedures attestation engagement, which consists of specific procedures performed on a subject matter and is substantially narrower in scope than a standard compliance audit, which is an examination level attestation.

The proposed regulations would require an annual submission of the compliance audit, except that, under certain conditions as described in the following paragraphs, an institution would submit a compliance audit annually for two consecutive years, then, if notified by the Department, would be permitted to submit a cumulative compliance audit every three years thereafter as long as the institution continued to receive less than $500,000 in U.S. Title IV funds each fiscal year being audited.

We anticipate 269 public institutions would require 25 hours to provide the alternate compliance audit increasing burden by 6,725 hours. We anticipate 81 private institutions would require 25 hours to provide the alternate compliance audit increasing burden by 2,025 hours. Collectively we anticipate a total of 8,750 hours of increased burden for § 668.23(h)(2)(ii) and (iii) in OMB Control Number 1845–0038.

For foreign institutions that receive $500,000 or more per year in U.S. Title IV, HEA program funds, as in the current regulations, under proposed § 668.23(h)(2)(i) they would be required to submit annual compliance audits using the standard audit procedures for foreign institutions set out in the audit guide issued by the Office of Inspector General. This compliance audit would be submitted together with an alternative compliance audit or audits prepared in accordance with proposed § 668.23(h)(2)(ii) for any preceding fiscal year or years in which the foreign institution received less than $500,000 in U.S. Title IV, HEA program funds.

We estimate 90 public institutions would require 40 hours to submit a full compliance audit increasing burden by 3,600 hours. We estimate 29 private nonprofit institutions would require 40 hours to submit a full compliance audit increasing burden by 1,160 hours. We estimate 4 for-profit institutions would require 40 hours to submit a full compliance audit increasing burden by 160 hours for a total of 4,920 hours. Collectively, we estimate that there would be 13,670 hours of increased burden associated with § 668.23(h)(2)(i) in OMB Control 1845–0038.

In total, we estimate that the burden related to proposed § 668.23(h) would increase by 17,920 hours in OMB Control Number 1845–0038.

Although audited financial statements and compliance audits have long been required of foreign schools, no separate calculation of the burden of those requirements had been done until now. As a result, by and large the burdens estimated are not new. What is new is the reduction in already-existing burdens that would result from the proposed regulations if finalized.

In relation to the proposed requirement to submit audited financial statements, if the proposed regulations (allowing for alternate submissions for institutions with funding over $500,000 in U.S. Title IV, HEA program funds) had not been offered, there would have been 123 foreign institutions required to submit annually audited financial statements prepared in accordance with U.S. GAAP at a burden of 12,300 hours (123 institutions × 100 hours = 12,300 hours). The proposed regulations reduce that burden by 9,100 hours (proposed burden of 3,200 hours subtracted from estimated burden of 12,300 hours required under current regulations).

In relation to the proposed requirement to submit a compliance audit, if the proposed regulations had not been offered, there would have been an annual standard compliance audit submission requirement burden of 17,500 hours over two years (350 institutions × 25 hours annual burden × 2 years) that foreign institutions disbursing less than $500,000 in U.S. Title IV, HEA program funds would have had to complete. The proposed regulations decrease burden by allowing for submission of alternative compliance audits once every three years upon notification from the Department.

Section 668.171—General (Subpart L—Financial Responsibility)

Proposed § 668.171 would consider a public foreign institution to be financially responsible if the institution: (1) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and (2) provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity. A foreign public institution would not meet this standard of financial responsibility if it was in violation of any past performance requirements in § 668.174.

If a foreign public institution did not meet the new requirements, its financial responsibility would be determined under the general requirements of financial responsibility, including the application of the equity, primary reserve, and net income ratios. Although the full faith and credit provision would provide an alternate way of meeting the financial responsibility standards for public foreign institutions, it would not excuse the institution from required submissions of audited financial statements. In addition, if a government entity provided full faith and credit backing, the entity would be held liable for any Title IV, HEA program liabilities that were not paid by the institution.

We estimate 13 public institutions would require 16 hours to obtain documentation from the applicable government entity at an increase in burden of 208 hours in OMB Control Number 1845–0022.

COLLECTION OF INFORMATION

Regulatory section	Information collection	Collection
600.20—Application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.	This proposed regulation change would add information that must be collected to determine the eligibility of foreign graduate medical schools to participate in Title IV programs.	OMB 1845–0012. The burden would increase by 42 hours. This regulatory change may require changes to the form, but they cannot be completed until the language of the final rule is determined.
600.21—Updating application information	This proposed regulation would identify when a foreign graduate medical school must notify the Department of specific changes in locations used by the school.	OMB 1845–0012. The burden would increase by 1 hour and 20 minutes. This regulatory change may require changes to the form, but they cannot be completed until the language of the final rule is determined.
600.54—Criteria for determining whether a foreign institution is eligible to participate in the FFEL programs.	This proposed regulation would require that the foreign institution demonstrate that its academic work for training program of at least one-academic-year is equivalent to an academic year as defined for domestic institutions.	OMB 1845–NEWA. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden would increase by 22 hours.
600.55—Additional criteria for determining whether a foreign graduate medical school is eligible to apply to participate in the Title IV, HEA programs.	This proposed regulation would require the schools to provide a consent form allowing the school to receive a copy of the students' MCAT score; would require a medical school to produce annually and to provide to its accrediting agency a report with data regarding its students who are US citizens, nationals, or eligible permanent residents, some of which data would be required to be submitted to the Department on an annual basis; and would require the school to notify their accrediting body within one year of material changes to its educational program and formal affiliation agreements. This section also would require schools to identify the languages in which it provides instruction.	OMB 1845–NEWA. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden would increase by 389 hours.
600.55(g)(2)—Additional criteria for determining whether a foreign graduate medical school is eligible to apply to participate in the Title IV, HEA programs.	This proposed regulation would require the foreign graduate medical schools to expand the satisfactory academic progress policy requirements to include foreign graduate medical schools and calculations of maximum timeframes to complete the program, and document any student remediation regarding SAP.	OMB 1845–NEW2. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden would increase by 177 hours and 30 minutes.
600.57—Additional criteria for determining whether a foreign nursing school is eligible to apply to participate in the FFEL program.	This proposed regulation would require the schools to provide a consent form allowing the school to receive a copy of the students' NCLEX–RN results or pass rate and would require a nursing school to annually produce and provide to the Department a report with data regarding the results of the NCLEX–RN exam taken by its students and graduates.	OMB 1845–NEWA. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden would increase by 102 hours.

COLLECTION OF INFORMATION—Continued

Regulatory section	Information collection	Collection
668.13—Certification procedures	The proposed regulation would change the certification time frame for for-profit schools from 6 to 3 years.	OMB 1845–0022. We do not anticipate a change in burden.
668.23(h)(1)—Compliance audits and audited financial statements.	The proposed regulation would change the requirements of institutions for submission of audited financial statements to the Department and would change the requirements of institutions for submission of compliance audits to the Department.	OMB 1845–0038. The burden would increase by 17,920 hours.
668.171—General (Subpart L—Financial Responsibility).	The proposed regulation would provide an alternate method to show financial responsibility by showing that it is a public institution designated by the proper governing authority in the country and by providing documentation of the full faith and credit of that country.	OMB 1845–0022. The burden would increase by 208 hours.

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by e-mail to *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble.

We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring 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).

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would 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 Numbers: 84.063 Federal Pell Grant Program; 84.033 Federal Work-Study Program; 84.379 TEACH Grant Program; 84.069 LEAP).

List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 668

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

Dated: July 12, 2010.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600, 668, and 682 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 revising paragraphs (1) and (2) of the definition of *Nonprofit institution.*

The revision reads as follows:

§ 600.2 Definitions.

* * * * *

Nonprofit institution: An institution that—

(1)(i) Is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); or

(2) For a foreign institution—

(i) An institution that is owned and operated only by one or more nonprofit corporations or associations; and

(ii)(A) If a recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, is determined by that tax authority to be a nonprofit educational institution; or

(B) If no recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, the foreign institution demonstrates to the satisfaction of the Secretary that it is a nonprofit educational institution.

* * * * *

3. Section 600.20 is amended by:

A. Revising paragraph (a).

B. Adding a new paragraph (b)(3).

C. In paragraph (c)(4), removing the word "or".

D. Redesignating paragraph (c)(5) as paragraph (c)(6).

E. Adding a new paragraph (c)(5).

The revision and additions read as follows:

§ 600.20 Application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

(a) *Initial eligibility application.* (1) An institution that wishes to establish its eligibility to participate in any HEA program must submit an application to the Secretary for a determination that it qualifies as an eligible institution under this part.

(2) If the institution also wishes to be certified to participate in the title IV, HEA programs, it must indicate that intent on the application, and submit all the documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in 34 CFR part 668, subparts B and L.

(3) A freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, must include in its application to participate—

(i)(A) A list of all educational sites and where they are located, including all sites at which its students receive clinical training, except those clinical training sites that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks; and

(B) The type of clinical training (core, required clinical rotation, not required clinical rotation) offered at each site listed on the application in accordance with paragraph (a)(3)(i)(A) of this section; and

(ii) Whether the school offers—

(A) Only post-baccalaureate/equivalent medical programs, as defined in § 600.52;

(B) Other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or

(C) Both; and

(iii) Copies of the formal affiliation agreements with hospitals or clinics providing all or a portion of a clinical training program required under § 600.55(e)(1).

(b) * * *

(3) A freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, must include in its reapplication to participate—

(i)(A) A list of all educational sites and where they are located, including all sites at which its students receive clinical training, except those clinical training sites that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks; and

(B) The type of clinical training (core, required clinical rotation, not required clinical rotation) offered at each site listed on the application in accordance with paragraph (b)(3)(i)(A) of this section; and

(ii) Whether the school offers—

(A) Only post-baccalaureate/equivalent medical programs, as defined in § 600.52;

(B) Other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or

(C) Both; and

(iii) Copies of the formal affiliation agreements with hospitals or clinics providing all or a portion of a clinical training program required under § 600.55(e)(1).

* * * * *

(c) * * *

(5) For a freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, add a location that offers all or a portion of the school's core clinical training or required clinical rotations, except for those locations that are included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME); or

* * * * *

4. Section 600.21 is amended by adding paragraph (a)(10) to read as follows:

§ 600.21 Updating application information.

(a) * * *

(10) For a freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, the school adds a location that offers all or a portion of the school's clinical rotations that are not required, except for those that are included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME), or that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks.

* * * * *

5. Section 600.51 is amended by revising paragraph (c) to read as follows:

§ 600.51 Purpose and scope.

* * * * *

(c) A foreign institution must comply with all requirements for eligible and participating institutions except—

(1) To the extent those provisions are inconsistent with this subpart or other provisions of these regulations or the HEA specific to foreign institutions; or

(2) When the Secretary, through a notice in the **Federal Register**, identifies specific provisions as inapplicable to foreign institutions.

* * * * *

6. Section 600.52 is amended by:

A. Adding, in alphabetical order, a definition of *Associate degree school of nursing.*

B. Adding, in alphabetical order, a definition of *Clinical training.*

C. Adding, in alphabetical order, a definition of *Collegiate school of nursing.*

D. Adding, in alphabetical order, a definition of *Diploma school of nursing.*

E. Revising the definition of *Foreign graduate medical school.*

F. Revising the definition of *Foreign institution.*

G. Adding, in alphabetical order, a definition of *Foreign nursing school.*

H. Adding, in alphabetical order, a definition of *Foreign veterinary school.*

I. Adding, in alphabetical order, a definition of *National Committee on Foreign Medical Education and Accreditation (NCFMEA).*

J. Revising the definition of *Passing score.*

K. Adding, in alphabetical order, a definition of *Post-baccalaureate/equivalent medical program.*

The additions and revisions read as follows:

§ 600.52 Definitions.

Associate degree school of nursing: A school that provides primarily or exclusively a two-year program of postsecondary education in professional nursing leading to a degree equivalent to an associate degree in the United States.

Clinical training: The portion of a graduate medical education program that counts as a clinical clerkship for purposes of medical licensure comprising core, required clinical rotation, and not required clinical rotation.

Collegiate school of nursing: A school that provides primarily or exclusively a minimum of a two-year program of postsecondary education in professional nursing leading to a degree equivalent to a bachelor of arts, bachelor of science, or bachelor of nursing in the United States, or to a degree equivalent to a graduate degree in nursing in the United States, and including advanced training related to the program of education provided by the school.

Diploma school of nursing: A school affiliated with a hospital or university, or an independent school, which provides primarily or exclusively a two-year program of postsecondary education in professional nursing leading to the equivalent of a diploma in the United States or to equivalent indicia that the program has been satisfactorily completed.

Foreign graduate medical school: A foreign institution (or, for a foreign institution that is a university, a component of that foreign institution) having as its sole mission providing an educational program that leads to a degree of medical doctor, doctor of osteopathic medicine, or the equivalent. A reference in these regulations to a foreign graduate medical school as "freestanding" pertains solely to those schools that qualify by themselves as foreign institutions and not to schools that are components of universities that qualify as foreign institutions.

Foreign institution:

(1) For the purposes of students who receive title IV aid, an institution that—

(i) Is not located in a State;

(ii) Except as provided with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2)—

(A) Has no U.S. location;

(B) Has no written arrangements, within the meaning of § 668.5, with institutions or organizations located in the United States for students enrolling at the foreign institution to take courses from institutions located in the United States;

(C) Does not permit students to enroll in any course offered by the foreign institution in the United States, including research, work, internship, externship, or special studies within the United States, except that independent research done by an individual student in the United States for not more than one academic year is permitted, if it is conducted during the dissertation phase of a doctoral program under the guidance of faculty, and the research can only be performed in a facility in the United States;

(iii) Is legally authorized by the education ministry, council, or equivalent agency of the country in which the institution is located to provide an educational program beyond the secondary education level;

(iv) Awards degrees, certificates, or other recognized educational credentials in accordance with § 600.54(d) that are officially recognized by the country in which the institution is located; and

(v) For any program designed to prepare the student for employment in a recognized occupation, with or without licensure, provides a credential, including a degree, that—

(A) Satisfies the educational requirements in the country in which the institution is located for entry into that occupation, including educational requirements for licensure; and

(B) Satisfies the educational requirements, including requirements for licensure, for entry into that occupation in the United States; or

(2) If the educational enterprise enrolls students both within a State and outside a State, and the number of students who would be eligible to receive title IV, HEA program funds attending locations outside a State is at least twice the number of students enrolled within a State, the locations outside a State must apply to participate as one or more foreign institutions and must meet all requirements of paragraph (1) of this definition, and the other requirements of this part. For the purposes of this paragraph, an educational enterprise consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership.

Foreign nursing school: A foreign institution (or, for a foreign institution that is a university, a component of that foreign institution) that is an associate degree school of nursing, a collegiate school of nursing, or a diploma school of nursing. A reference in these regulations to a foreign nursing school as "freestanding" pertains solely to those schools that qualify by themselves as foreign institutions and not to schools that are components of universities that qualify as foreign institutions.

Foreign veterinary school: A foreign institution (or, for a foreign institution that is a university, a component of that foreign institution) having as its sole mission providing an educational program that leads to the degree of doctor of veterinary medicine, or the equivalent. A reference in these regulations to a foreign veterinary school as "freestanding" pertains solely to those schools that qualify by themselves as foreign institutions and not to schools that are components of universities that qualify as foreign institutions.

National Committee on Foreign Medical Education and Accreditation (NCFMEA): The operational committee of medical experts established by the Secretary to determine whether the medical school accrediting standards used in other countries are comparable to those applied to medical schools in the U.S., for purposes of evaluating the eligibility of accredited foreign graduate medical schools to participate in the title IV, HEA programs.

Passing score: The minimum passing score as defined by the Educational Commission for Foreign Medical Graduates (ECFMG), or on the National Council Licensure Examination for Registered Nurses (NCLEX–RN), as applicable.

Post-baccalaureate/equivalent medical program: A program offered by a foreign graduate medical school that requires, as a condition of admission, that its students have already completed their non-medical undergraduate studies and that consists solely of courses and training leading to employment as a doctor of medicine or doctor of osteopathic medicine.

* * * * *

7. Section 600.54 is revised to read as follows:

§ 600.54 Criteria for determining whether a foreign institution is eligible to apply to participate in the FFEL programs.

The Secretary considers a foreign institution to be comparable to an eligible institution of higher education in the United States and eligible to apply to participate in the FFEL

programs if the foreign institution meets the following requirements:

(a) Except for a freestanding foreign graduate medical school, foreign veterinary school, or foreign nursing school, the foreign institution is a public or private nonprofit educational institution.

(b) The foreign institution admits as regular students only persons who—

(1) Have a secondary school completion credential; or

(2) Have the recognized equivalent of a secondary school completion credential.

(c)(1) Notwithstanding § 668.5, an eligible foreign institution may not enter into a written arrangement under which an ineligible institution or organization provides any portion of one or more of the eligible foreign institution's programs. For the purposes of this paragraph, written arrangements do not include affiliation agreements for the provision of clinical training for foreign medical, veterinary, and nursing schools.

(2) An additional location of a foreign institution must separately meet the definition of a foreign institution in § 600.52 if it is—

(i) Located outside of the country in which the main campus is located, except as provided in § 600.55(h)(1), § 600.56(b), § 600.57(a)(2), § 600.55(h)(3), and the definition of foreign institution found in § 600.52; or

(ii) Located within the same country as the main campus, but is not covered by the legal authorization of the main campus.

(d) The foreign institution provides an eligible education program—

(1) For which the institution is legally authorized to award a degree that is equivalent to an associate, baccalaureate, graduate, or professional degree awarded in the United States;

(2) That is at least a two-academic-year program acceptable for full credit toward the equivalent of a baccalaureate degree awarded in the United States; or

(3)(i) That is equivalent to at least a one-academic-year training program in the United States that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation.

(ii) An institution must demonstrate to the satisfaction of the Secretary that the amount of academic work required by a program in paragraph (d)(3)(i) of this section is equivalent to at least the definition of an academic year in § 668.3.

(e) For a for-profit foreign medical, veterinary, or nursing school—

(1) No portion of an eligible medical or veterinary program offered may be at what would be an undergraduate level in the United States; and

(2) The title IV, HEA program eligibility does not extend to any joint degree program.

(f) Proof that a foreign institution meets the requirements of paragraph (1)(iii) of the definition of a foreign institution in § 600.52 may be provided to the Secretary by a legal authorization from the appropriate education ministry, council, or equivalent agency—

(i) For all eligible foreign institutions in the country;

(ii) For all eligible foreign institutions in a jurisdiction within the country; or

(iii) For each separate eligible foreign institution in the country.

(Authority: 20 U.S.C. 1082, 1088)

8. Section 600.55 is revised to read as follows:

§ 600.55 Additional criteria for determining whether a foreign graduate medical school is eligible to apply to participate in the title IV, HEA programs.

(a) *General.* (1) The Secretary considers a foreign graduate medical school to be eligible to apply to participate in the title IV, HEA programs if, in addition to satisfying the criteria of this part (except the criterion in § 600.54 that the institution be public or private nonprofit), the school satisfies the criteria of this section.

(2) A foreign graduate medical school must provide, and in the normal course require its students to complete, a program of clinical training and classroom medical instruction of not less than 32 months in length, that is supervised closely by members of the school's faculty and that—

(i) Is provided in facilities adequately equipped and staffed to afford students comprehensive clinical training and classroom medical instruction;

(ii) Is approved by all medical licensing boards and evaluating bodies whose views are considered relevant by the Secretary; and

(iii) As part of its clinical training, does not offer more than two electives consisting of no more than eight weeks per student at a site located in a foreign country other than the country in which the main campus is located or in the United States, unless that location is included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME).

(3) A foreign graduate medical school must appoint for the program described in paragraph (a)(2) of this section only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at medical schools in the United States.

(4) A foreign graduate medical school must have graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination.

(b) *Accreditation.* A foreign graduate medical school must—

(1) Be approved by an accrediting body—

(i) That is legally authorized to evaluate the quality of graduate medical school educational programs and facilities in the country where the school is located; and

(ii) Whose standards of accreditation of graduate medical schools have been evaluated by the NCFMEA or its successor committee of medical experts and have been determined to be comparable to standards of accreditation applied to medical schools in the United States; or

(2) Be a public or private nonprofit educational institution that satisfies the requirements in § 600.4(a)(5)(i).

(c) *Admission criteria.* (1) A foreign graduate medical school having a post-baccalaureate/equivalent medical program must require students accepted for admission who are U.S. citizens, nationals, or permanent residents to have taken the Medical College Admission Test (MCAT) and to have reported their scores to the foreign medical school; and

(2) A foreign graduate medical school must determine the consent requirements for and require the necessary consents of all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents to enable the school to comply with the collection and submission requirements of paragraph (d) of this section.

(d) *Collection and submission of data.* A foreign graduate medical school must obtain, at its own expense, and by September 30 of each year, submit—

(1) To its accrediting authority and, on request, to the Secretary, the scores on the MCAT or successor examination, of all students admitted during the preceding award year who are U.S. citizens, nationals, or eligible permanent residents, together with a statement of the number of times each student took the examination;

(2) To its accrediting authority and, on request, to the Secretary, the percentage of students graduating during the preceding award year (including at least all graduates who are

U.S. citizens, nationals, or eligible permanent residents) who obtain placement in an accredited U.S. medical residency program;

(3) To the Secretary, except upon written notice from the Secretary that the necessary information has been obtained by the Secretary for the year directly from the Educational Commission for Foreign Medical Graduates (ECFMG) or other responsible third parties, all scores, disaggregated by step/test—*i.e.,* Step 1, Step 2—Clinical Skills (Step 2—CS), and Step 2—Clinical Knowledge (Step 2—CK), or the successor examinations—and attempt, earned during the preceding award year by at least each student and graduate who is a U.S. citizen, national, or eligible permanent resident, on Step 1, Step 2—CS, and Step 2—CK, or the successor examinations, of the U.S. Medical Licensing Examination (USMLE), together with the dates the student has taken each test, including any failed tests;

(e) *Requirements for clinical training.* (1)(i) A foreign graduate medical school must have—

(A) A formal affiliation agreement with any hospital or clinic at which all or a portion of the school's core clinical training or required clinical rotations are provided; and

(B) Either a formal affiliation agreement or other written arrangements with any hospital or clinic at which all or a portion of its clinical rotations that are not required are provided, except for those locations that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks.

(ii) The agreements described in paragraph (e)(1)(i) of this section must state how the following will be addressed at each site—

(A) Maintenance of the school's standards;

(B) Appointment of faculty to the medical school staff;

(C) Design of the curriculum;

(D) Supervision of students;

(E) Provision of liability insurance; and

(F) Evaluation of student performance.

(2) A foreign graduate medical school must notify its accrediting body within one year of any material changes in—

(i) The educational programs, including changes in clinical training programs; and

(ii) The overseeing bodies and in the formal affiliation agreements with hospitals and clinics described in paragraph (e)(1)(i) of this section.

(f) *Citizenship and USMLE pass rate percentages.* (1)(i)(A) During the academic year preceding the year for which any of the school's students seeks an title IV, HEA program loan, at least 60 percent of those enrolled as full-time regular students in the school and at least 60 percent of the school's most recent graduating class must have been persons who did not meet the citizenship and residency criteria contained in section 484(a)(5) of the HEA, 20 U.S.C. 1091(a)(5); or

(B) The school must have had a clinical training program approved by a State prior to January 1, 2008, and must continue to operate a clinical training program in at least one State that approves the program; and

(ii) Except as provided in paragraph (f)(4) of this section, for a foreign graduate medical school outside of Canada, for Step 1, Step 2—CS, and Step 2—CK, or the successor examinations, of the USMLE administered by the ECFMG, at least 75 percent of the school's U.S. citizen, national, or eligible permanent resident students and graduates who took that step/test of the examination in the year preceding the year for which any of the school's students seeks a title IV, HEA program loan must have received a passing score on that step/test and are taking the step/test for the first time; or

(2)(i) The school must have had a clinical training program approved by a State as of January 1, 1992; and

(ii) The school must continue to operate a clinical training program in at least one State that approves the program.

(3) In performing the calculation required in paragraph (f)(1)(ii) of this section, a foreign graduate medical school shall—

(i) Count as a graduate each U.S. citizen, national, or eligible permanent resident who graduated from the school during the three years preceding the year for which the calculation is performed; and

(ii) Count each U.S. citizen, national, or eligible permanent resident who takes more than one step/test of the USMLE examination in a year in the denominator for each of those steps/tests;

(4)(i) If the calculation described in paragraph (f)(1)(ii) of this section would result in any step/test pass rate based on fewer than eight students, a single pass rate for the school is determined instead based on the performance of the school's U.S. citizen, national, and eligible permanent resident students and graduates on Step 1, Step 2—CS, and Step 2—CK combined;

(ii) If combining the results on all three step/tests as permitted in paragraph (f)(4)(i) of this section would result in a pass rate based on fewer than eight step/test results, the school is deemed to have no pass rate for that year and the results for the year are combined with each subsequent year until a pass rate based on at least eight step/test results is derived.

(g) *Other criteria.* (1) As part of establishing, publishing, and applying reasonable satisfactory academic progress standards, a foreign graduate medical school must include as a quantitative component a maximum timeframe in which a student must complete his or her educational program that must—

(i) Be no longer than 150 percent of the published length of the educational program measured in academic years, terms, credit hours attempted, clock hours completed, etc., as appropriate; and

(ii) Meet the requirements of § 668.16(e)(2)(ii)(B), (C) and (D).

(2) A foreign graduate medical school must document the educational remediation it provides to assist students in making satisfactory academic progress.

(3) A foreign graduate medical school must publish all the languages in which instruction is offered.

(h) *Location of a program.* (1) Except as provided in paragraph (h)(3)(ii) of this section, all portions of a graduate medical education program offered to U.S. students must be located in a country whose medical school accrediting standards are comparable to standards used in the United States, as determined by the NCFMEA, except for clinical training sites located in the United States.

(2) No portion of the graduate medical educational program offered to U.S. students, other than the clinical training portion of the program, may be located outside of the country in which the main campus of the foreign medical school is located.

(3)(i) Except as provided in paragraph (h)(3)(ii) of this section, for any part of the clinical training portion of the educational program located in a foreign country other than the country in which the main campus is located or in the United States, in order for students attending the site to be eligible to borrow title IV, HEA program funds—

(A) The site must be located in an NCFMEA approved comparable foreign country;

(B) The institution's medical accrediting agency must have conducted an on-site evaluation and specifically approved the clinical training site; and

(C) Clinical instruction must be offered in conjunction with medical educational programs offered to students enrolled in accredited medical schools located in that approved foreign country.

(ii) A clinical training site located in a foreign country other than the country in which the main campus is located or in the United States is not required to meet the requirements of paragraph (h)(3)(i) of this section in order for students attending that site to be eligible to borrow title IV, HEA program funds if—

(A) The location is included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME); or

(B) No individual student takes more than two electives at the location and the combined length of the electives does not exceed eight weeks.

9. Section 600.56 is revised as follows:

§ 600.56 Additional criteria for determining whether a foreign veterinary school is eligible to apply to participate in the FFEL programs.

(a) The Secretary considers a foreign veterinary school to be eligible to apply to participate in the FFEL programs if, in addition to satisfying the criteria in this part (except the criterion in § 600.54 that the institution be public or private nonprofit), the school satisfies all of the following criteria:

(1) The school provides, and in the normal course requires its students to complete, a program of clinical and classroom veterinary instruction that is supervised closely by members of the school's faculty, and that is provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom veterinary instruction through a training program for foreign veterinary students that has been approved by all veterinary licensing boards and evaluating bodies whose views are considered relevant by the Secretary.

(2) The school has graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination.

(3) The school employs for the program described in paragraph (a)(1) of this section only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at veterinary schools in the United States.

(4) Effective July 1, 2015, the school is accredited or provisionally accredited by an organization acceptable to the Secretary for the purpose of evaluating veterinary programs.

(b)(1) No portion of the foreign veterinary educational program offered to U.S. students, other than the clinical training portion of the program as provided for in paragraph (b)(2) of this section, may be located outside of the country in which the main campus of the foreign veterinary school is located;

(2)(i) For a veterinary school that is neither public nor private nonprofit, the school's students must complete their clinical training at an approved veterinary school located in the United States;

(ii) For a veterinary school that is public or private nonprofit, the school's students may complete their clinical training at an approved veterinary school located—

(A) In the United States;

(B) In the home country; or

(C) Outside of the United States or the home country, if no individual student takes more than two electives at the location and the combined length of the elective does not exceed eight weeks.

Authority: 20 U.S.C. 1002 and 1092.

10. Section 600.57 is redesignated as § 600.58 and a new § 600.57 is added to read as follows:

§ 600.57 Additional criteria for determining whether a foreign nursing school is eligible to apply to participate in the FFEL program.

(a) The Secretary considers a foreign nursing school to be eligible to apply to participate in the FFEL programs if, in addition to satisfying the criteria in this part (except the criterion in § 600.54 that the institution be public or private nonprofit), the nursing school satisfies all of the following criteria:

(1) The nursing school is an associate degree school of nursing, a collegiate school of nursing, or a diploma school of nursing.

(2) The nursing school has an agreement with a hospital located in the United States or an accredited school of nursing located in the United States that requires students of the nursing school to complete the student's clinical training at the hospital or accredited school of nursing.

(3) The nursing school has an agreement with an accredited school of nursing located in the United States providing that students graduating from the nursing school located outside of the United States also receive a degree from the accredited school of nursing located in the United States.

(4) The nursing school certifies only Federal Stafford Loan program loans or Federal PLUS program loans, as those terms are defined in § 668.2, for students attending the nursing school.

(5) The nursing school reimburses the Secretary for the cost of any loan defaults for current and former students included in the calculation of the institution's cohort default rate during the previous fiscal year.

(6)(i) The nursing school determines the consent requirements for and requires the necessary consents of all students accepted for admission who are U.S. citizens, nationals, or eligible permanent residents to enable the school to comply with the collection and submission requirements of paragraph (a)(6)(ii) of this section.

(ii) The nursing school annually either—

(A) Obtains, at its own expense, all results achieved by students and graduates who are U.S. citizens, nationals, or eligible permanent residents on the National Council Licensure Examination for Registered Nurses (NCLEX–RN), together with the dates the student has taken the examination, including any failed examinations, and provides such results to the Secretary; or

(B) Obtains a report or reports from the National Council of State Boards of Nursing (NCSB), or an NCSB affiliate or NCSB contractor, reflecting the percentage of the school's students and graduates taking the NCLEX–RN in the preceding year who passed the examination, or the data from which the percentage could be derived, and provides the report to the Secretary.

(7) Not less than 75 percent of the school's students and graduates who are U.S. citizens, nationals, or eligible permanent residents who took the NCLEX–RN in the year preceding the year for which the institution is certifying a Federal Stafford Loan or a Federal Plus Loan, passed the examination.

(8) The school provides, including under the agreements described in paragraphs (a)(2) and (a)(3) of this section, and in the normal course requires its students to complete, a program of clinical and classroom nursing instruction that is supervised closely by members of the school's faculty that is provided in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom nursing instruction, through a training program for foreign nursing students that has been approved by all nurse licensing boards and evaluating bodies whose views are considered relevant by the Secretary.

(9) The school has graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination.

(10) The school employs only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at nursing schools in the United States.

(b) For purposes of paragraph (a)(5) of this section, the cost of a loan default is the sum of the defaulted loan's—

(1) Outstanding principal;

(2) Accrued interest;

(3) Unpaid late fees and collection costs;

(4) Special allowance payments;

(5) Reinsurance payments; and

(6) Any related or similar payments the Secretary is obligated to make on the loan.

(c) After a school reimburses the Secretary for the amount specified in paragraph (b) of this section, the loan is assigned to the school, and the borrower remains liable to the school for the outstanding balance of the loan, under the terms and conditions specified in the promissory note.

(d) No portion of the foreign nursing program offered to U.S. students may be located outside of the country in which the main campus of the foreign nursing school is located, except for clinical sites located in the United States.

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

11. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, and 1099c–1, unless otherwise noted.

12. Section 668.2 is amended by adding the words "Foreign institution" immediately after "Federal Family Education Loan (FFEL) programs" in the list of definitions in paragraph (a).

13. Section 668.13(b) is revised to read as follows:

§ 668.13 Certification procedures.

* * * * *

(b) *Period of participation.* (1) If the Secretary certifies that an institution meets the standards of this subpart, the Secretary also specifies the period for which the institution may participate in a title IV, HEA program. An institution's period of participation expires six years after the date that the Secretary certifies that the institution meets the standards of this subpart, except that—

(i) The period of participation for a private, for profit foreign institution expires three years after the date of the Secretary's certification; and

(ii) The Secretary may specify a shorter period.

(2) Provided that an institution has submitted an application for a renewal of certification that is materially complete at least 90 days prior to the expiration of its current period of participation, the institution's existing certification will be extended on a month to month basis following the expiration of the institution's period of participation until the end of the month in which the Secretary issues a decision on the application for recertification.

§ 668.15 [Amended]

14. Section 668.15 is amended by removing paragraph (h).

15. Section 668.23 is amended by:

A. In paragraph (a)(5), removing the words " "Audits of Institutions of Higher Education and Other Non-profit Organizations"; Office of Management and Budget Circular A–128, "Audits of State and Local Governments" " and adding, in their place, the words "Audits of States, Local Governments, and Non-Profit Organizations" ".

B. In paragraph (d)(1)—

Adding the words "issued by the Comptroller General of the United States" after "with generally accepted government auditing standards" and removing the words " "Audits of Institutions of Higher Education and Other Non-profit Organizations"; Office of Management and Budget Circular A–128, "Audits of State and Local Governments" "; and adding, in their place, "Audits of States, Local Governments, and Non-Profit Organizations".

C. Removing paragraph (d)(3).

D. Redesignating paragraph (d)(4) as paragraph (d)(3).

E. Redesignating paragraph (d)(5) as paragraph (d)(4).

F. Adding paragraph (h).

The addition reads as follows:

§ 668.23 Compliance audits and audited financial statements.

* * * * *

(h) *Audit submission requirements for foreign institutions.* (1) *Audited financial statements.* (i) The Secretary waives for that fiscal year the submission of audited financial statements if the institution is a foreign public or nonprofit institution that received less than $500,000 in U.S. title IV program funds during its most recently completed fiscal year, unless that foreign public or nonprofit institution is in its initial provisional period of participation, and received title IV program funds during that year, in which case the institution must submit, in English, audited financial statements prepared in accordance with generally accepted accounting principles of the institution's home country.

(ii) Except as provided in paragraph (h)(1)(iii) of this section, a foreign institution that received $500,000 or more in U.S. title IV program funds during its most recently completed fiscal year must submit, in English, for each most recently completed fiscal year in which it received title IV program funds, audited financial statements prepared in accordance with generally accepted accounting principles of the institution's home country along with corresponding audited financial statements that meet the requirements of paragraph (d) of this section.

(iii) In lieu of making the submission required by paragraph (h)(1)(ii) of this section, a public or private nonprofit institution that received—

(A) $500,000 or more in U.S. title IV program funds, but less than $3,000,000 in U.S. title IV program funds during its most recently completed fiscal year, may submit for that year, in English, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country, and is not required to submit the corresponding audited financial statements that meet the requirements of paragraph (d) of this section;

(B) At least $3,000,000, but less than $5,000,000 in U.S. title IV, program funds during its most recently completed fiscal year, must submit in English, for each most recently completed fiscal year, audited financial statements prepared in accordance with the generally accepted accounting principles of the institution's home country along with corresponding audited financial statements that meet the requirements of paragraph (d) of this section, except that an institution that continues to receive at least $3,000,000 but less than $5,000,000, in U.S. title IV funds during its most recently completed fiscal year may omit the audited financial statements that meet the requirements of paragraph (d) of this section for up to two consecutive years following the submission of audited financial statements that meet the requirements of paragraph (d) of this section.

(2) *Compliance audits.* A foreign institution's compliance audit must cover, on a fiscal year basis, all title IV, HEA program transactions, and must cover all of those transactions that have occurred since the period covered by the institution's last compliance audit. A compliance audit that is due under this paragraph must be submitted no later than six months after the last day of the institution's fiscal year, and must meet the following requirements:

(i) If the foreign institution received $500,000 or more in U.S. dollars in title IV, HEA program funds during its most recently completed fiscal year, it must submit a standard compliance audit for that year that is performed in accordance with audit guides developed by, and available from, the Department of Education's Office of Inspector General, together with an alternative compliance audit or audits prepared in accordance with paragraph (h)(2)(ii) of this section for any preceding fiscal year or years in which the foreign institution received less than $500,000 in U.S. dollars in title IV, HEA program funds;

(ii) If the foreign institution received less than $500,000 U.S. in title IV, HEA program funds for its most recently completed fiscal year, it must submit an alternative compliance audit for that prior fiscal year that is performed in accordance with audit guides developed by, and available from, the Department of Education's Office of Inspector General, except as noted in paragraph (h)(2)(iii) of this section.

(iii) If so notified by the Secretary, a foreign institution may submit an alternative compliance audit performed in accordance with audit guides developed by, and available from, the Department of Education's Office of Inspector General, that covers a period not to exceed three of the institution's consecutive fiscal years if such audit is submitted either no later than six months after the last day of the most recent fiscal year, or contemporaneously with a standard compliance audit timely submitted under paragraph (h)(2)(i) or (h)(3)(ii) of this section for the most recently completed fiscal year, and if the following conditions are met:

(A) The institution received less than $500,000 in title IV, HEA program funds for its most recently completed fiscal year.

(B) The institution has timely submitted acceptable compliance audits for two consecutive fiscal years, and following such submission, has no history of late submission since then.

(C) The institution is fully certified.

(3)(i) *Exceptions.* Notwithstanding the provisions of paragraphs (h)(1)(i) and (h)(1)(iii) of this section, the Secretary may issue a letter to a foreign institution that identifies problems with its financial condition or financial reporting and requires the submission of audited financial statements in the manner specified by the Secretary.

(ii) Notwithstanding the provisions of paragraphs (h)(2)(ii) and (h)(2)(iii) of this section, the Secretary may issue a letter to a foreign institution that identifies problems with its administrative capability or compliance reporting that may require the compliance audit to be performed at a higher level of engagement, and may require the compliance audit to be submitted annually.

16. Section 668.171 is amended by revising paragraph (c) to read as follows:

§ 668.171 General.

* * * * *

(c) *Public institutions.* (1) The Secretary considers a domestic public institution to be financially responsible if the institution—

(i)(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not in violation of any past performance requirement under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution—

(i)(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not in violation of any past performance requirement under § 668.174.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

17. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071–1087–2, unless otherwise noted.

18. Section 682.200 is amended by:

A. Adding the words "Foreign institution" immediately after "Federal Family Education Loan Program (formerly known as the Guaranteed Student Loan (GSL) Program" in the list of definitions in paragraph (a)(2).

B. Removing the definition of *Foreign school* in paragraph (b).

§ 682.611 [Removed]

19. Section 682.611 is removed and reserved.

[FR Doc. 2010–17313 Filed 7–19–10; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Tuesday,
July 20, 2010

Part III

Environmental Protection Agency

40 CFR Part 80

Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2010–0133; FRL–9175–8]

RIN 2060–AQ16

Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: Under the Clean Air Act Section 211(o), as amended by the Energy Independence and Security Act of 2007 (EISA), the Environmental Protection Agency is required to set the renewable fuel standards each November for the following year based on gasoline and diesel projections from EIA. Additionally, EPA is required to set the cellulosic biofuel standard each year based on the volume projected to be available during the following year, using EIA projections and assessments of production capability from industry. This regulatory action proposes these annual standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuels that apply to all gasoline and diesel produced or imported in year 2011. This action also presents two proposed changes to the RFS2 regulations. The first would create a temporary and limited means for certain renewable fuel producers to generate delayed RINs after they have produced and sold renewable fuel. This proposed provision would apply only to those producers who use canola oil, grain sorghum, pulpwood, or palm oil to produce renewable fuel. The second proposed regulatory provision would establish criteria for foreign countries to adopt an aggregate approach to compliance with the renewable biomass provision akin to that applicable to the U.S.

DATES: Comments must be received on or before August 19, 2010.

Hearing: We do not expect to hold a public hearing. However, if we receive such a request we will publish information related to the timing and location of the hearing and the timing of a new deadline for public comments.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0133, by one of the following methods:

- *http://www.regulations.gov: Follow the online instructions for submitting comments.*
- *E-mail: asdinfo@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. 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–2010–0133. 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, 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.* For additional instructions on submitting comments, go to Section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

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, 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: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; Telephone number: 734–214–4131; Fax number: 734–214–4816; E-mail address: *macallister.julia@epa.gov,* or Assessment and Standards Division Hotline; telephone number 734–214–4636; E-mail address *asdinfo@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this proposed rule are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol and biodiesel. Potentially regulated categories include:

Category	NAICS [1] codes	SIC [2] codes	Examples of potentially regulated entities
Industry	324110	2911	Petroleum Refineries.
Industry	325193	2869	Ethyl alcohol manufacturing.
Industry	325199	2869	Other basic organic chemical manufacturing.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.

Category	NAICS [1] codes	SIC [2] codes	Examples of potentially regulated entities
Industry	454319	5989	Other fuel dealers.

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

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is now aware could potentially be regulated by this proposed action. Other types of entities not listed in the table could also be regulated. To determine whether your activities would be regulated by this proposed action, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of this proposed action to a particular entity, consult the person listed in the preceding section.

B. 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.

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.

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G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
VIII. Statutory Authority

I. Executive Summary

The Renewable Fuel Standard (RFS) program began in 2007 following the requirements in Clean Air Act (CAA) section 211(o) which were implemented through the Energy Policy Act of 2005 (EPAct). The statutory requirements for the RFS program were subsequently modified through the Energy Independence and Security Act of 2007 (EISA), resulting in the release of revised regulatory requirements on March 26, 2010 [1]. In general, the transition from the RFS1 requirements of EPAct to the RFS2 requirements of EISA will occur on July 1, 2010.

EPA is required to determine and publish the applicable annual percentage standards for each compliance year by November 30 of the previous year. The determination of the applicable standards under RFS2 requires the EPA to conduct an in-depth evaluation of the volume of qualifying cellulosic biofuel that can be supplied in the following year. If the projected

[1] 75 FR 14670.

volume of cellulosic biofuel production is less than the required volume specified in the statute, EPA must lower the required volume used to set the annual cellulosic biofuel percentage standard to the projected volume of production. We must also determine whether the advanced biofuel and/or total renewable fuel volumes should be reduced by the same or a lesser amount. Since these evaluations will be based on evolving information about emerging segments of the biofuels industry, and may result in the required volumes differing from those in the statute, we believe that a notice-and-comment rulemaking process is appropriate. Today's notice provides our evaluation of the projected production of cellulosic biofuel for 2011, and proposed percentage standards for compliance year 2011. We will complete our evaluation based on comments received in response to this proposal, the Production Outlook Reports due to the Agency on September 1, 2010, the estimate of projected biofuel volumes that the EIA is required to provide to EPA by October 31, and other information that becomes available, and will finalize the standards for 2011 by November 30, 2010.

Today's proposed rule does not include an assessment of the environmental impacts of the standards we are proposing for 2011. All of the impacts of the RFS2 program were addressed in the RFS2 final rule published on March 26, 2010, including impacts of the biofuel standards specified in the statute. Today's rulemaking simply proposes the standards for 2011 whose impacts were already analyzed previously.

Today's notice also presents two proposed changes to the RFS2 regulations. The first would create a temporary and limited means for certain renewable fuel producers to generate RINs after they have produced and sold renewable fuel. This proposed provision for "Delayed RINs" would apply only to those producers who use canola oil, grain sorghum, pulpwood, or palm oil to produce renewable fuel, and only if EPA determines that fuel pathways utilizing these feedstocks provide appropriate greenhouse gas reductions as compared to baseline fuels to enable EPA to list the pathways in Table 1 to § 80.1426. We are proposing that the provision for Delayed RINs would apply only to these four feedstocks because we would have included them in the final RFS2 rule if the lifecycle analyses had been completed in time. The greenhouse gas (GHG) lifecycle impacts of these four feedstocks are currently being analyzed as a supplement to the RFS2 final rule and are expected to be completed in 2010. The second proposed regulatory provision would establish criteria for EPA to use in determining whether to authorize renewable fuel producers using foreign-grown feedstocks to use an aggregate approach to compliance with the renewable biomass verification provisions, akin to that applicable to producers using crops and crop residue grown in the United States. Further discussion of both of these proposed provisions can be found in Section V.

Finally, we note that in the RFS2 final rule we also stated our intent to make two announcements each year:

- Set the price for cellulosic biofuel waiver credits that will be made available to obligated parties in the event that we reduce the volume of cellulosic biofuel below the volume required by EISA.
- Announce the results of our assessment of the aggregate compliance approach for verifying renewable biomass requirements for U.S. crops and crop residue, and our conclusion regarding whether the aggregate compliance provision will continue to apply.

For both of these determinations EPA will use specific sources of data and a methodology laid out in the RFS2 final rule. We intend to present the results of both of these determinations in the final rule following today's proposal.

A. Statutory Requirements for Cellulosic Biofuel

The volumes of renewable fuel that must be used under the RFS2 program each year (absent an adjustment or waiver by EPA) are specified in CAA 211(o)(2). These volumes for 2011 are shown in Table I.A–1.

TABLE I.A–1—REQUIRED VOLUMES IN THE CLEAN AIR ACT FOR 2011

[Bill gal]

	Actual volume	Ethanol equivalent volume
Cellulosic biofuel	0.25	[a] 0.25
Biomass-based diesel	0.80	1.20
Advanced biofuel	1.35	1.35
Renewable fuel	13.95	13.95

[a] This value assumes that all cellulosic biofuel would be ethanol. If any portion of the renewable fuel used to meet the cellulosic biofuel volume mandate has a volumetric energy content greater than that for ethanol, this value will be higher.

By November 30 of each year, the EPA is required under CAA 211(o) to determine and publish in the **Federal Register** the renewable fuel standards for the following year. These standards are to be based in part on transportation fuel volumes estimated by the Energy Information Administration (EIA) for the following year. The calculation of the percentage standards is based on the formulas in § 80.1405(c) which express the required volumes of renewable fuel as a volume percentage of gasoline and diesel sold or introduced into commerce in the 48 contiguous states plus Hawaii.

The statute requires the EPA to determine whether the projected volume of cellulosic biofuel production for the following year is less than the minimum applicable volume shown in Table I.A–1. If this is the case, then the standard for cellulosic biofuel must be based upon the volume projected to be available rather than the applicable volume in the statute. In addition, if EPA reduces the required volume of cellulosic biofuel below the level specified in the statute, the Act also indicates that we may reduce the applicable volume of advanced biofuels and total renewable fuel by the same or a lesser volume.

As described in the final rule for the RFS2 program, we intend to examine EIA's projected volumes and other available data including the Production Outlook Reports required under § 80.1449 in making the determination of the appropriate volumes to require for 2011. Since the first set of Production Outlook Reports are not due until September 1, 2010, they were not available for today's proposal but will be considered for development of the

final rule to be released by November 30, 2010.

B. Assessment of 2011 Cellulosic Biofuel Volume

To estimate the volume of cellulosic biofuel that could be made available in the U.S. in 2011, we researched all potential production sources by company and facility. This included sources that were still in the planning stages, those that were under construction, and those that are already producing some volume of cellulosic ethanol, cellulosic diesel, or some other type of cellulosic biofuel. We considered all pilot and demonstration plants as well as commercial plants. From this universe of potential cellulosic biofuel sources we identified the subset that had a possibility of producing some volume of qualifying cellulosic biofuel for use as transportation fuel in 2011. We then conducted a rigorous process of contacting all of these producers to determine which ones were actually in a position to produce and make available any commercial volumes of cellulosic biofuel in 2011. Based on information gathered in this process, we estimated the maximum potentially available 2011 volumes. For the final rule, we will specify the projected available volume for 2011 that will be the basis for the percentage standard for cellulosic biofuel. To determine the projected available volume, we will consider factors such as the current and expected state of funding, the status of the technology and contracts for feedstocks, and progress towards construction and production goals. A complete list of all the factors we expect to consider in this process is provided in Section II.A.5.

In our assessment we evaluated both domestic and foreign sources of cellulosic biofuel. Of the domestic sources, we estimated that seven facilities have the potential to make volumes of cellulosic biofuel available for transportation use in the U.S. in 2011. We also determined that one facility in Canada has the potential to export some cellulosic biofuel to the U.S. These facilities are listed in Table I.B–1 along with our estimate of the maximum potentially available volume.

TABLE I.B–1—MAXIMUM POTENTIALLY AVAILABLE CELLULOSIC BIOFUEL PLANT VOLUMES FOR 2011

Company	Location	Fuel type	Maximum potentially available volume (million ethanol-equivalent gallons)
AE Advanced Fuels Keyes	Keyes, CA	Ethanol	0.5
Agresti Biofuels	Pike County, KY	Ethanol	1
Bell Bio-Energy	Atlanta, GA	Diesel feedstock	11.9
Cello Energy	Bay Minette, AL	Diesel	8.5
DuPont Dansico	Vonore, TN	Ethanol	0.15
Fiberight	Blairstown, IA	Ethanol	2.8
Iogen Corporation	Ottawa, Ont	Ethanol	0.25
KL Energy Corp/WBE	Upton, WY	Ethanol	0.4
Total			25.5

The volumes in Table I.B–1 for each facility represent the volume that would be produced in 2011 based upon the owner's expected month of startup and an assumed period of production rampup for testing and process validation. However, none of the facilities we evaluated are currently producing cellulosic biofuel at the rates they project for 2011. Moreover, there are other uncertainties associated with each facility's projected volume that could result in less production volume in 2011 than the maximum potentially available values shown in Table I.B–1. These uncertainties include outstanding issues in areas such as technology, funding, and construction. Historical successes in meeting various past milestones also play a role in assessing the likelihood of meeting future milestones. A detailed discussion of these uncertainties is presented in Section II.A. Finally, the volumes that should be considered for setting the 2011 standard are those that result from valid cellulosic biofuel pathways in Table 1 to § 80.1426. As described more fully in Section IV.A, some of the facilities in Table I.B–1 may use feedstocks that have not yet been subjected to lifecycle analyses to determine if the pathway meets the applicable GHG thresholds.

Based on our preliminary assessment for this NPRM, we believe that we could justify a 2011 cellulosic biofuel volume requirement of at least 6.5 million ethanol-equivalent gallons, and potentially as high as 25.5 million gallons. For the final rule we will use additional information that becomes available after publication of this proposal and a more precise assessment of the uncertainties associated with each facility to determine the projected available volume on which to base the cellulosic biofuel percentage standard for 2011.

C. Advanced Biofuel and Total Renewable Fuel

As described in Section I.A above, the statute indicates that we may reduce the applicable volume of advanced biofuel and total renewable fuel if we determine that the projected volume of cellulosic biofuel production for 2011 falls short of the statutory volume of 250 million gallons. As shown in Table I.B–1, we are proposing a determination that this is the case. Therefore, we also needed to evaluate the need to lower the required volumes for advanced biofuel and total renewable fuel.

We first considered whether it appears likely that the required biomass-based diesel volume of 0.8 billion gallons can be met with existing biodiesel production capacity in 2011. As discussed in Section II.D, we believe that the 0.8 billion gallon standard can indeed be met. Since biodiesel has an Equivalence Value of 1.5, 0.8 billion physical gallons of biodiesel would provide 1.20 billion ethanol-equivalent gallons that can be counted towards the advanced biofuel standard of 1.35 billion gallons. Of the remaining 0.15 bill gallons, up to 0.026 bill gallons would be met with the proposed volume of cellulosic biofuel. Based on our analysis as described in Section II.C, there may be sufficient volumes of other advanced biofuels, such as imported sugarcane ethanol, additional biodiesel, or renewable diesel, such that the standard for advanced biofuel could remain at the statutory level of 1.35 billion gallons. However, uncertainty in

the potential volumes of these other advanced biofuels coupled with the range of potential production volumes of cellulosic biofuel could provide a rationale for lowering the advanced biofuel standard. If we do not simultaneously lower the required volume for total renewable fuel, the result would be that additional volumes of conventional renewable fuel, such as corn-starch ethanol, would be produced, effectively replacing some advanced biofuels. In today's NPRM we are proposing that neither the required 2011 volumes for advanced biofuel nor total renewable fuel be lowered below the statutory volumes. However, we request comment on whether the advanced biofuel and/or total renewable fuel volume requirements should be lowered if, as we propose, EPA lowers the required cellulosic biofuel volume from that specified in the Act.

D. Proposed Percentage Standards

The renewable fuel standards are expressed as a volume percentage, and are used by each refiner, blender or importer to determine their renewable fuel volume obligations. The applicable percentages are set so that if each regulated party meets the percentages, and if EIA projections of gasoline and diesel use are accurate, then the amount of renewable fuel, cellulosic biofuel, biomass-based diesel, and advanced biofuel used will meet the volumes required on a nationwide basis. To calculate the percentage standard for cellulosic biofuel for 2011, we have used a potential volume range of 6.5–25.5 million ethanol-equivalent gallons (representing 5–17.1 million physical gallons). For the final rule, EPA intends to pick a single value from within this range to represent the projected available volume on which the 2011 percentage standard for cellulosic biofuel will be based. We are also proposing that the applicable volumes for biomass-based diesel, advanced biofuel, and total renewable fuel for 2011 will be those specified in the statute. These volumes are shown in Table I.D–1.

TABLE I.D–1—PROPOSED VOLUMES FOR 2011

	Actual volume	Ethanol equivalent volume
Cellulosic biofuel	5–17.1 mill gal	6.5–25.5 mill gal.
Biomass-based diesel	0.80 bill gal	1.20 bill gal.
Advanced biofuel	1.35 bill gal	1.35 bill gal.
Renewable fuel	13.95 bill gal	13.95 bill gal.

Four separate standards are required under the RFS2 program, corresponding to the four separate volume requirements shown in Table I.D–1. The specific formulas we use to calculate the renewable fuel percentage standards are contained in the regulations at § 80.1405 and repeated in Section III.B.1. The percentage standards represent the ratio of renewable fuel volume to non-renewable gasoline and diesel volume. The projected volumes of gasoline and renewable fuels used to calculate the standards are provided by EIA's Short-Term Energy Outlook (STEO) [2]. The projected volume of transportation diesel used to calculate the standards is provided by EIA's 2010 Annual Energy Outlook (early release version).[3] Because small refiners and small refineries are also regulated parties beginning in 2011 [4], there is no small refiner/refinery volume adjustment to the 2011 standard as there was for the 2010 standard. Thus, the increase in the percentage standards relative to 2010 appears smaller than would otherwise be the case, since more obligated parties will be participating in the program. The proposed standards for 2011 are shown in Table I.D–2. Detailed calculations can be found in Section III.

TABLE I.D–2—PROPOSED PERCENTAGE STANDARDS FOR 2011

	Percent
Cellulosic biofuel	0.004–0.015
Biomass-based diesel	0.68
Advanced biofuel	0.77
Renewable fuel	7.95

II. Volume Production and Import Potential for 2011

In order to project production volumes of cellulosic biofuel in 2011 for use in setting the percentage standards, we collected information on individual facilities that have the potential to produce qualifying volumes for consumption as transportation fuel, heating oil, or jet fuel in the U.S. in 2011. This section describes the potential volumes that we believe could be produced or imported in 2011 as well as the uncertainties associated with those volumes. The volumes listed in this section do not represent the projected available volume of cellulosic biofuel that will be used to finalize the cellulosic biofuel percentage standard for 2011. Rather, for today's NPRM we have assessed the maximum potentially available volume for 2011, which is intended to represent an upper bound of the volume of fuel that may be produced and made available. The production of cellulosic biofuel remains highly uncertain, and EPA expects that the volume of cellulosic biofuel used to set the 2011 percentage standard will be a lesser volume than this maximum potentially available volume. Section III describes the conversion of our maximum potentially available volumes for cellulosic biofuel into a range of percentage standards.

While the 2011 volume projections in today's proposal were based on our own assessment of the cellulosic biofuel industry, by the time we announce the final 2011 volumes and percentage standards we will have additional information. First, in addition to comments in response to today's proposal, we will have updated and more detailed information about how the industry is progressing in 2010. Second, by September 1 all registered producers and importers of renewable fuel must submit Production Outlook Reports describing their expectations for new or expanded biofuel supply for the next five years, according to § 80.1449. Finally, by October 2010 the Energy

[2] The March 2010 issue of STEO was used for today's proposal. We intend to use the October 2010 version for the final rule.

[3] EIA has recommended the use of the Annual Energy Outlook (AEO) rather than the Short Term Energy Outlook as a better representation of the estimated transportation sector diesel fuel use. We will use the most recent version of AEO in the final values of the standards.

[4] The Department of Energy concluded that there is no reason to believe that any small refinery would be disproportionately harmed by inclusion in the proposed RFS2 program for 2011 and beyond. See DOE report "EPACT 2005 Section 1501 Small Refineries Exemption Study", (January 2009). We will revisit extensions to the exemption for small refiners and refineries if DOE revises their study and provides a different conclusion, or an individual small refinery is able to demonstrate that it will suffer a disproportionate economic hardship under the RFS program.

Information Administration (EIA) is required by statute to provide EPA with an estimate of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the U.S. in 2011.

A. Cellulosic Biofuel

The task of projecting the volume of cellulosic biofuels that will be produced in 2011 is a difficult one. Currently there are no facilities consistently producing cellulosic biofuels for commercial sale. Announcements of new projects, changes in project plans, project delays, and cancellations occur with great regularity. Biofuel producers face not only the challenge of the scale up of innovative, first-of-a-kind technology, but also the challenge of securing funding in a difficult economy.

In order to project cellulosic biofuel production in 2011, EPA has tracked the progress of over 100 biofuel production facilities. From this list of facilities we used publicly available information, as well as information provided by DOE and USDA, to determine which facilities were the most likely candidates to produce cellulosic biofuel and make it commercially available in 2011. Each of these companies was contacted by EPA in order to determine the current status of their facilities and discuss their commercialization plans for the coming years. Our estimate of the maximum potentially available cellulosic biofuel production in 2011 is based on the information we received in conversations with these companies as well as our own assessment of the likelihood of these facilities successfully producing cellulosic biofuel in the volumes indicated.

A brief description of each of the companies we believe may produce cellulosic biofuel and make it commercially available can be found below. These companies have been grouped according to the type of biofuel they produce. For the purpose of setting the cellulosic biofuel standard for 2011 this is a convenient grouping, as the number of RINs generated per gallon of fuel produced is dependent on the type of fuel. A more in depth discussion of the technologies used to produce cellulosic biofuels can be found in Section IV.

In today's NPRM EPA is proposing a range, rather than a single value, for the required 2011 cellulosic biofuel volume. At a minimum, we believe that a volume of 6.5 million gallons could be justified based on currently available information. This is the cellulosic biofuel volume that was required in 2010, and absent a waiver for some portion of this volume, producers will be aiming to meet it. Therefore, it is reasonable to project that this same volume could, at minimum, also be produced in 2011.

For a maximum potentially available cellulosic biofuel volume for 2011, we are proposing 25.5 million ethanol equivalent gallons, representing the highest volume of fuel that can reasonably be expected to be produced and made available based on current information. In order for this volume of cellulosic biofuel to be produced in 2011, each of the companies discussed below would have to achieve their production targets in their projected timeframes. However, historical trends among cellulosic biofuel producers suggests that this is unlikely to be the case, as there are many factors which have the potential to result in production delays. For instance, several of the companies we considered when setting the 2010 cellulosic biofuel standard have yet to sell cellulosic biofuel in the United States and appear unlikely to do so by the end of 2010. This fact demonstrates the uncertainty of cellulosic biofuel production estimates, and is one of many factors EPA will consider when setting the cellulosic biofuel standard for 2011.

The rest of this section describes the analyses that were used as the basis for this maximum value. We will continue to gather more information to help inform our decision on the final cellulosic biofuel standard for 2011, and we will specify a single volume in the final rule that will be the basis for the cellulosic biofuel percentage standard for 2011.

1. Domestic Cellulosic Ethanol

Based on our assessment of the cellulosic biofuel industry we believe that there are five companies in the United States with the potential to produce cellulosic ethanol and make it commercially available in 2011. These companies are AE Biofuels, Agresti Biofuels, DuPont Danisco Cellulosic Ethanol, Fiberight, and KL Energy Corporation. This section will provide a brief description of each of these companies and our assessment of their potential fuel production in 2011. This section also provides a brief update on companies from whom we do not expect any commercial sales of transportation fuel in 2011 in the U.S. but were included in prior assessments.

AE Biofuels is a company that plans to convert corn cobs and corn stover to ethanol using an enzymatic hydrolysis. They plan to use an integrated process that converts both starch and cellulose to ethanol. In August 2008 they opened a demonstration plant in Butte, Montana to test their technology and gather information for their first commercial scale plant. AE Biofuels has reached a lease agreement with Cilion to operate Cilion's 55 MGY corn ethanol plant in Keyes, CA under the name AE Advanced Fuels Keyes. This facility has been idled since April 2009 and will require repairs before being operational. AE Biofuels plans to start up production with a starch feedstock in late-2010 and then begin to transition some production to cellulosic feedstock in mid-2011. AE Biofuels plans to eventually use up to 25% cellulosic feedstock for ethanol production in this facility. EPA projects that up to 0.5 million gallons of ethanol may be produced by this facility in 2011.

Agresti Biofuels plans to produce ethanol from separated municipal solid waste (separated MSW) at a facility in Pike County, Kentucky. Their process uses a gravity pressure vessel licensed from GeneSyst to crack the lignin in their feedstock and then a combination of weak bases and acids to convert the cellulose and hemicellulose into simple sugars for later fermentation into ethanol. Agresti plans to begin construction on their first production facility in Pike County sometime in the summer of 2010 and hope to be producing ethanol by the end of 2011. The full production capacity of this facility will be 20 million gallons of ethanol per year. Due to the fact that construction on this facility has not yet begun and production is not expected until late in 2011 EPA expects no more than 1 million gallons of cellulosic ethanol to be produced by Agresti Biofuels in 2011.

DuPont Danisco Cellulosic Ethanol (DDCE) began start up operations at a small demonstration facility in Vonore, Tennessee in early 2010. This facility has a maximum production capacity of 250,000 gallons of ethanol per year and uses an enzymatic hydrolysis process to convert corn cobs into ethanol. The main purpose of this facility is not to produce ethanol to be sold commercially, but rather to provide information for the future construction and optimization of larger, commercial scale cellulosic ethanol production facilities. DDCE have indicated that they do not intend to produce more than 150,000 gallons of ethanol in 2011 from the Vonore facility.

Fiberight is another company planning to convert MSW to ethanol. Fiberight purchased a small corn ethanol plant in Blairstown, IA and has converted it to produce cellulosic ethanol. They use an enzymatic hydrolysis process, with enzymes

provided by Novozymes, to convert the cellulosic waste materials to simple sugars and eventually to ethanol. Fiberight has a unique enzyme recycle and recovery process that allows them to affordably use high concentrations of enzymes to increase the speed and conversion rate of the cellulose to simple sugars. Fiberight plans to begin ethanol production in the summer of 2010 and ramp up to full production capacity of 5.7 million gallons of ethanol per year by late 2011. Based on company estimates, EPA projects Fiberight could produce as much as 2.8 million gallons of cellulosic ethanol in 2011.

The fifth company that EPA is aware of with the potential to produce cellulosic ethanol in 2011 is KL Energy Corporation. KL Energy has a small facility in Upton, Wyoming that uses an enzymatic hydrolysis process to convert wood chips and wood waste to ethanol. This facility has a maximum annual production volume of 1.5 million gallons and has been operational since the fall of 2007. Since KL Energy completed construction on this facility they have been slowly ramping up production and gathering information to optimize this and future ethanol production facilities. KL has informed EPA that they intend to produce 400,000 gallons of cellulosic ethanol from their Upton, WY facility in 2011.

In addition to the five companies mentioned above, EPA is also tracking the progress of more than 70 ethanol production facilities in various stages ranging from construction to planning stages. Several of these companies, including Abengoa, BlueFire Ethanol, Coskata, Fulcrum, POET, and Vercipia all intend to begin the production and commercial sale of cellulosic ethanol in 2012. These facilities range in maximum production capacity from 10 to 100 million gallons of ethanol. EPA anticipates a significant increase in the production and sale of cellulosic ethanol in 2012, and strong continued growth in the following years. In addition, if any of these or other companies accelerates their production plans to make cellulosic biofuel available for commercial sale in 2011, we will take those volumes into account in our final rule.

2. Domestic Cellulosic Diesel

EPA is also aware of two companies in the United States with the potential of producing cellulosic diesel fuel in 2011. The first of these companies is Cello Energy. Cello Energy plans to use a catalytic depolymerization process to produce diesel fuel from wood chips and hay. Cello currently has a structurally complete facility in Bay Minette, Alabama with an annual production capacity of 20 million gallons of diesel per year. While having a structurally complete facility puts Cello ahead of many other potential biofuel producers they have yet to be able to produce biofuel at anywhere near the production capacity. They are currently assessing feedstock preparation and handling issues that must be resolved before they are able to again attempt start up and production at this facility. If these issues are successfully addressed EPA believes that Cello could, at most, produce up to 5 million gallons (8.5 million ethanol equivalent gallons) of cellulosic diesel fuel in 2011.

Another potential producer of cellulosic biofuel in 2011 is Bell Bio-Energy. Bell Bio-Energy uses proprietary organisms to convert waste materials to liquid fuels and compost in a single step. The company currently has an agreement in place for the sale of the compost they produce and are searching for a location for their first plant and a partner to supply the waste materials they intend to use as feedstock. The liquid fuel they produce is not a finished transportation fuel, but could be upgraded to jet or diesel fuel. Bell Bio-Energy is currently working with a refining company to analyze the fuel they produce and determine the extent of upgrading necessary for the fuel to qualify as transportation fuel. They plan to begin construction on their first facility, which will have an annual fuel production capacity of 14.4 million gallons per year, as soon as a suitable site and partner are found. The simplicity and low capital costs of Bell Bio-Energy's single step production process allow them to construct plants very rapidly, in as little as six weeks. This would make it possible for Bell Bio-Energy to produce cellulosic biofuel in 2011 despite the fact that they have not yet begun construction on their first commercial scale facility. It is unclear when fuel will be produced at this facility, and whether it would qualify under the RFS2 program. If Bell Bio-Energy is successful in producing and upgrading their fuel EPA estimates the maximum volume of fuel they could produce in 2011 would be 7 million gallons (11.9 million ethanol equivalent gallons) of jet or diesel fuel.

EPA is also tracking the progress of 17 other facilities that plan to produce cellulosic diesel. Flambeau Rivers Biofuels, New Page, and Terrabon are planning on opening commercial scale cellulosic diesel facilities in 2012. Both Bell Bio-Energy and Cello have plans to build additional facilities if their initial projects are successful. As with cellulosic ethanol, cellulosic diesel production has the potential for rapid growth in 2012 and the following years.

3. Other Domestic Cellulosic Biofuels

We are currently unaware of any companies in the United States planning on producing cellulosic biofuel other than ethanol and diesel and making it commercially available. EPA is currently tracking the efforts of 10 companies that plan to produce fuels such as gasoline, jet fuel, dimethyl ether (DME), and others. Many of these companies have reported that they are still developing their technologies and waiting for funding, and that they are not expecting to make any cellulosic fuel commercially available until 2012 at the earliest. There are several companies, such as Gevo and Virent, with small demonstration facilities who intend to produce other fuels from cellulosic feedstocks, but are currently optimizing their technology with sugar or starch feedstocks. EPA anticipates that in the future this may be a significant source of cellulosic biofuel, however we are only expecting cellulosic ethanol and diesel to be produced in 2011.

4. Imports of Cellulosic Biofuel

In addition to the companies located in the United States, EPA is also aware of two Canadian companies with the potential for cellulosic biofuel production in 2011. If this fuel was imported into the United States, these companies would be eligible to participate in the RFS2 program. Counting on cellulosic biofuel produced internationally in setting the 2011 standard brings with it the additional uncertainty associated with the fact that the fuel may be used locally rather than imported into the United States.

Iogen uses a steam explosion pre-treatment process followed by enzymatic hydrolysis to produce cellulosic ethanol from wheat, oat, and barley straw. They have a demonstration facility with an annual production capacity of 500,000 gallons of ethanol located in Ontario, Canada. This facility has been operational and producing small volumes of ethanol since 2004. So far all of the ethanol produced by this facility has been used locally and in racing and other promotional events. Iogen, however, is exploring the possibility of participating in the RFS2 program. If they do decide to import ethanol to the United States, EPA projects that they could provide as much as 250,000 gallons of cellulosic ethanol in 2011 based on production volumes from previous years.

Another Canadian company with the potential to produce cellulosic ethanol in 2011 is Enerkem. Enerkem plans to use a thermo-chemical process to gasify separated MSW and other waste products and then use a catalyst to convert the synthesis (syn) gas into ethanol. Enerkem is currently finishing construction on a 1.3 million gallon per year facility in Westbury, Quebec and plans to begin producing ethanol in the summer of 2010. They are also planning a 10 million gallon per year facility in Edmonton, Alberta, however production from this facility is not expected until 2012. Enerkem has informed EPA that they plan to market ethanol they produce locally, and have no intentions to import cellulosic ethanol into the United States. We are therefore not projecting any available cellulosic fuel from Enerkem in 2011.

While Canada may be the most likely source of imported cellulosic biofuels due to its close proximity, it is possible that cellulosic biofuels produced in other countries may be imported into the United States as well. Another potential source of cellulosic biofuel imports is Brazil, due to its established ethanol industry and history of importing ethanol into the United States. EPA is aware of several companies exploring the possibility of cellulosic biofuel production in Brazil; however none of these companies are likely to make cellulosic biofuels commercially available in the United States in 2011. With the exception of Iogen, as mentioned above, EPA has not projected imports of cellulosic biofuels from outside the United States in 2011.

5. Summary of Volume Projections

The information EPA has gathered on the potential cellulosic biofuel producers in 2011, summarized in Section II.A above, allows us to project a maximum potentially available biofuel volume for each facility in 2011. After the appropriate ethanol equivalence value has been applied to the volumes of those facilities producing diesel fuel, the overall maximum potentially available volume of cellulosic biofuels for 2011 can be calculated by summing the maximum potential of each facility. EPA is not proposing to set the 2011 cellulosic biofuel standard at this maximum potentially available volume, rather this is intended to serve as an upper bound. This information is summarized in Table II.A.5–1 below.

TABLE II.A.5–1—CELLULOSIC BIOFUEL MAXIMUM 2011 POTENTIALLY AVAILABLE VOLUME

Company name	Location	Feedstock	Fuel	Capacity (MGY)	Earliest production	Maximum 2011 potentially available volume (MG)	Ethanol equivalent gallons (MG)
AE Advanced Fuels Keyes.	Keyes, CA	Corn, then stover	Ethanol	20	June 2011	0.5	0.5
Agresti Biofuels	Pike County, KY	MSW	Ethanol	20	Oct. 2011	1	1
Bell Bio-Energy	Atlanta, GA	MSW or other cellulosic biomass.	Diesel Feedstock	14.4	June 2011	7	11.9
Cello Energy	Bay Minette, AL	Wood, hay	Diesel	20	Online	5	8.5
DuPont Danisco [a]	Vonore, TN	Corn cobs, then switchgrass.	Ethanol	0.25	Online	0.15	0.15
Fiberight [a]	Blairstown, IA	MSW	Ethanol	6	April 2010	2.8	2.8
Iogen	Ottawa, Ontario	Wheat, oat & barley straw.	Ethanol	0.5	Online	0.25	0.25
KL Energy [a]	Upton, WY	Wood	Ethanol	1.5	Online	0.4	0.4
Total						17.1	25.5

[a] Maximum Production/Import Potential represents company estimate.

It is important to note that this maximum potentially available volume of 17.1 million gallons of cellulosic biofuel, or 25.5 million ethanol equivalent gallons, is not the volume on which the final 2011 cellulosic biofuel standard will be based. This number represents the maximum amount of fuel EPA believes could reasonably be expected to be produced or imported and made available for use as transportation fuel, heating oil, or jet fuel in 2011. It incorporates some reductions from the annual production capacity of each facility based on when the facilities anticipate fuel production will begin and assumptions regarding a ramp up period to full production. However, as stated earlier, in order for this volume of cellulosic biofuel to be produced in 2011, each of the companies listed in Table II.A.5–1 would have to achieve their production targets in their projected timeframes. The history of the cellulosic biofuels industry has many examples of delays in achieving full production capacity in new facilities. Also, there are many other factors that increase the uncertainty of fuel production facilities being able to achieve their maximum potential production. These factors may include:

- Difficulty/delays in securing necessary funding.
- Delays in permitting and/or construction.
- Difficulty in scale up, especially for 1st of their kind technologies.
- Volumes from pilot and demonstration plants may not be sold commercially.
- Not all feedstocks may qualify to produce cellulosic RINs; some still awaiting evaluation of lifecycle impacts.
- Likelihood that fuels produced internationally will be exported to the United States rather than consumed locally.

Each of the facilities listed in Table II.A.5–1 may experience some of the difficulties listed above, and as a result may produce a volume of fuel less than that listed as their maximum 2011 potentially available volume. Despite this uncertainty, EPA believes that the volume of cellulosic biofuel produced in 2011 will, at minimum, be able to meet or exceed the 2010 standard of 6.5 million ethanol equivalent gallons. However, we will have more detailed and accurate information for the final rule, including the first round of Production Outlook Reports, due on

September 1, 2010[5] which will provide information from each producer or importer on the type or types of fuel they plan to make available, the volume of fuel, and the number of RINs they plan to generate for the next five calendar years.[6] Therefore, in today's NPRM we are proposing a range of values, from a minimum of 6.5 million ethanol equivalent gallons to a maximum of 25.5 million ethanol equivalent gallons for the 2011 cellulosic biofuel standard. As time progresses and we are able to track whether or not the cellulosic biofuels producers are able to meet the construction and ramp up schedules they have presented, we will have a better idea of the appropriate volume of fuel that we can reasonably expect to be produced and made commercially available in 2011. Additionally, each year by October 31 EIA is required to provide an estimate of the volume of cellulosic biofuel they expect to be sold or introduced into commerce in the United States in the following year. EPA will consider this information as well when finalizing a single volume for use in setting the 2011 cellulosic biofuel standard.

Although we are currently projecting that the potentially available volume of cellulosic biofuel in 2011 will be in the range of 6.5 to 25.5 million ethanol-equivalent gallons, we expect that volumes of cellulosic biofuel will increase rapidly in the years following 2011. As stated before, we are aware of more than 100 companies that are actively investigating or making plans to produce cellulosic biofuel in the near future. Many of these companies intend to begin construction in 2011 or 2012. We will be monitoring these companies carefully as we project the potential volumes of cellulosic biofuel for years 2012 and beyond.

B. Potential Limitations

In addition to production capacity, a variety of other factors have the potential to limit the amount of cellulosic biofuel that can be produced and used in the U.S. For instance, there may be limitations in the availability of qualifying cellulosic feedstocks at reasonable prices. Most of the cellulosic biofuel producers that we project will produce commercial volumes in 2011 have indicated that they will use some type of cellulosic waste, such as separated municipal solid waste, wastes from the forestry industry, and agricultural residues. Based on the analyses of cellulosic feedstock availability in the RFS2 final rule, we believe that there will be significantly more than enough sources of these feedstocks for 2011. For producers that intend to use dedicated energy crops, we do not believe that the availability of existing cropland will limit production in 2011. We plan to continue to evaluate the availability of valid feedstocks in future years as the required volumes of cellulosic biofuel increase.

Another factor that has the potential to limit the amount of renewable fuel that can be produced and used in the U.S. is distribution and storage capacity. In the longer term, most biofuels are expected to be produced in the heartland of the country and then be shipped towards the coasts, flowing roughly in the opposite direction of petroleum-based fuels. The physical and chemical nature of many of these biofuels may limit the extent to which they can be shipped and/or stored fungibly with petroleum-based fuels. As a result, new and expanded rail, barge and tank truck transport will need to be put in place. Dedicated biofuels pipelines are also being investigated. For instance, a short gasoline pipeline in Florida is currently shipping batches of ethanol.[7] Evaluations are also currently underway regarding the feasibility of constructing a new dedicated ethanol pipeline from the Midwest to the East coast.[8] However, for 2011 the volumes of cellulosic biofuel are small enough that long-distance transport will be unnecessary; with the exception of foreign-produced biofuels, much of the cellulosic biofuel volumes can be consumed in regions close to their production facilities. We also expect existing distribution and storage capacity to be sufficient to accommodate the small increase in cellulosic biofuel volumes in 2011.

C. Advanced Biofuel and Total Renewable Fuel

Under CAA 211(o)(7)(D)(i), EPA has the flexibility to reduce the applicable volume of the advanced biofuel and total renewable fuel requirements in the event that the projected volume of cellulosic biofuel is determined to be below the volume specified in the statute. As described in Section II.A above, even the largest potential volumes of cellulosic biofuel supply for 2011 are significantly below the statutory volume of 250 million gallons. Therefore, we must consider whether and to what degree to lower the advanced biofuel and total renewable fuel standards for 2011.

As described in the RFS2 final rule, we believe it may be appropriate to allow excess advanced biofuels to make up some or all of the shortfall in cellulosic biofuel. This could include excess biomass-based diesel, sugarcane ethanol, or other biofuels categorized as advanced biofuel. We believe that Congress wanted to encourage the development of advanced renewable fuels and allow in appropriate circumstances for the use of additional volumes of those fuels in the event that the projected volume of cellulosic biofuel falls below the statutory mandate.

If we were to maintain the advanced biofuel and total renewable fuel volume requirements at the levels specified in the statute, we estimate that 125–144 million ethanol-equivalent gallons of additional advanced biofuels would be needed, depending on the standard we set for cellulosic biofuel. *See* Table II.C–1.

TABLE II.C–1—PROJECTED IMPACT OF CELLULOSIC VOLUME ON USE OF OTHER BIOFUELS IN 2011

[Mill gallons]

	Ethanol-equivalent volume	Physical volume
Total renewable fuel	13,950	13,500–13,549
Conventional renewable fuel [a]	12,600	12,600
Total advanced biofuel	1,350	900–949
Cellulosic biofuel	6.5–25.5	5–17.1
Biomass-based diesel	1200	800
Other advanced biofuel [b]	125–144	83 [c]–144 [d]

[a] Predominantly corn-starch ethanol.

[b] Rounded to nearest million gallons for simplicity.

[c] Lowest volume of other advanced biofuel assumes cellulosic biofuel standard is based on 25.5 mill gallons and only excess biodiesel (with an equivalence value (EV) of 1.5) is used to fill the need for other advanced biofuel.

[d] Highest volume of other advanced biofuel assumes cellulosic biofuel standard is based on 6.5 mill gallons and only imported sugarcane ethanol (with an EV of 1.0) is used to fill the need for other advanced biofuel.

[5] In future years, Production Outlook Reports will be due on March 1. As a result, they may be considered during development of the NPRM in year 2011 and beyond.

[6] For more information on the annual production outlook reports see § 80.1449 of the RFS2 regulations.

[7] Kinder Morgan announcement that their Central Florida Pipeline from Tampa to Orlando ships batches of ethanol along with batches of gasoline. *http://www.kindermorgan.com/business/products_pipelines/.*

[8] "POET Joins Magellan Midstream Partners to Assess Dedicated Ethanol Pipeline", March 2009, *http://www.poet.com/news/showRelease.asp?id=155.*

To determine if there are likely to be sufficient volumes of imported sugarcane ethanol and/or excess biodiesel to meet the need for 125–144 million gallons of other advanced biofuel, we examined historical data on ethanol imports and EIA projections for 2011. For instance, as shown in Table II.C–2 below, recent annual import volumes of ethanol were higher than what would be needed in 2011.

TABLE II.C–2—HISTORICAL IMPORTS OF ETHANOL

[Mill gallons] [9]

2007	439
2008	530
2009	194

Brazilian imports have made up a sizeable portion of total ethanol imported into the U.S. However, as shown above, these import volumes decreased significantly in 2009. Part of the reason for this decline in imports is the cessation of the duty drawback that became effective on October 1, 2008, but also changes in world sugar prices.[10] However, Brazil produces the most ethanol in the world, reaching about 9 billion gallons in 2008.[11] Thus if there were a demand in the U.S. in 2011 for 125–144 million gallons of advanced biofuel, it may be economical for Brazil to export at least this volume of sugarcane ethanol to the U.S.

EIA's projections for 2011 suggest that there may be sufficient volumes of imported sugarcane ethanol and excess biodiesel production to make up for our proposed reduction in the required volume of cellulosic biofuel. See Table II.C–3.

TABLE II.C–3—EIA PROJECTED IMPORTED ETHANOL AND BIODIESEL AVAILABILITY IN 2011

[Mill gallons] [12]

Imported ethanol	202
Total domestic biodiesel production	860
Biodiesel needed to meet biomass-based diesel standard	800
Excess biodiesel	60

Further discussion of the potential availability of biomass-based diesel in 2011 can be found in the next Section II.D below.

Based on these projections, there would be a total of 60 million gallons of excess biodiesel production (90 million gallons ethanol-equivalent), plus another 202 million gallons of imported sugarcane ethanol. The total would therefore be 292 million gallons ethanol-equivalent. Since we are projecting that the need for other advanced biofuel would be in the range of 125–144 million gallons depending on the cellulosic biofuel standard that we set, 292 million gallons would likely be sufficient. Moreover, the projections in Table II.C–3 do not account for other potential sources of advanced biofuels. For instance, California's Low Carbon Fuel Standard goes into effect in 2011, and may compel some refiners to import additional volumes of sugarcane ethanol from Brazil into California. These same volumes could count towards the Federal RFS2 program as well. There may also be other types of advanced biofuel not included in the EIA projections that could help meet our projected shortfall. These other advanced biofuels include, for instance, renewable fuels made from separated yard and food waste such as waste cooking oil or restaurant grease used as a diesel fuel additive. Finally, additional market demand for imported sugarcane ethanol and biodiesel would likely be created if we chose not to lower the advanced biofuel standard for 2011. Given these factors, we believe that there are likely to be sufficient volumes of other advanced biofuels such that the advanced biofuel standard need not be lowered below 1.35 billion gallons. Thus, we are proposing to leave the required volume of advanced biofuel for 2011 at 1.35 billion gallons. Nevertheless, we request comment on whether we should lower the advanced biofuel standard. If we do lower the advanced biofuel standard, we request comment on the degree to which we should take into account other potential sources of advanced biofuel as discussed above.

If we lower the cellulosic biofuel standard, we would also need to determine if the total renewable standard should be lowered. Lowering both the advanced biofuel standard and the total renewable fuel standard by the same amount would mean that the expected amount of conventional renewable fuel use, such as corn-ethanol, would remained unchanged at 12,600 million gallons ethanol equivalent, the same as shown in Table II.C–1.

If instead we were to lower the advanced biofuel standard but retain the total renewable fuel standard at 13,950 million gallons, then we would expect the use of conventional renewable fuels such as corn ethanol to increase. For instance, if we were to lower the advanced biofuel standard by 144 million gallons to 1,206 million gallons, we would expect the amount of corn-ethanol used would increase by 144 million gallons in order to satisfy the total renewable fuel standard of 13,950 million gallons. According to EIA, projected volumes of corn-ethanol are indeed expected to be higher than 12,600 million gallons in 2011, producing an excess of 1050 million gallons. See Table II.C–4.

TABLE II.C–4—PROJECTED EXCESS CORN ETHANOL IN 2011

[Mill gallons]

Total domestic corn ethanol production [13]	13,650
Corn ethanol needed to meet total renewable fuel standard	12,600
Excess corn ethanol	1050

[13] EIA STEO, June 2010, Table 8.

However, the market potential for ethanol in the U.S. is also a function of the ethanol blender's tax credit, set to expire at the end of 2010. If this tax credit is not renewed, the excess ethanol volume shown in Table II.C–4 may be smaller. Thus, while we are proposing that the required volume of total renewable fuel for 2011 be set at the statutory level of 13.95 billion gallons, we request comment on whether the total renewable fuel standard should be lowered.

D. Biomass-Based Diesel

While the statutory requirement that we project volumes of cellulosic biofuel for next year does not explicitly apply to biomass-based diesel as well, there are two other statutory requirements that compel us to investigate current and potential future volumes of biomass-based diesel. First, the Clean Air Act provides limited waiver authority specific to biomass-based diesel under 211(o)(7)(E) if a significant renewable feedstock disruption or other market circumstance would make the price of biomass-based diesel fuel increase significantly. Second, as described more fully in Section II.C above, we must determine whether the required volumes of advanced biofuel and/or total renewable fuel should be reduced at the same time that we reduce the required volume of cellulosic biofuel. The amount of biomass-based diesel that we project can be available

[9] "Monthly U.S. Imports of Fuel Ethanol," EIA, released 4/8/2010.

[10] Lundell, Drake, "Brazilian Ethanol Export Surge to End; U.S. Customs Loophole Closed Oct. 1," Ethanol and Biodiesel News, Issue 45, November 4, 2008.

[11] Renewable Fuels Association (RFA), "2008 World Fuel Ethanol Production," *http://www.ethanolrfa.org/industry/statistics/#E,* March 31, 2009.

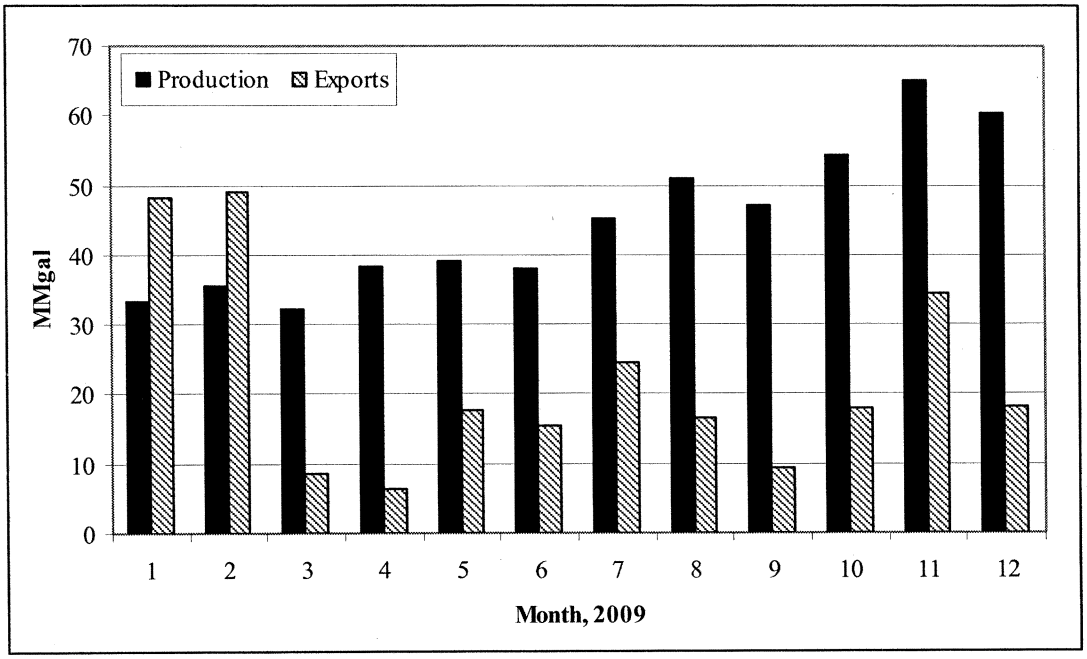
[12] EIA STEO, June 2010, Table 8.

will directly affect our consideration of adjustments to the volumetric requirements for advanced biofuel and total renewable fuel.

To project biodiesel production volumes for 2011, we examined both production capacity of the industry as well as actual recent production rates. As of April 2010, the aggregate production capacity of biodiesel plants in the U.S. was estimated at 2.2 billion gallons per year across approximately 137 facilities.[14] Biodiesel production for calendar year 2009, according to the most recently available information, was 540 million gallons, with an estimated 351 mill gallons (or 65%) being used domestically. Domestic production rates in the second half of 2009 increased above production rates in the first half as economic conditions improved, to an annualized rate of around 646 mill gal per year. Meanwhile, exports appeared to stabilize at an annualized rate of about 242 mill gal per year, after recovering from changes in European import regulations early in the year. These trends for 2009 are shown inFigure II.D–1.

Figure II.D-1

U.S. Biodiesel Production and Export Trends for 2009. [15]



In the early part of 2010, industry reports of monthly biodiesel production indicated that production rates have dropped below the 2009 average. The most likely cause is the expiration of the biodiesel tax credit. However, EIA's Short-Term Energy Outlook projects that, for the year as a whole, average monthly biodiesel production rates in 2010 will actually exceed those in 2009. The projected increase in monthly biodiesel production rates later in 2010 is consistent with the fact that obligated parties are not required to demonstrate compliance with the 2010 biomass-based diesel volume requirement of 1.15 billion gallons until February 28, 2011. For development of our final rule setting the standards for 2011, we will have more complete data with which to evaluate the progress of the biodiesel industry in meeting the 2010 volume mandate and thus its preparedness for 2011.

In order to meet a 2011 biomass-based diesel volume requirement of 0.8 billion gallons to be consumed in the United States, the biodiesel industry will need to produce approximately 725 million gal of fuel. This value accounts for the production of 75 million gallons of renewable diesel at one renewable diesel facility in Geismar, Louisiana, set to begin operations later this year.[16] Assuming imports and exports continue at a rate equivalent to that in the second half of 2009, biodiesel production in the U.S. would need to total approximately 900 million gal in 2011. While this production rate would be about 10% higher than the production rate projected by EIA for the second half of 2010, it would be significantly lower than the current 2.2 billion gallon biodiesel production capacity of the industry. Indications from the biodiesel industry are that these idled facilities can be brought back into production with a relatively short leadtime, and can thus meet the 2011 requirements for biomass-based diesel. Moreover, as shown in Table II.C–3, EIA is projecting that biodiesel availability will in fact exceed the minimum volume needed to meet the biomass-based diesel standard in 2011.

Finally, we believe that there will be sufficient sources of qualifying renewable biomass to meet the needs of the biodiesel industry in 2011. The largest sources of feedstock for biodiesel in 2011 are expected to be soy oil, rendered fats, and potentially some corn

[14] Figures taken from National Biodiesel Board list of operating plants as of April 5, 2010.

[15] Data taken from Energy Information Administration Monthly Energy Review, Table 10.4, March 2010.

[16] Project status updates are available via the Syntroleum Web site, *http://dynamicfuelsllc.com/wp-news/*.

oil extracted during production of fuel ethanol, as this technology continues to proliferate. Moreover, comments we received from a large rendering company after the May 2009 RFS2 proposed rule suggest that there will be adequate fats and greases feedstocks to supply biofuels production as well as other historical uses.[17]

III. Proposed Percentage Standards for 2011

A. Background

The renewable fuel standards are expressed as a volume percentage, and are used by each refiner, blender or importer to determine their renewable volume obligations (RVO). Since there are four separate standards under the RFS2 program, there are likewise four separate RVOs applicable to each obligated party. Each standard applies to the sum of all gasoline and diesel produced or imported. The applicable percentage standards are set so that if each regulated party meets the percentages, then the amount of renewable fuel, cellulosic biofuel, biomass-based diesel, and advanced biofuel used will meet the volumes required on a nationwide basis.

As discussed in Section II.A.5, we are proposing a required volume of cellulosic biofuel for 2011 in the range of 5–17.1 million gallons (6.5–25.5 million ethanol equivalent gallons). The single volume we select for the final rule will be used as the basis for setting the percentage standard for cellulosic biofuel for 2011. We are also proposing that the advanced biofuel and total renewable fuel volumes would not be reduced below the statutory requirements. The proposed 2011 volumes used to determine the four percentage standards are shown in Table III.A–1.

TABLE III.A–1—PROPOSED VOLUMES FOR 2011

	Actual volume	Ethanol equivalent volume
Cellulosic biofuel	5–17.1 mill gal	6.5–25.5 mill gal.
Biomass-based diesel	0.80 bill gal	1.20 bill gal.
Advanced biofuel	1.35 bill gal	1.35 bill gal.
Renewable fuel	13.95 bill gal	13.95 bill gal.

The formulas used in deriving the annual renewable fuel standards are based in part on an estimate of combined gasoline and diesel volumes, for both highway and nonroad uses, for the year in which the standards will apply. Producers of other transportation fuels, such as natural gas, propane, and electricity from fossil fuels, are not subject to the standards. Since the standards apply to producers and importers of gasoline and diesel, these are the transportation fuels used to set the standards, and then again to determine the annual volume obligations of an individual producer or importer.

B. Calculation of Standards

1. How are the standards calculated?

The following formulas are used to calculate the four percentage standards applicable to producers and importers of gasoline and diesel (*see* § 80.1405):

$$\mathrm{Std}_{\mathrm{CB,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{CB,i}}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

$$\mathrm{Std}_{\mathrm{BBD,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{BBD,i}} \times 1.5}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

$$\mathrm{Std}_{\mathrm{AB,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{AB,i}}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

$$\mathrm{Std}_{\mathrm{RF,i}} = 100\% \times \frac{\mathrm{RFV}_{\mathrm{RF,i}}}{(G_i - RG_i) + (GS_i - RGS_i) - GE_i + (D_i - RD_i) + (DS_i - RDS_i) - DE_i}$$

Where

$\mathrm{Std}_{\mathrm{CB,i}}$ = The cellulosic biofuel standard for year i, in percent.

$\mathrm{Std}_{\mathrm{BBD,i}}$ = The biomass-based diesel standard (ethanol-equivalent basis) for year i, in percent.

$\mathrm{Std}_{\mathrm{AB,i}}$ = The advanced biofuel standard for year i, in percent.

$\mathrm{Std}_{\mathrm{RF,i}}$ = The renewable fuel standard for year i, in percent.

$\mathrm{RFV}_{\mathrm{CB,i}}$ = Annual volume of cellulosic biofuel required by section 211(o) of the Clean Air Act for year i, in gallons.

$\mathrm{RFV}_{\mathrm{BBD,i}}$ = Annual volume of biomass-based diesel required by section 211(o) of the Clean Air Act for year i, in gallons.

$\mathrm{RFV}_{\mathrm{AB,i}}$ = Annual volume of advanced biofuel required by section 211(o) of the Clean Air Act for year i, in gallons.

$\mathrm{RFV}_{\mathrm{RF,i}}$ = Annual volume of renewable fuel required by section 211(o) of the Clean Air Act for year i, in gallons.

G_i = Amount of gasoline projected to be used in the 48 contiguous states and Hawaii, in year i, in gallons.

D_i = Amount of diesel projected to be used in the 48 contiguous states and Hawaii, in year i, in gallons.

RG_i = Amount of renewable fuel blended into gasoline that is projected to be consumed in the 48 contiguous states and Hawaii, in year i, in gallons.

RD_i = Amount of renewable fuel blended into diesel that is projected to be consumed

[17] See **Federal Register** v.74 n.99 p.24903. Comments are available in docket EPA–HQ–OAR–2005–0161.

in the 48 contiguous states and Hawaii, in year i, in gallons.

GS_i = Amount of gasoline projected to be used in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

RGS_i = Amount of renewable fuel blended into gasoline that is projected to be consumed in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

DS_i = Amount of diesel projected to be used in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

RDS_i = Amount of renewable fuel blended into diesel that is projected to be consumed in Alaska or a U.S. territory in year i if the state or territory opts-in, in gallons.

GE_i = The amount of gasoline projected to be produced by exempt small refineries and small refiners in year i, in gallons, in any year they are exempt per §§ 80.1441 and 80.1442, respectively. For 2011, this value is zero. *See* further discussion in Section III.B.2 below.

DE_i = The amount of diesel projected to be produced by exempt small refineries and small refiners in year i, in gallons, in any year they are exempt per §§ 80.1441 and 80.1442, respectively. For 2011, this value is zero. *See* further discussion in Section III.B.2 below.

The four separate renewable fuel standards for 2011 are based on the 49-state gasoline and diesel consumption volumes projected by EIA. The Act requires EPA to base the standards on an EIA estimate of the amount of gasoline and diesel that will be sold or introduced into commerce for that year. The projected volume of gasoline used to calculate the final percentage standards will continue to be provided by the October issue of EIA's Short-Term Energy Outlook (STEO). For the purposes of this proposal, we have used the March 2010 issue of STEO. The projected volume of transportation diesel used to calculate the final percentage standards will be provided by the most recent Annual Energy Outlook (AEO). For the purposes of this proposal, we have used the Early Release version of AEO2010. Gasoline and diesel volumes are adjusted to account for renewable fuel contained in the EIA projections. Beginning in 2011, gasoline and diesel volumes produced by small refineries and small refiners are not exempt, and thus there is no adjustment to the gasoline and diesel volumes in today's proposal to account for such an exemption, as there has been in past years. However, as discussed more fully in Section III.B.2 below, depending upon the results of a Congressionally-mandated DOE study, it is possible that the exemption for gasoline and diesel volumes produced by small refineries and small refiners may be extended. In addition, EPA may extend the exemption for individual small refineries on a case-by-case basis if they demonstrate disproportionate economic hardship.

As finalized in the March 26, 2010 RFS2 rule, the standards are expressed in terms of energy-equivalent gallons of renewable fuel, with the cellulosic biofuel, advanced biofuel, and total renewable fuel standards based on ethanol equivalence and the biomass-based diesel standard based on biodiesel equivalence. However, all RIN generation is based on ethanol-equivalence. More specifically, the RFS2 regulations provide that production or import of a gallon of biodiesel will lead to the generation of 1.5 RINs. In order to ensure that demand for 0.8 billion physical gallons of biomass-based diesel will be created in 2011, the calculation of the biomass-based diesel standard provides that the required volume be multiplied by 1.5. The net result is a biomass-based diesel gallon being worth 1.0 gallons toward the biomass-based diesel standard, but worth 1.5 gallons toward the other standards.

The levels of the percentage standards would be reduced if Alaska or a U.S. territory chooses to participate in the RFS2 program, as gasoline and diesel produced in or imported into that state or territory would then be subject to the standard. Neither Alaska nor any U.S. territory has chosen to participate in the RFS2 program at this time, and thus the value of the related terms in the calculation of the standards is zero.

Note that the terms for projected volumes of gasoline and diesel use include gasoline and diesel that has been blended with renewable fuel. Because the gasoline and diesel volumes described above include renewable fuel use, we must subtract the total renewable fuel volume from the total gasoline and diesel volume to get total non-renewable gasoline and diesel volumes. The values of the variables described above are shown in Table III.B.1–1. Terms not included in this table have a value of zero.

TABLE III.B.1–1—VALUES FOR TERMS IN CALCULATION OF THE STANDARDS

[Bill gallons]

Term	Value
$RFV_{CB,2011}$	0.0065–0.0255
$RFV_{BBD,2011}$	0.80
$RFV_{AB,2011}$	1.35
$RFV_{RF,2011}$	13.95
G_{2011}	139.66
D_{2011}	50.01
RG_{2011}	13.38
RD_{2011}	0.74

Using the volumes shown in Table III.B.1–1, we have calculated the proposed percentage standards for 2011 as shown in Table III.B.1–2.

TABLE III.B.1–2—PROPOSED PERCENTAGE STANDARDS FOR 2011

Cellulosic biofuel	0.004–0.015%
Biomass-based diesel	0.68%
Advanced biofuel	0.77%
Renewable fuel	7.95%

2. Small Refineries and Small Refiners

In CAA section 211(o)(9), enacted as part of EPAct, Congress provided a temporary exemption to small refineries (those refineries with a crude throughput of no more than 75,000 barrels of crude per day) through December 31, 2010. In RFS1, we exercised our discretion under section 211(o)(3)(B) and extended this temporary exemption to the few remaining small refiners that met the Small Business Administration's (SBA) definition of a small business (1,500 employees or less company-wide) but did not meet the statutory small refinery definition as noted above. Because EISA did not alter the small refinery exemption in any way, the RFS2 program regulations exempt gasoline and diesel produced by small refineries and small refiners in 2010 from the renewable fuels standard (unless the exemption was waived), see 40 CFR § 80.1141.

Under the RFS program, Congress has provided two ways that small refineries can receive a temporary extension of the exemption beyond 2010. One is based on the results of a study conducted by

the Department of Energy (DOE) to determine if small refineries would face a disproportionate economic hardship under the RFS program. The other is based on EPA determination of disproportionate economic hardship on a case-by-case basis in response to refiner petitions.

In January 2009, DOE issued a *Small Refineries Exemption Study* which did not find that small refineries would face a disproportionate economic hardship under the RFS program. The conclusions were based in part on the expected robust availability of RINs and EPA's ability to grant relief on a case-by-case basis. Subsequently, Congress directed DOE to complete a reassessment and issue a revised report by June 30, 2010. DOE had not revised its study at the time of the RFS2 final rulemaking nor at the time of this writing. Additionally, we have not received any requests for relief on a case-by-case basis from any small refinery. If DOE prepares a revised study, and the results of that study show a disproportionate economic hardship for any small refineries under the RFS program, we will take appropriate action to extend the exemption. However, until and unless a DOE study supporting an extension to the temporary exemption for small refineries beyond 2010 is used, or any petitions to EPA from individual small refineries claiming disproportionate economic hardship are approved, we are not proposing to change the required inclusion of small refineries and small refiners in the RFS2 program beginning with the 2011 compliance period.

IV. Cellulosic Biofuel Technology Assessment

In projecting the volumes of cellulosic biofuel for 2011, we conducted a technical assessment of the production technologies that are under consideration by the broad universe of companies we investigated. Many of these companies are still in the research phase, resolving outstanding issues with specific technologies, and/or in the design phase to implement those technologies for the production of commercial-scale volumes of cellulosic biofuel. A subset of the companies we investigated have moved beyond the research and design phase and are actively preparing for production. This smaller group of companies formed the basis for our projection of potential 2011 volumes of cellulosic biofuel.

This section discusses the full range of cellulosic biofuel technologies being considered among producers, with reference to those individual companies that are focusing on each technology and those we project will be most likely to use those technologies to produce cellulosic biofuel in 2011.

A. What pathways are valid for the production of cellulosic biofuel?

In determining the appropriate volume of cellulosic biofuel on which to base the percentage standard for 2011, we must ensure that the production facilities we use as the basis for this volume are using fuel pathways that are valid for the production of cellulosic biofuel. In general this means that each facility's pathway (combination of feedstock, production process, and fuel type) must be included in Table 1 to § 80.1426 and be assigned a D code of either 3 or 7. As of this writing, there are three valid pathways available as shown in Table IV.A–1 below.

TABLE IV.A–1—CELLULOSIC BIOFUEL PATHWAYS FOR USE IN GENERATING RINS

Fuel type	Feedstock	Production process requirements	D–Code
Ethanol	Cellulosic Biomass from agricultural residues, slash, forest thinnings and forest product residues, annual covercrops; switchgrass, and miscanthus; cellulosic components of separated yard wastes; cellulosic components of separated food wastes; and cellulosic components of separated MSW.	Any	3 (cellulosic biofuel).
Cellulosic Diesel, Jet Fuel and Heating Oil.	Cellulosic Biomass from agricultural residues, slash, forest thinnings and forest product residues, annual covercrops, switchgrass, and miscanthus; cellulosic components of separated yard wastes; cellulosic components of separated food wastes; and cellulosic components of separated MSW.	Any	7 (cellulosic diesel).
Cellulosic Naphtha	Cellulosic Biomass from agricultural residues, slash, forest thinnings and forest product residues, annual covercrops, switchgrass, and miscanthus; cellulosic components of separated yard wastes; cellulosic components of separated food wastes; and cellulosic components of separated MSW.	Fischer-Tropsch process	3 (cellulosic biofuel).

Of the eight facilities that we currently believe could contribute to the volume of commercially available cellulosic biofuel in 2011, six would produce ethanol from cellulosic biomass and two would produce diesel from cellulosic biomass. None of the facilities we have evaluated would produce cellulosic naphtha through a Fischer-Tropsch process.

Two of the facilities shown in Table II.A.5–1, Cello Energy and KL Energy, intend to use wood as the primary feedstock. The only types of wood that are currently allowed as a valid feedstock are those derived from various types of waste. If either of these two companies choose to use trees from a tree plantation instead of qualifying waste wood, its pathway would not fall into the any of the pathways currently listed in Table 1 to § 80.1426. However, as described more fully in Section V.A, we are currently evaluating the lifecycle GHG impacts of biofuel made from pulpwood, including wood from tree plantations. If such a pathway is determined to meet the 60% GHG threshold required for cellulosic biofuel, we expect that it will be added to Table 1 to § 80.1426 in time to apply to fuel produced in 2011. For the purposes of this proposal, we have chosen to retain the volumes from these two companies in our projections of 2011 cellulosic biofuel volume, but we will revisit this issue for the final rule.

B. Cellulosic Feedstocks

Cellulosic biofuel technologies are different from other biofuel technologies because they convert the cellulose and

other very difficult to convert compounds into biofuels. Unlike grain feedstocks where the major carbohydrate is starch (very simply combined sugars), lignocellulosic biomass is composed mainly of cellulose (40–60%) and hemicellulose (20–40%).[18] Cellulose and hemicellulose are made up of sugars linked together in long chains called polysaccharides. Once hydrolyzed, they can be fermented into ethanol. Most all the remainder of cellulosic feedstocks consists of lignin, a complex polymer which serves as a stiffening and hydrophobic (water-repelling) agent in cell walls. Currently, lignin cannot be fermented into ethanol, but could be burned as a by-product to generate electricity. Thermochemical, pyrolysis and depolymerization processing, however, can convert some or even most of the lignin, in addition to the cellulosic and hemicellulose, into biofuels.

C. Emerging Technologies

When evaluating the array of biofuel technologies which could produce one or more fuels from cellulose that could qualify under RFS2, we found that it is helpful to organize them into fuel technology categories. Organizing them into categories eases the task of understanding the technologies, and also simplifies our understanding of the costs and lifecycle impacts of these technologies because similar technologies likely have similar cost and lifecycle impacts. The simplest organization is by the fuel produced. However, we frequently found that additional subdivisions were also helpful. Table IV.C–1 provides a list of technologies, the cellulosic fuels produced and a list of many of the companies which we learned are pursuing the technology (or something very similar to the technology listed in the category).

TABLE IV.C–1—LIST OF TECHNOLOGY CATEGORIES, THE FUELS PRODUCED THROUGH EACH TYPE OF TECHNOLOGY, AND THE COMPANIES PURSUING THEM

Technology category	Technology	Fuels produced	Companies
Biochemical	Enzymatic Hydrolysis	Ethanol	Abengoa, AE Fuels, DuPont Danisco, Florida Crystals, Gevo, Poet, ICM, Iogen, BPI, Energy, Fiberight, KL Energy.
	Acid Hydrolysis	Ethanol	Agresti, Arkenol, Blue Fire, Pencor, Pangen, Raven Biofuels.
	Dilute Acid, Steam Explosion of Cellulose.	Ethanol	Verenium, BP, Central Minnesota Ethanol Coop.
	Consolidated Bioprocessing (one step hydrolysis and fermentation) of Cellulose.	Ethanol	Mascoma, Qteros.
	Conversion of Cellulose via carboxylic acid.	Ethanol, Gasoline, Jet Fuel, Diesel Fuel.	Terrabon, Swift Fuels.
	One step Conversion of Cellulose to distillate.	Diesel, Jet Fuel or Naphtha	Bell Bioenergy, LS9.
Thermochemical	Thermochemical/Fischer Tropsch	Diesel Fuel and Naphtha	Choren, Flambeau River Biofuels, Baard, Clearfuels, Gulf Coast Energy, Rentech, TRI.
	Thermochemical/Fischer Tropsch	DME	Chemrec, New Page.
	Thermochemical/Catalytic conversion of syngas to alcohols.	Ethanol	Range Fuels, Pearson Technologies, Fulcrum Bioenergy, Enerkem, and Gulf Coast Energy.
Hybrid	Thermochemical w/Biochemical catalyst.	Ethanol	Coskata, INEOS Bio.
	Acid Hydrolysis of cellulose to intermediate; hydrogenation using Thermochemical syngas from non-cellulose fraction.	Ethanol, Other alcohols	Zeachem.
Depolymerization	Catalytic Depolymerization of Cellulose.	Diesel, Jet Fuel or Naphtha	Cello Energy.
	Pyrolysis of Cellulose	Diesel, Jet Fuel, or Gasoline	Envergent (UOP/Ensyn), Dynamotive, Petrobras, Univ. of Mass, KIOR.
Other	Catalytic Reforming of Sugars from Cellulose.	Gasoline.	Virent.

Of the technologies listed above, many of them are considered to be "second generation" biofuels or new biofuel technologies capable of meeting either the advanced biofuel or cellulosic biofuel RFS standard. The following sections describe specific companies and the new biofuel technologies which the companies have developed or are developing. This summary is not meant to be an unabridged list of new biofuel technologies, but rather a description of some of the more prominent of the new biofuel technologies that serve to provide a sense of the technology categories listed above. The process technology summaries are based on information provided by the respective companies. EPA has not been able to confirm all of the information, statements, process conditions, and the process flow steps necessary for any of these processes and companies.

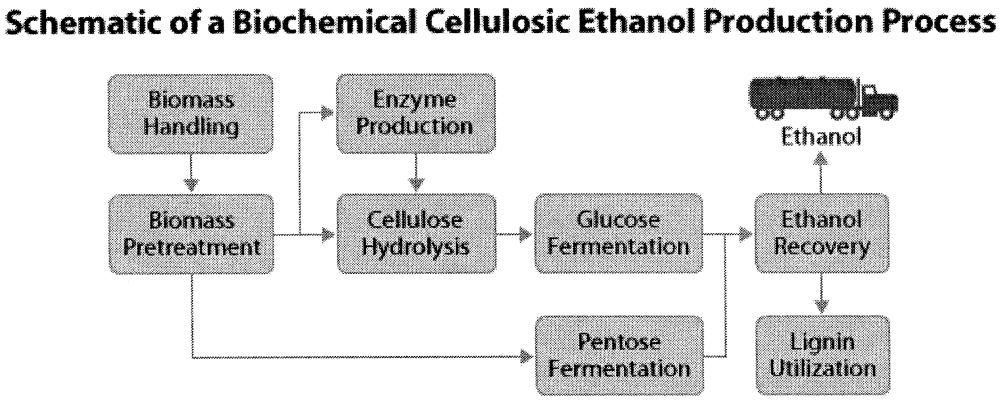
1. Biochemical

Biochemical conversion refers to a broad grouping of processes that use

[18] DOE. "Biomass Program: ABC's of Biofuels". Accessed at: *http://www1.eere.energy.govbiomass/abcs_biofuels.html#content.*

biological organisms to convert cellulosic feedstocks into biofuels. While no two processes are identical, many of these processes follow a similar basic pathway to convert cellulosic materials to biofuel. The general process of most biochemical cellulosic biofuel processes consists of five main steps: feedstock handling, pretreatment, hydrolysis, fermentation/fuel conversion, and distillation/separation. The feedstock handling step reduces the particle size of the incoming feedstock and removes any contaminants that may negatively impact the rest of the process. In the pretreatment step the structure of the lignin and hemicellulose is disrupted, usually using some combination of heat, pressure, acid, or base, to allow for a more effective hydrolysis of the cellulosic material to simple sugars. In the hydrolysis stage the cellulose and any remaining hemicellulose is converted into simple sugars, usually using an enzyme or strong acid. In the fermentation or fuel conversion step, the simple sugars are converted to the desired fuel by a biological organism. In the final step the fuel that is produced is separated from the water and other byproducts by distillation or some other means. A basic diagram of the biochemical conversion process can be found in Figure IV.C.1–1 below.

Figure IV.C.1-1[19]



While this diagram shows the production of ethanol from cellulosic biomass, it is possible to use the same process to produce other fuels or specialty chemicals using different biological organisms.

The following sections will discuss each of these steps in greater detail, discuss some of the variations to this general process, and discuss some of the advantages and disadvantages of the biochemical process of producing biofuel from cellulosic materials as compared to other fuel production processes.

Seven of the eight companies that EPA believes may produce cellulosic biofuel in 2011 plan to use a biochemical process to produce biofuels. Five of these companies, AE Biofuels, Dupont Danisco Cellulosic Ethanol, Fiberight, Iogen, and KL energy, all plan to use an enzymatic hydrolysis, while Agresti Biofuels and Bell Bio-Energy are pursuing gravity pressure vessel and single step process technologies, respectively. The main reason for the dominance of biochemical technologies in 2011 is the relatively low capital costs of these projects compared to other cellulosic biofuel facilities. Biochemical projects also benefit less from economies of scale, making smaller and less capital intensive commercial facilities more feasible. The following sections, as well as a technical memorandum that has been added to the docket[20], provide more information on the biochemical processes being pursued by majority of the companies we expect to produce cellulosic biofuels and make them commercially available in 2011, as well as many other companies planning to begin production in later years.

a. Feedstock Handling

The first step of the biochemical conversion process is to insure that the biomass stream can be utilized by the rest of the conversion process. This most often takes the form of size reduction, either by grinding or chipping as appropriate for the type of biomass. While this is a relatively simple process it is essential to allow the following steps of the process to function as designed. It is also a potentially energy intensive process. It may be possible for biofuel producers to purchase cellulosic material that is already of the appropriate size, however we believe that in the near term this is unlikely and most biofuel producers will have to invest in equipment to reduce the size of the material they receive as needed for their process. In coming years, as the market for cellulosic materials expands, purchasing feedstock that has already been ground or chipped may be possible and cost effective, as these processes increase the density of this material and may reduce transportation costs.

In addition to size reduction, steps must also be taken to remove any material from the feedstock that might be detrimental to the fuel production process. Contaminants in the feedstock, such as dirt, rocks, plastics, metals, and other non-biogenic materials, would at best travel through the fuel production process unchanged, resulting in reduced fuel production capacity. Depending on the type of contaminant they may also be converted to undesired byproducts that must be separated from the fuel. They could also be toxic to the biological organisms being used to convert the sugars to fuel, necessitating a shut down and restart of the plant. Any of these scenarios would result in a significant cost to the fuel producer. Feedstocks such as agricultural residues, wood chips, or herbaceous or woody energy crops are likely to contain far fewer contaminants than more heterogeneous feedstocks such as municipal solid waste (MSW).

[19] Image From: *http://www.afdc.energy.gov/afdc/ethanol/production_cellulosic.html.*

[20] Wyborny, Lester. "In-Depth Assessment of Advanced Biofuels Technologies." Memo to the docket, May 2010.

b. Biomass Pretreatment

The purpose of the biomass pretreatment stage is to disrupt the structure of the cellulosic biomass to allow for the hydrolysis of the cellulose and hemicellulose into simple sugars. The ideal pretreatment stage would allow for a high conversion of the cellulose and hemicellulose to simple sugars, minimize the degradation of these sugars to undesired forms that reduce fuel yields and inhibit fermentation, not require especially large or expensive reaction vessels, and be a relatively robust and simple process. No single biomass pretreatment method has yet been discovered that meets all of these goals, but rather a variety of options are being used by various cellulosic fuel producers, each with their own strengths and weaknesses. Dilute acid pretreatment and alkaline pretreatment are two methods currently being used that attack the hemicellulose and lignin portions of the cellulosic biomass respectively. Other methods, such as steam explosion and ammonia fiber expansion, seek to use high temperature and pressure, followed by rapid decompression to disrupt the structure of the cellulosic biomass and allow for a more efficient hydrolysis of the cellulose and hemicellulose to simple sugars. Each of these methods is discussed in more detail in a technical memo that has been added to the docket.[21] The cost and characteristics of the cellulosic feedstock being processed is likely to have a significant impact on the pretreatment process that is used.

c. Hydrolysis

In the hydrolysis step the cellulose and any remaining hemicellulose are converted to simple sugars. There are two main methods of hydrolysis, acid hydrolysis and enzymatic hydrolysis. Acid hydrolysis is the oldest technology for the conversion of cellulosic feedstock to ethanol and can only be used following an acid pretreatment process. An alternative method is to use a combination of enzymes to perform the hydrolysis after the biomass has been pretreated. This process is potentially more effective at hydrolyzing pretreated biomass but in the past has not been economically feasible due to the prohibitively high cost of the enzymes. The falling cost of these enzymes in recent years has made the production of cellulosic biofuels using enzymatic hydrolysis possible. The lignin is largely unaffected by the hydrolysis and fuel production steps but is carried through these processes until it is separated out in the fuel separation step and burned for process energy or sold as a co-product.

i. Acid Hydrolysis

Acid hydrolysis is a technique that has been used for over 100 years to convert cellulosic feedstocks into fuels. In the acid hydrolysis process the lignin and cellulose portions of the feedstock that remain after the hemicellulose has been dissolved, hydrolyzed, and separated during the dilute acid pretreatment process is treated with a second acid stream. This second acid treatment uses a less concentrated acid than the pretreatment stage but at a higher temperature, as high as 215° C. This treatment hydrolyzes the cellulose into glucose and other 6 carbon sugars that are then fed to biological organisms to produce the desired fuel. It is necessary to hydrolyze the hemicellulose and cellulose in two separate steps to prevent the conversion of the pentose sugars that result from the hydrolysis of the hemicellulose from being further converted into furfural and other chemicals. This would not only reduce the total production of sugars from the cellulosic feedstock, but also inhibit the production of fuel from the sugars in later stages of the process.

The acidic solution containing the sugars produced as a result of the hydrolysis reaction must also be treated so that this stream can be fed to the biological organisms that will convert these sugars into fuel. In order to operate an acid hydrolysis process cost effectively the acid must be recovered, not simply neutralized. Methods currently being used to recover this acid include membrane separation and continuous ion exchange. The advantages of using an acid hydrolysis are that this process is well understood and capable of producing high sugar yields from a wide variety of feedstocks. Capital costs are high however, as materials compatible with the acidic streams must be extensively utilized. The high temperatures necessary for acid hydrolysis also result in considerable energy costs, and profitability is highly dependent on the ability to effectively recover and reuse the acid.

ii. Enzymatic Hydrolysis

The enzymatic hydrolysis process uses enzymes, rather than acids, to hydrolyze the cellulose and any remaining hemicellulose from the pretreatment process. This process is much more versatile than the acid hydrolysis and can be used in combination with any of the pretreatment processes described above, provided that the structure of the lignocellulosic feedstock has been disrupted enough to allow the enzymes to easily access the hemicellulose and cellulose. After the feedstock has gone through pretreatment a cocktail of cellulose enzymes is added. These enzymes can be produced by the cellulosic biofuel producer or purchased from enzyme producers such as Novozymes, Genencor, and others. The exact mixture of enzymes used in the enzymatic hydrolysis stage can vary greatly depending on which of the pretreatment stages is used as well as the composition of the feedstock.

The main advantages of the enzymatic hydrolysis process are a result of the mild operating conditions. Because no acid is used special materials are not required for the reaction vessels. Enzymatic hydrolysis is carried out at relatively low temperatures, usually around 50° C, and atmospheric pressure and therefore has low energy requirements. These conditions also result in less undesired reactions that would reduce the production of sugars and potentially inhibit fuel production. Enzymatic hydrolysis works best with a uniform feedstock, such as agricultural residues or energy crops, where the concentration and combination of enzymes can be optimized for maximum sugar production. If the composition of the feedstock varies daily, as can be the case with fuel producers utilizing MSW or other waste streams, or even seasonally, it would make it more difficult to ensure that the correct enzyme cocktail is being used to carry out the hydrolysis as efficiently as possible. The main hurdle to using an enzymatic hydrolysis has been and continues to be the costs of the enzymes. Recent advances by companies that produce enzymes for the hydrolysis of cellulosic materials have resulted in a drastic cost reduction of these enzymes. If, as many researchers and cellulosic biofuel producers expect, the cost of these enzymes continues to fall it is likely that enzymatic hydrolysis will be a lower cost option than acid hydrolysis, especially for cellulosic biofuel producers utilizing uniform feedstocks.

d. Fuel Production

After the cellulosic biomass has been hydrolyzed to simple sugars this sugar solution is converted to fuel by biological organisms. In some biochemical fuel production processes the sugars produced from the fermentation of the hemicellulose, which are mainly five carbon sugars, are

[21] Wyborny, Lester. "In-Depth Assessment of Advanced Biofuels Technologies." Memo to the docket, May 2010.

converted to fuel in a separate reactor and with a different set of organisms than the sugars produced from the cellulose hydrolysis, which are mainly six carbon sugars. Others processes, however, produce fuel from the five and six carbon sugars in the same reaction vessel.

A wide range of biological organisms can be used to convert the simple sugars into fuel. These include yeasts, bacteria, and other microbes, some of which are naturally occurring and others that have been genetically modified. The ideal biological organism converts both five and six carbon sugars to fuel with a high efficiency, is able to tolerate a range of conditions, and is adaptable to process sugar streams of varying compositions that may result from variations in feedstock. Many cellulosic biofuel producers have their own proprietary organism or organisms optimized to produce the desired fuel from their unique combination of feedstock, pretreatment and hydrolysis processes, and fuel conversion conditions. Other cellulosic fuel producers license these organisms from biotechnology companies who specialize in their discovery and production.

The many different biological organisms being considered for cellulosic biofuel production are capable of producing many different types of fuels. Many cellulosic biofuel producers are working with organisms that produce ethanol. In many ways this is the most simple fuel to produce from lignocellulosic biomass as the production of ethanol from simple sugars is a well understood process. Others intend to produce butanol or other alcohols that have higher energy content. Butanol may be able to be blended into gasoline in greater proportion to ethanol and therefore has a potentially greater market as well as value due to its higher energy content. Yields for butanol, however, are currently significantly lower per ton of feedstock than ethanol. Some of the fuel producers who plan to produce alcohols are considering purchasing and modifying already existing grain ethanol plants. This would potentially have significant capital cost savings as many of the units used in a grain ethanol process are very similar to those required by the biochemical fuel production process and could be used with minimal modification.

Other cellulosic biofuel producers intend to produce hydrocarbon fuels very similar to gasoline, diesel, and jet fuel. These fuels command a higher price than alcohols, have a greater energy density, and are potentially drop in fuels that could be used in any conventional vehicles without strict blending limits. They could also be transported by existing pipelines and utilize the same infrastructure as the petroleum industry. Some of the processes being researched by fuel producers produce a single compound, such as iso-octane, that would need to be blended into petroleum gasoline in order to be used while others produce a range of hydrocarbons very similar to those found in gasoline or diesel fuel refined from petroleum and could potentially be used in conventional vehicles without blending. While the prospect of producing hydrocarbon fuels from cellulosic feedstock is promising, the current yields of fuel produced by these organisms are significantly lower than those that are producing ethanol and other alcohols. Improvement in the yields of these organisms will have to be realized in order for cellulosic hydrocarbon fuels produced via a biochemical process to compete with cellulosic ethanol, and ultimately petroleum based fuels.

e. Fuel Separation

In the fuel separation stage the fuel produced is separated from the water, lignin, any un-reacted hemicellulose and cellulose, and any other compounds remaining after the fuel production stage. The complexity of this stage is highly dependent on the type of fuel produced. For processes producing hydrocarbon fuels this stage can be as simple as a settling tank, where the hydrocarbons are allowed to float to the top and removed. Recovering the ethanol is a much more difficult task. To recover the ethanol a distillation process, nearly identical to that used in the grain ethanol industry, is used. The ethanol solution is first separated from the solids before being sent to a distillation column called a beer column. The overheads of the beer column are fed to a second distillation column, called a rectifier for further separation. The rectifier produces a stream with an ethanol of approximately 96%. A molecular sieve unit is then used to dehydrate this stream to produce fuel grade ethanol with purity greater than 99.5%. Gasoline is added to the fuel ethanol as a denaturant before the fuel is stored. The distillation of ethanol is a very energy intensive process and new technologies, such as membrane separation, are being developed that could potentially reduce the energy intensity, and thus the cost, of the ethanol dehydration process. After the fuel has been recovered the remaining lignin and solids are dried and either burned on site to provide process heat and electricity or sold as a byproduct of the fuel production process. The waste water is either recycled or sent to a water treatment facility.

f. Process Variations

While the process described above outlines the general biochemical process used by many cellulosic biofuel producers, there are several prominent variations being pursued by prospective biofuel producers. These variations usually seek to simplify the biochemical fuel production process by combining several steps into a single step or using other means to reduce the capital or operating costs of the process. Simultaneous Saccharification and Fermentation (SSF), Simultaneous Saccharification and Co-Fermentation (SSCF), Consolidated Bio-Processing (CBP), and Single Step Fuel Production are all production methods being developed by various biofuel production companies to combine two or more of the steps outlined above. These process variations are discussed in more detail in a technical memo that can be found in the docket.[22] These modifications are usually enabled by a proprietary technology or biological organism that makes these changes possible.

g. Current Status of Biochemical Conversion Technology

The biochemical cellulosic fuel production industry is currently transitioning from an industry consisting mostly of small scale research and optimization focused facilities to one capable of producing fuel at a commercial scale. Companies such as Iogen, DuPont Danisco Cellulosic Ethanol, and KL Energy are just beginning to market the fuel they are producing at their first small scale commercial fuel production facilities. By 2011 we expect several other cellulosic fuel production facilities using biochemical processes to come online, including the first commercial scale facilities of AE Advanced Fuels, Agresti Biofuels, Bell Bio-Energy, and Fiberight. Many other facilities, including some large scale facilities capable of producing tens of millions of gallons of fuel are planned to come online starting in 2012 and in the following years.

There are many factors that are likely to continue to drive the expansion of the cellulosic biofuel industry. The high price of petroleum fuels and the mandates put into place by the RFS2

[22] Wyborny, Lester. "In-Depth Assessment of Advanced Biofuels Technologies." Memo to the docket, May 2010.

program have created a large demand for cellulosic biofuels. The biochemical production process also has several advantages over other methods of producing fuel from cellulosic feedstocks including relatively low capital costs, highly selective fuel production, flexibility in the type of fuel produced, and the promise of future production cost reductions.

While the poor worldwide economy and tight credit markets has had a negative impact on the biofuel industry as a whole the cellulosic biofuel producers utilizing biochemical processes have not been as hard hit as many others in the industry. This is partially due to the relatively low capital costs of biochemical production plants as a result of the relative simplicity and mild operating conditions of these plants. Several companies have been able to purchase distressed grain ethanol plants and are in the process of modifying them to produce cellulosic ethanol, further reducing the capital costs of their initial facilities. Once biochemical fuel production facilities have been constructed another advantage they have over other fuel production processes is that their high selectivity in the fuels they produce. Unlike chemical catalysts, which often produce a range of products and byproducts, biological organisms often produce a single type of fuel, which leads to very high fuel production rates per unit sugar. Finally, there is a large potential to further decrease the production costs of cellulosic biofuels using the biochemical processes. Unlike other production methods such as gasification which are relatively mature technologies, biochemical production of fuels is a young technology. One of the major costs of the biochemical fuel production processes currently are the enzymes. Great strides have been made recently in reducing the cost of these enzymes, and as the price of enzymes continues to fall so will the operating costs of biochemical fuel production processes.

h. Major Hurdles to Commercialization

Despite the many promising qualities of the biochemical fuel production process several significant hurdles remain. Improvements must be made to the pretreatment processes of the cellulosic materials to maximize the conversion of cellulose and hemicellulose to simple sugars and to minimize the production of other undesired compounds, especially those that may inhibit the fuel production process. The ability of the biological fuel production organisms to process a wide range of both five and six carbon sugars must also continue to be improved. Both these improvements will increase the fuel yield per ton of cellulosic feedstock, reducing the operating costs of the process. The cost of enzymes must continue to decrease to allow the fuel produced by biochemical processes to be cost competitive with petroleum and other cellulosic biofuels.

Another significant hurdle that must be overcome is the profitable utilization of the lignin portion of the cellulosic feedstock. Unlike some of the other cellulosic biofuel production processes, the biochemical process does not convert the lignin to fuel. Cellulosic feedstock can contain up to 40% lignin, depending on the type of feedstock used, so the effective utilization of this lignin is an important piece of the profitability of the biochemical process. One option for the use of the lignin is to burn it to provide process heat and electricity, as well as excess electricity to the grid. While this would provide good value for the lignin, it would require fairly expensive boilers and turbines that increases the capital cost of the facility. If the lignin cannot be used as part of the fuel production process it may be able to be marketed as a solid fuel with high energy density and low carbon intensity.

2. Thermochemical

Thermochemical conversion involves biomass being broken down into syngas using heat and upgraded to fuels using a combination of heat and pressure in the presence of catalysts.[23] For generating the syngas, thermochemical processes partially oxidize biomass in the presence of a gasifying agent, usually air, oxygen, and/or steam. It is important to note that these processing steps are also applicable to other feedstocks (*e.g.,* coal or natural gas); the only difference is that a renewable feedstock is used (*i.e.,* biomass) to produce cellulosic biofuel. The cellulosic biofuel produced can be mixed alcohols, but optimizing the process to produce ethanol, or it could be diesel fuel and naphtha. A thermochemical unit can also complement a biochemical processing plant to enhance the economics of an integrated biorefinery by converting lignin-rich, non-fermentable material left over from high-starch or cellulosic feedstocks conversion.[24] Compared to corn ethanol or biochemical cellulosic ethanol plants, the use of biomass gasification may allow for greater flexibility to utilize different biomass feedstocks at a specific plant. Mixed biomass feedstocks may be used, based on availability of long-term suppliers, seasonal availability, harvest cycle, and costs.

The general steps of the gasification thermochemical process include: feedstock handling, gasification, gas cleanup and conditioning, fuel synthesis, and separation. Refer to Figure IV.C.2–1 for a schematic of the thermochemical cellulosic ethanol production process through gasification. For greater detail on the thermochemical mixed-alcohols route refer to NREL technical documentation.[25]

[23] U.S. DOE. Technologies: Processing and Conversion. Accessed at: *http://www1.eere.energy.gov/biomass/processing_conversion.html* on October 28, 2008.

[24] EERE, DOE, *Thermochemical Conversion,* & *Biochemical Conversion, Biomass Program Thermochemical R&D. http://www1.eere.energy.gov/biomass/thermochemical_conversion.html http://www1.eere.energy.gov/biomass/biochemical_conversion.html.*

[25] Aden, Andy, Mixed Alcohols from Woody Biomass—2010, 2015, 2022, National Renewable Energy Laboratory (NREL), September 23, 2009.

Figure IV.C.2-1

Cellulosic Ethanol Thermochemical Gasification Process

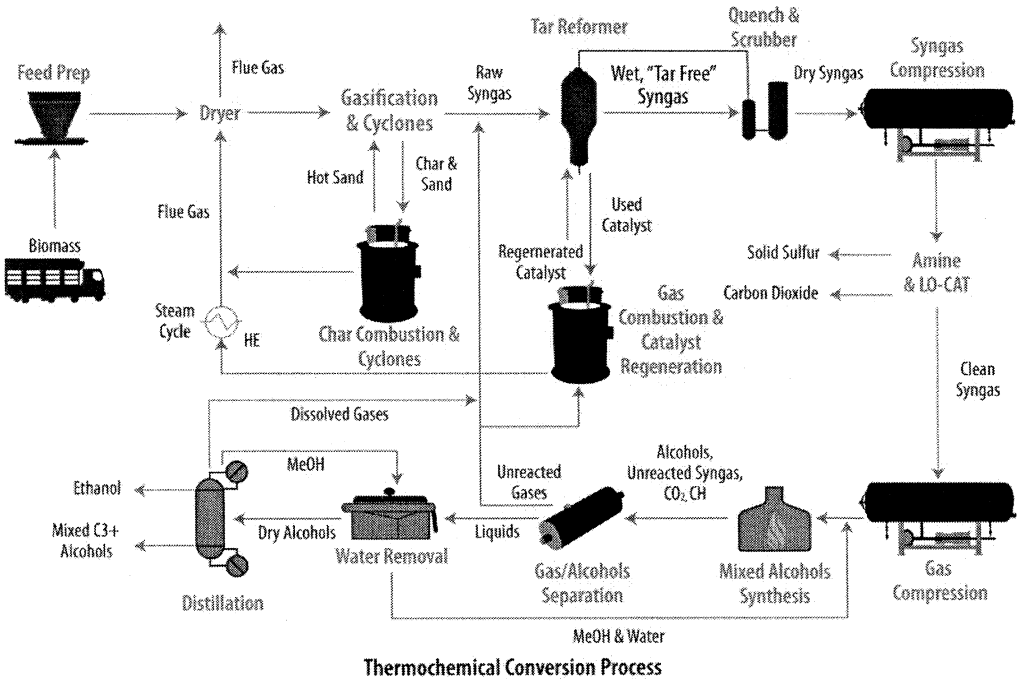
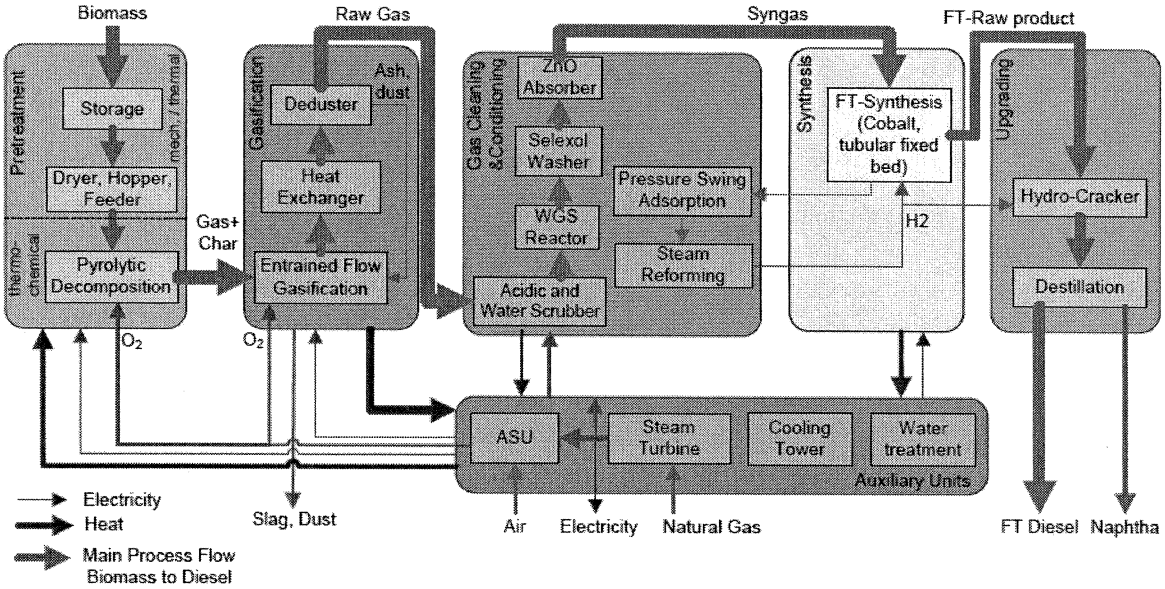


Figure IV.C.2–2 is a block diagram of a biomass to liquids (BTL) process which produces diesel fuel and naphtha through a thermochemical process.

Figure IV.C.2-2

Biomass to Liquids (BTL) Thermochemical Gasification Process



The first step in a thermochemical plant is feedstock size reduction. The particle size requirement for a thermochemical process is around 10-mm to 100-mm in diameter.[26] Once the feed is ground to the proper size, flue gases from the char combustor and tar reformer catalyst regenerator dry the feed from the as received moisture level of around 30% to 50% moisture to the level required by the gasifier.

The dried, ground feedstock is fed to a gasification reactor for producing syngas. There are two general classes of gasifiers, partial oxidation (POx) and indirect gasifiers. Partial oxidation gasifiers (directly-heated gasifiers) use the exothermic reaction between oxygen and organics to provide the heat necessary to devolatilize biomass and to convert residual carbon-rich chars. Indirect gasifiers use steam to accomplish gasification through heat transfer from a hot solid or through a heat transfer surface. Either the byproduct char and/or a portion of the product gas can be combusted with air (external to the gasifier itself) to provide the energy required for gasification. The raw syngas produced from either type of gasifier has a low to medium energy content which consists mainly of CO, H_2, CO_2, H_2O, N_2, and hydrocarbons.

Once the biomass is gasified and converted to syngas, the syngas must be cleaned and conditioned, as minor components of tars, sulfur, nitrogen oxides, alkali metals, and particulates have the potential to negatively affect the syngas conversion steps. Therefore, unwanted impurities are removed in a gas cleanup step and the gas composition is further modified during gas conditioning. Because this step is a necessary part of the thermochemical process, thermochemical plants are good candidates for processing municipal solid waste (MSW) which may contain a significant amount of toxic material. Gas conditioning steps include sulfur polishing to remove trace levels of H_2S and water-gas shift to adjust the final H_2/CO ratio for optimized fuel synthesis.

After cleanup and conditioning, the "clean" syngas is comprised of essentially CO and H_2. The syngas is then converted into a liquid fuel by a catalytic process. The fuel producer has the choice of producing diesel fuel or alcohols from syngas by optimizing the type of catalyst used and the H_2/CO ratio. Diesel fuel has historically been the primary focus of such processes by using a Fischer Tropsch reactor, as it produces a high quality distillate product. However, with a $1.01 per gallon cellulosic biofuel tax deduction which favors the less energy dense ethanol, it may be economically advantageous for fuel producers to convert syngas to ethanol instead of to diesel fuel.

A carefully integrated conventional steam cycle produces process heat and electricity (excess electricity is exported). Pre-heaters, steam generators, and super-heaters generate steam that drives turbines on compressors and electrical generators. The heat balance around a thermochemical unit or thermochemical combined unit must be carefully designed and tuned in order to avoid unnecessary heat losses.[27] These facilities greatly increase the thermal efficiency of these plants, but they add to the very high capital costs of these technologies.

a. Ethanol Based on a Thermochemical Platform

Conceptual designs and techno-economic models have been developed for ethanol production via mixed alcohol synthesis using catalytic processes. The proposed mixed alcohol process produces a mixture of ethanol along with higher normal alcohols (*e.g.,* n-propanol, n-butanol, and n-pentanol). The by-product higher normal alcohols have value as commodity chemicals and fuel additives.

The liquid rundown from the low-pressure separator is dehydrated in vapor-phase molecular sieves, producing the dehydrated mixed alcohol feed into a methanol/ethanol overhead stream and a mixed, higher molecular weight alcohol bottom stream. The overhead stream is further separated into a methanol stream and an ethanol stream.

Two companies which are pursuing ethanol based on a thermochemical route are Range Fuels and Enerkem. Range has operated a pilot plant for over 7 years using over 20 different nonfood feedstocks. Range broke ground building its first commercial plant late in late 2008 and is expected to be operational in 2010. This plant will be located in Soperton, Georgia and is partially funded from proceeds of a DOE grant. The plant will use wood, grasses, and corn stover as feedstocks. In its initial phase, the Range plant is expected to produce 4 million gallons per year of methanol. After the company is confident in its operations, Range will begin efforts to expand the plant and add additional reaction capacity to convert the methanol to ethanol.

Enerkem is pursuing cellulosic ethanol production via the thermochemical route. The Canadian-based company was recently announced as a recipient of a $50 million grant from DOE to build a 10 MGY woody biomass-to-ethanol plant in Pontotoc, MS. The U.S. plant is not scheduled to come online until 2012, but Enerkem is currently building a 1.3 MGY demonstration plant in Westbury, Quebec. According to the company, plant construction in Westbury started in October 2007 and the facility is currently scheduled to come online around the middle of 2010. While it's unclear at this time whether the cellulosic ethanol produced will be exported to the United States, Enerkem has expressed interest in selling its fuel commercially. If Enerkem does export some of its cellulosic biofuel to the U.S., it could help to enable refiners meet the 2011 cellulosic biofuel standard.

b. Diesel and Naphtha Production Based on a Thermochemical Platform

The cleaned and water-shifted syngas is sent to the Fischer Tropsch (FT) reactor where the carbon monoxide and hydrogen are reacted over a FT catalyst. Current FT catalysts include iron-based catalysts, and cobalt-based catalysts. The FT reactor creates a syncrude, which is a variety of hydrocarbons that boil over a wide distillation range (a mix of heavy and light hydrocarbons) which are separated into various components based on their vapor pressure, mainly liquid petroleum gas (LPG), naphtha, distillate and wax fractions. The heavier compounds are hydrocracked to maximize the production of diesel fuel. Conversely, the naphtha material is very low in octane thus, it would either have to be upgraded, or blended down with high octane blendstocks (*i.e.,* ethanol), or be upgraded to a higher octane blendstock to have much value for use in gasoline.

Choren is an European company which is pursuing a thermochemical technology for producing diesel fuel and naphtha. The principal aspect of Choren's process is their patented three stage gasification reactor. The three-stage gasification reactor includes low temperature gasification, high

[26] Lin Wei, Graduate Research Assistant, Lester O. Pordesimo, Assistant Professor Willam D. Batchelor, Professor, Department of Agricultural and Biological Engineering, Mississippi State University, MS 39762, USA, *Ethanol Production from Wood: Comparison of Hydrolysis Fermentation and Gasification Biosynthesis,* Paper Number: 076036, Written for presentation at the 2007 ASABE Annual International Meeting. Minneapolis Convention Center, Minneapolis, MN, 17-20 June 2007.

[27] S. Phillips, A. Aden, J. Jechura, and D. Dayton, National Renewable Energy Laboratory, Golden, Colorado 80401–3393, T. Eggeman, Neoterics International, Inc., *Thermochemical Ethanol via Indirect Gasification and Mixed Alcohol Synthesis of Lignocellulosic Biomass,* Technical Report, NREL/TP–510–41168, April 2007.

temperature gasification and endothermic entrained bed gasification. Choren designed its gasification reactor with three stages to more fully convert the feedstock to syngas. Choren will be building a commercial Plant in Freiberg/Saxony Germany that is expected to be operational in 2011 or 2012. Initially, the plant will use biomass from nearby forests, the wood-processing industry and straw from farmland. Although any fuel produced in 2011 by its Freiberg/Saxony plant and marketed commercially would most likely be used in Europe, it is possible that some of that fuel could be exported to the U.S. Choren is also planning to build a commercial thermochemical/biomass-to-liquids (BTL) plant in the U.S. after their Freiberg/Saxony plant is operational in Germany.

Baard Energy is a U.S. company which plans on utilizing a thermochemical technology for producing diesel fuel and naphtha. Baard, however, plans on primarily combusting coal and cofiring biomass with the coal. Cofiring the biomass with the coal will make their first plant more like the coal-to-liquids plants which are operating today, which may help to convince investors that this technology is already tested. Baard's coal and biomass-to-liquids plant is not expected to be operational until at least 2012.

Probably the largest commercialization hurdle for the companies pursing the thermochemical route is the very high capital costs associated with these technologies. Because of the economic hardships associated with recent global recession, banks are less willing to make loans to fund new technologies which are likely to be considered riskier investments. The capital costs are very high because there are two significant reactors required for each plant—the gasification reactor and the syngas to fuel reactor. Additionally, the syngas must be cleaned to protect the catalysts used in the downstream syngas to fuel reactor which requires additional capital costs. Because the syngas would be cleaned anyways, this technology is a very good candidate for processing MSW which may contain toxic compounds. When considering the cost savings for not having to pay the tipping fees at municipal dumping grounds, MSW feedstocks may avoid almost all the purchase costs for MSW feedstocks which would significantly help offset the high capital costs.

3. Hybrid Thermochemical/Biochemical Processes

Hybrid technologies include process elements involving both the gasification stage of a typical thermochemical process, as well as the fermentation stage of a typical biochemical process and therefore cannot be placed easily into either category. For more specific information regarding either biochemical processes or thermochemical, please see Sections IV.C.1 and IV.C.2 respectively. Currently, there are several strategies for the production of ethanol through hybrid processes; these strategies are differentiated by the order in which the thermochemical and biochemical steps take place within the process, as well as how the intermediate products from each step are used.

While we do not expect significant commercial production from hybrid processes in 2011, there are several companies pursing this approach for the future. Examples of the first process strategy, described in the paragraph below, include both INEOS Bio and Coskata. INEOS Bio (along with partner New Planet Energy) has recently been selected for a $50MM DOE grant for the construction of an 8 MGPY plant in River County, Florida; predicted to finish construction in late 2011. Coskata is currently running a 40,000 gallon per year pilot plant that became operational in 2009 in Madison, Pennsylvania. Coskata is targeting to design and build a 50 MGPY commercial plant that it expects to be operational in 2012. A company currently pursing the second process strategy, described in the following third paragraph, is Zeachem Inc. Zeachem is currently constructing a 250 KGPY demonstration plant in Boardman, Oregon. They have received a $25MM DOE grant and expect to have a full commercial production facility operational in 2013.

One strategy involves the gasification of all feedstock material to syngas before being processed into ethanol using a biochemical fermenter. Further information regarding gasification can also be found in Section IV.C.2. After gasification, the syngas stream is cooled and bubbled into a fermenter containing modified microorganisms, usually bacteria or yeast. This fermenter replaces the typical catalysts found after gasification in a traditional thermochemical process. Further information regarding fermentation can be found in Section IV.C.1. Unlike traditional fermentation (which break down C5 and C6 sugars), these microorganisms are engineered to convert the carbon monoxide and hydrogen contained in the syngas stream directly into ethanol. After fermentation, the effluent water/ethanol stream from the fermenter is separated similarly to a biochemical process; usually using a combination of distillation and molecular sieves. The separated water can then be recycled back into the fermentation stage of the process. Typical yields of ethanol are predicted in the 100–120 gallon per ton range.

Since gasification converts all carbonaceous feedstock material to a uniform syngas before fermentation, there is a higher flexibility of feedstock choices than if these materials were to be fermented directly; including agricultural residues, switchgrass, farm-grown trees, sorted MSW, or any combination of such. In addition, processing incoming feedstock with gasification does not require the addition of enzymes or acid hydrolysis necessary in a biochemical process to aid in the breakdown of cellulosic materials. Fermenting syngas also captures all available carbon contained in the feedstock, including lignin that would not be processed in a typical biochemical fermentation. However, more energy is lost as waste heat as well as secondary carbon dioxide production in the gasification process than would be lost for biochemical feedstock preparation. Using a fermenter in a hybrid process replaces the catalyst needed in a typical thermochemical process. These microorganisms allow for a higher variation of the incoming syngas stream properties, avoid the necessity of a water-shift reaction preceding traditional catalytic conversion, and are able to operate at lower temperatures and pressures than those required for a catalytic conversion to ethanol. Microorganisms, unlike a catalyst, are also self-sustaining and do not require periodic replacement. They are, however, susceptible to bacterial and viral infections which requires periodic cleaning of the fermentation reactors.

Another hybrid production strategy involves gasification of the typically unfermentable feedstock fraction (lignin) concurrently with a typical fermentation step for the cellulose and hemicellulose fraction. These steps are subsequently combined in a hydrogenation reaction of the produced syngas with the product of the fermented stream. Feedstock first undergoes acid hydrolysis to break down contained cellulose and hemicellulose. Before fermentation, the unfermentable portion of feedstock (lignin, ash and other residue) is fractioned and sent to a gasifier. Concurrently, the remaining fraction of hydrolyzed feedstock is fermented using an acetogen microorganism. These acetogens occur naturally, and therefore do not have to be modified for this

process. These acetogen convert both C6 and C5 portions of the hydrolized feedstock to acetic acid. This reaction creates no carbon dioxide, unlike traditional fermentation using yeast, preserving the maximum amount of carbon for the finished fuel. The acetic acid stream then undergoes esterification to create ethyl acetate. Meanwhile, the syngas stream from the gasification of lignin and other residue is separated into its carbon monoxide and hydrogen components. The carbon monoxide stream can be further combusted to provide process heat or energy. The hydrogen stream is combined with the ethyl acetate in a hydrolysis reaction to form ethanol. Acetic acid and ethyl acetate also form the precursors to many other chemical compounds and therefore may also be sold in addition to ethanol. Typical yields for this technology are predicted in the 130–150 gallon per ton range.

4. Pyrolysis and Depolymerization

Pyrolysis and depolymerization is a group of technologies which are capable of creating biofuels from cellulose by either thermally or catalytically breaking them down into molecules which fall within the boiling range of transportation fuels. Pyrolysis technologies are usually thought of being primarily a thermal technology, however, newer pyrolysis technologies are being developed which are attempting to integrate some catalysts into the technology. These are all unique processes, typically with single companies developing the technologies, so they are discussed separately.

a. Pyrolysis Diesel Fuel and Gasoline

Pyrolysis oils, or bio-oils, are produced by decomposing cellulosic biomass at lower temperatures than the gasification process, thus producing a liquid bio oil instead of a synthesis gas.[28] The reaction can occur either with or without the use of catalysts, but it occurs without any additional oxygen being present. The resulting oil which is produced must have particulates and ash removed in filtration to create a homogenous "dirty" crude oil type of product. This dirty crude oil must be further upgraded to hydrocarbon fuels via hydrotreating and hydrocracking processing, which reduces its total oxygen content and cracks the heaviest of the hydrocarbon compounds. One of the finished fuels produced by the pyrolysis process is diesel fuel, however, a significant amount of gasoline would likely be produced as well. There are two main reaction pathways currently being explored: A two step pyrolysis pathway, and a one step pyrolysis pathway.

The simplest technology used for the two-step pyrolysis approach is called fast pyrolysis. The fast pyrolysis technology uses sand in a fluidized bed to transform bio-fuels into a product named bio-oil. This is purely a thermal process, where the sand's (or other solid) role is to transport heat to the biomass. Fast pyrolysis technology has two problems to be solved. First, fast pyrolysis oil is unstable, acidic, viscous and may separate itself into two phases so it must be immediately upgraded or it will begin to degrade and repolymerize. The second issue is that pyrolysis bio-oil must be upgraded before it can be used as a transportation fuel.

Another approach to Fast Pyrolysis being pursued by several companies would be to substitute a catalyst in place of sand and the catalyst would be able to stabilize the resulting bio-oil in addition to helping depolymerize the biomass to liquids. Although the resulting bio-oil is stable, it still has to be upgraded into a transportation fuel, since it would still have a high level of oxygenated compounds.

The National Renewable Energy Laboratory (NREL) is working on a "hot filtration" technology that apparently is able to stabilize bio-oil created using the fast pyrolysis process for a very long period of time (years). This would allow the bio-oil to be stored and transported to an upgrading facility without significant degradation.

It is possible to use a sophisticated catalyst (instead of sand) in a single step pyrolysis reaction to create pyrolysis oils that exhibit much improved bio-oil properties. The catalysts would not only be able to help depolymerize cellulosic feedstocks, but they produce a bio-oil which could possibly be used directly as transportation fuel. Thus, a second upgrading step may not be necessary. The difficulty encountered by this technology is that catalysts which have been used in the one step process are relatively expensive and they degrade quickly due to the metals which are present in the biomass. Development work on the two-step and one-step pyrolysis processes is ongoing.

Dynamotive Energy Systems Corporation is a Canadian company which has developed a pyrolysis technology that uses medium temperatures and oxygen free reactions to convert dry waste biomass and energy crops into different products. The liquid product produced by the Dynamotive process is called BioOil. The BioOil contains up to 25% water, though the water is intimately mixed and does not easily separate into another phase with time. Since the BioOil contains significant amounts of water, it is not directly useable as fuel in conventional vehicles and would have to be converted via another catalytic conversion processing step. The additional catalytic step envisioned by Dynamotive to upgrade the BioOil into a transportation fuel would combust the material into a synthesis gas which would then be converted into diesel fuel or bio-methanol via a catalytic reaction (the BTL process). The diesel fuel produced is expected to be compatible with existing petroleum diesel fuels. The poor quality BioOil, though, could be used in the No. 2 industrial heating oil market at industrial facilities. However, because of its high acidity level, users would need to change equipment metallurgy to stainless steel for pipes, pumps, tanks, nozzles etc.

Dynamotive has two small demonstration plants. One demonstration plant is located in Guelph, Ontario, Canada and its capacity is 66,000 dry tons of biomass a year with an energy output equivalent to 130,000 barrels of oil. The other of its demonstration plants is located in West Lorne Ontario, Canada. Dynamotive continues to work on a technology for converting its BioOil to transportation fuels, although they have not announced plans for building such a facility due to funding limits. While Dynamotive is expected to continue to sell its fuel into the chemicals market, it could find a fuel oil user in the U.S. to use its fuel under the RFS2 program that refiners could use to comply with the 2011 cellulosic biofuel standard.

Envergent is a company formed through a joint venture between Honeywell's UOP and the Ensyn Corporation. Although Ensyn has been using fast pyrolysis for more than a decade to produce specialty chemicals, UOP is relying on its decades of experience developing refining technologies to convert the pyrolysis oils into transportation fuels. Envergent is also working with Federal laboratories to further their technology. Based on their current technology and depending on the feedstock processed, about 70% of the feedstock is converted into liquid products. The gasoline range products produced are high in octane, while the diesel fuel products are low in cetane. Envergen estimates that if it was able to procure cellulosic feedstocks at 70 per ton, that their technology would be competitive with

[28] DOE EERE Biomass Program. "Thermochemical Conversion Processes: Pyrolysis" *http://www1.eere.energy.gov/biomass/thermochemical_processes.html,* November 6, 2008.

#2 fuel oil produced from crude oil priced at about $40 per barrel. Envergent is licensing this technology as well as working with a U.S. oil company to test out this technology in a commercial setting here in the U.S.

Petrobras is a Brazilian oil company also working to develop a pyrolysis technology. Because of Petrobas' work in this area (and other areas on biofuels), a Memorandum of Understanding was signed by United States' Secretary of State and Brazil's External Relations Minister on March 9, 2007 to advance the cooperation on biofuels. A second Memorandum of Understanding was signed by PETROBRAS and NREL on September 2008 aiming at collaborating to maximize the benefit of their respective institutional interests in second generation biofuels. Petrobras is negotiating a Cooperation Agreement with NREL to develop a two step pyrolysis route to produce biofuels from agricultural wastes such as sugar cane bagasse, wood chips or corn stover. Petrobras is optimistic that a catalytic pyrolysis technology can be developed that will produce a stable bio-oil (pyrolysis oil). Petrobras is hopeful that a one-step pyrolysis technology can be developed to convert biomass directly to transportation fuels, although in the end Petrobras believes that the two step process may be more economically attractive.

b. Catalytic Depolymerization

Two companies that are pursuing catalytic depolymerization are Green Power Inc. and Cello Energy.

The Green Power process catalytically depolymerizes cellulosic feedstocks at moderate temperatures into liquid hydrocarbon fuels. The proposed feedstock is municipal solid waste (MSW) or other waste material such as animal waste, plastics, agriculture residue, woody biomass and sewage waste. The feedstock is first ground to a size finer than 5 mm. The feedstock is placed along with a catalyst, some lime, which serves as a neutralizing agent, and some fuel which provides a liquid medium, into a reactor and heated to around 350 degrees Celsius. As described, this technology may fit the description for catalyzed pyrolysis reactions described above, but because we are not certain of the reaction kinetics, we have categorized this as a separate catalytic depolymerization technology. In the reactor, the feedstock is catalytically converted to liquid fuels which primarily fall within the gasoline and diesel fuel boiling ranges, although these fuels may need further upgrading. The liquid fuels are separated from some solids which are present and are distilled into typical fuel streams including naphtha, diesel fuel, kerosene and fuel oil. According to the literature writing about this technology, the process reportedly produces 120 gallons per ton of feedstock inputted into the process. A light hydrocarbon gas, which is mostly methane, is also produced, but this gas is expected to be burned in a turbine to generate electricity and the waste heat is used for heating the process. Apparently, some carbon dioxide is also formed and is released from the process.

Greenpower completed construction on a demonstration plant located in Fife, Washington about March of 2008. Greenpower is working on obtaining additional funding and to obtain an air permit through the State of Washington Environmental Office. While we don't believe that Greenpower will have its plant operational in 2011 due to financial and other issues the company faces, those issues could be resolved to allow this company to produce fuel that could help refiners comply with the cellulosic biofuel volume standard for 2011.

The Cello-Energy process is also a catalytic depolymerization technology. At moderate pressure and temperature, the Cello-Energy process catalytically removes the oxygen and minerals from the hydrocarbons that comprise finely ground cellulose. This results in a mixture of short chain (3, 6 and 9 carbon) hydrocarbon compounds. These short chain hydrocarbon compounds are polymerized to form compounds that boil in the diesel boiling range, though the process can also be adjusted to produce gasoline or jet fuel. The resulting diesel fuel meets the ASTM standards, is in the range of 50 cetane to 55 cetane and typically contains 3 ppm of sulfur.

The Cello process is reported to be on the order of 82% efficient at converting the feedstock energy content into the energy content of the product, which is very high compared to most of today's biochemical and thermochemical processes which are on the order of 50% efficient, or less. Because of the simplicity of the process, the capital costs are very low. A 50 million gallon per year plant is claimed to only incur a total cost of $45 million. Because of its high efficiency in converting feedstocks into liquid fuel, the production and operating costs are estimated to be very low.

In December 2008, Cello completed construction on a 20 million gallon per year commercial demonstration plant. However, at the present they are still working to resolve process issues that have arisen upon scaleup from their pilot plant. We expect that Cello will be able to produce some volume of cellulosic biofuel in 2011.

5. Catalytic Reforming of Sugars to Gasoline

Virent Biorefining is pursuing a process called "Bioforming" which functions similarly as the gasoline reforming process used in the refining industry. Hence, this is a very different technology to any of those other cellulosic biofuel technologies discussed above. While refinery-based catalytic reforming technologies raise natural gasoline's octane value and produces aromatic compounds, Bioforming reforms biomass-derived sugars into hydrocarbons for blending into gasoline and diesel fuel. The process operates at moderate temperatures and pressures. In March of 2010, Virent announced that they had begun operating a larger pilot plant capable of about 30 gallons per day. Commercialization of the Virent process will happen sometime after 2011.

For this technology to become a cellulosic biofuel technology, it will be necessary to link this reforming technology with a technology which breaks cellulose down into starch or sugars. In parallel with its Bioreforming work, Virent is working on a technology to break down cellulose into sugars upstream of its technology which reforms sugars to gasoline.

V. Proposed Changes to RFS2 Regulations

Following publication of the final RFS2 program regulations ,[29] EPA identified two program areas that could benefit from the addition of new regulatory provisions. The first would provide for the generation of RINs for fuel produced between July 1, 2010 and December 31, 2010 representing certain fuel pathways that are not currently in Table 1 to § 80.1426, but which could possibly be added later this year if they are determined to meet the applicable GHG thresholds. Under this proposal RINs could be generated only if the pathways are indeed approved, and only for quantities reflecting fuel produced between the effective date of the RFS2 regulations and the effective date of a new pathway added to Table 1 to § 80.1426. The second program addition would establish procedures for petitions requesting EPA authorization of an aggregate compliance approach to renewable biomass verification for feedstocks grown in foreign countries, akin to that applicable to crops and crop

[29] 75 FR 14670, March 26, 2010.

residue grown within the U.S. We are proposing to make amendments to the RFS regulations in Subpart M to implement both of these provisions.

A. Delayed RIN Generation for New Pathways

As described in the RFS2 final rule, we did not have sufficient time to complete the necessary lifecycle GHG impact assessment for certain fuel pathways. We indicated that we would model and evaluate several additional pathways after the final rule (*see* Section V.C of the RFS2 final rule, 75 FR 14796). EPA anticipates modeling and publishing the lifecycle GHG analyses for the following four pathways later this year:

- Grain sorghum ethanol.
- Pulpwood biofuel.
- Palm oil biodiesel.
- Canola oil biodiesel.

Depending on how these lifecycle GHG results compare with the required GHG thresholds for cellulosic biofuel, biomass-based diesel, advanced biofuel, and conventional renewable fuel, we may add one or more of these pathways to Table 1 to § 80.1426. Once a new pathway is approved, producers using that pathway could generate RINs with the specified D code.

We consider the four new fuel pathways currently being analyzed to be an extension of the RFS2 final rule. Had we been able to complete these analyses for the RFS2 final rule and verified that the GHG thresholds had been met, D codes to represent these pathways would have been included in Table 1 to § 80.1426 promulgated on March 26, 2010, and renewable fuel producers could have begun using those pathways to generate RINs beginning on July 1, 2010. Indeed, we are aware of a number of producers who intend to produce biofuel using one of the four pathways listed above despite the fact that a determination regarding their lifecycle GHG impact has not yet been made.

Based on the fact that we may have included the four pathways listed above in the RFS2 final rule if the lifecycle modeling had been completed in time, we believe that it would be appropriate to allow renewable fuel producers using any of these four pathways that are ultimately approved for inclusion in Table 1 to § 80.1426 to generate RINs for all fuel they produce and sell on and after July 1, 2010. However, while EPA is expeditiously working to complete its GHG assessments for these four fuel pathways in 2010, the determination of whether any of the four pathways will meet the 20%, 50%, or 60% GHG thresholds may not occur until after July 1, 2010. Therefore, RINs representing fuel produced between July 1, 2010 and any EPA approval of a new fuel pathway could only be generated after the renewable fuel in question had been produced and sold, after the time when EPA announces the results of the lifecycle analyses and specifies the applicable D code in Table 1 to § 80.1426. Thus we are proposing a new regulatory provision for the generation of "Delayed RINs" that would allow RINs with newly specified D codes to be generated for eligible fuel produced between July 1, 2010 and the date any new D code is approved for one of the four fuel pathways listed above. This Delayed RINs provision would only be applicable for any of the four pathways described above that are determined to meet the applicable GHG thresholds. We are also proposing that this provision would apply only for renewable fuel produced in 2010, since the lifecycle GHG assessments for the four pathways listed above is expected to be completed in 2010. Our proposed regulatory provision for Delayed RIN generation would be inserted into § 80.1426 as new paragraph (g). As for any RIN generation, producers using this new regulatory provision would need to be registered under RFS2 before they could generate Delayed RINs, and would need to comply with the recordkeeping and reporting requirements of the regulations.

We do not believe that this proposed provision for Delayed RINs should be extended to any other pathways. The four pathways listed above are the only pathways currently under evaluation that would have been included in the RFS2 final rule if we had completed the modeling in time. Moreover, we have provided a petition process in § 80.1416 for other fuel pathways for which lifecycle GHG assessments have not yet been made.

In developing this proposed provision for Delayed RIN Generation, we have accounted for renewable fuel producers who are eligible for an exemption from the 20% GHG reduction requirement for their fuel under § 80.1403 ("grandfathered" producers) and those that are not. Grandfathered producers can generate RINs for their renewable fuel starting on July 1, 2010, but must designate the D code as 6 for such fuel, identifying it as conventional renewable fuel. They must also transfer those RINs with renewable fuel they sell. If one of the four fuel pathways described above is approved between July 1, 2010 and December 31, 2010 for use of a D code other than 6, and the producer wishes to apply this new D code to fuel they have already produced and transferred, the RINs they already generated and transferred with renewable fuel they produced must be accounted for. We are proposing a process whereby these grandfathered producers would be required to acquire and retire RINs from the open market with a D code of 6 prior to the generation of Delayed RINs. The number of RINs retired in this fashion must be no greater than the number they generated between July 1, 2010 and the effective date of the new applicable pathway. Producers who are not grandfathered under § 80.1403 cannot generate RINs starting on July 1, 2010, and so would not be required to acquire and retire any RINs prior to the generation of Delayed RINs.

The generation of Delayed RINs would also differ for grandfathered producers and non-grandfathered producers. Grandfathered producers would base the number of Delayed RINs they generate on the number of RINs with a D code of 6 that they retired as described above. In contrast, non-grandfathered producers would base the number of Delayed RINs they generate on the volume of renewable fuel they produced and sold between July 1, 2010 and the effective date of the new pathway. Since all Delayed RINs will be generated after the renewable fuel in question had been produced and sold, they would be assigned a K code of 2 and thus could be sold by the producer separately from renewable fuel.

Finally, we believe that there should be a deadline for the generation of Delayed RINs to ensure that they are entering the market as close as possible to the date of production of the renewable fuel that they represent. We are proposing that all Delayed RINs must be generated within 30 days of the effective date of a new pathway added to Table 1 to § 80.1426 between July 1, 2010 and December 31, 2010. We believe that 30 days would provide sufficient time for producers who are grandfathered to first acquire and retire RINs from the open market, and would be sufficient to allow any producer to generate Delayed RINs according to the procedures in the regulations. However, we request comment on a longer period within which Delayed RINs must be generated.

We request comment on our proposed provision for Delayed RINs.

B. Criteria and Process for Adoption of Aggregate Approach to Renewable Biomass for Foreign Countries

In the preamble to the final RFS2 regulations, EPA indicated that, while we did not have sufficient data at the time to make a finding that the aggregate compliance approach adopted for domestically-grown crops and crop

residues would be appropriate for foreign-grown feedstocks, we would consider applying the aggregate compliance approach for renewable biomass on a country by country basis if adequate land use data becomes available.

Since promulgation of the final RFS2 regulations, we have received several inquiries regarding the process, criteria, and data needed for EPA to approve the aggregate compliance approach for planted crops and crop residue grown in areas outside the U.S. Thus, in today's rule, EPA is proposing a process by which entities may petition EPA for approval of the aggregate compliance approach for specified renewable fuel feedstocks either in a foreign country as a whole or in a specified geographical area within a country. The proposed regulations include a general criterion and a number of considerations that EPA will use in evaluating petitions. They also include a list of submissions that are required, absent an explanation by petitioner of why they should not be required for EPA to approve a petition. The proposed rule also includes a description of the proposed process by which EPA would make decisions concerning any petitions received.

1. Criterion and Considerations

In developing these proposed regulations, EPA relied substantially on the approach we used to determine that an aggregate compliance approach was appropriate for planted crops and crop residue from U.S. agricultural land. The fundamental finding that would be required of EPA in approving a petition for application of the aggregate approach would be that an aggregate compliance approach will provide reasonable assurance that specified renewable fuel feedstocks from a given geographical area meet the definition of renewable biomass and will continue to meet the definition of renewable biomass, based on the submission of credible, reliable and verifiable data. Based on our experience in making the comparable finding for U.S.-grown crops and crop residues, we are also proposing a number of more specific factors that would be considered in determining whether this finding should be made, as described below. EPA is proposing to consider:

- Whether there has been a reasonable identification of the aggregate amount of agricultural land in the specified geographical area on December 19, 2007 that was available for the production of the specified feedstock(s) and that satisfy the definition of renewable biomass, taking into account the definitions of terms such as "cropland," "pastureland," "planted crop," and "crop residue" included in the final RFS2 regulations.
- Whether information from years preceding and following 2007 shows that the identified aggregate amount of land in the specific geographical area, called the 2007 baseline area of land, is not likely to be exceeded in the future.
- Whether economic considerations, legal constraints, historical land use and agricultural practices and other factors show that it is likely that producers of the feedstock(s) will continue to use agricultural land within the baseline area of land identified into the future, as opposed to clearing and cultivating land not eligible under the 2007 baseline.
- Whether there is a reliable method to evaluate on a continuing basis whether the 2007 baseline area of land is being or has been exceeded.
- Whether an entity has been identified to conduct data gathering and analysis needed for an annual EPA evaluation of the aggregate compliance approach if EPA grants the petition.

EPA is requesting comments on the proposed general criterion and specific considerations for approving the aggregate compliance approach for non-domestically grown feedstocks. The existing approved aggregate approach for U.S. domestic feedstocks applies to all crops and crop residue that could be used in renewable fuel production. EPA has received inquiries on the extent to which approval could be obtained for a single, or limited number, of feedstocks. The proposed regulations leave open the possibility of feedstock-specific petitions, but EPA particularly solicits comment on the extent to which different or additional data submittals or inquiries would be appropriate for such petitions.

2. Data Sources

To make the aggregate compliance determination for U.S. agricultural lands, EPA obtained USDA data from three independently gathered national land use data sources (the Farm Service Agency (FSA) Crop History Data, the USDA Census of Agriculture (2007), and the satellite-based USDA Crop Data Layer (CDL)). Please see Section II.C.4.c.iii. of the preamble to the final RFS2 rule (75 FR 14701 (March 26, 2010)) for a more detailed description of the data sources used. Using these data sources, EPA was able assess the area of land (acreage) available in the United States under EISA for production of crops and crop residues that meet the definition of renewable biomass. In the case of a petition to apply the aggregate compliance approach to feedstocks from a specific geographical area in a foreign country, when considering the information and data submitted by the petitioner, EPA will evaluate such information on a case-by-case basis, but suggests that petitioners obtain data from sources that are at least as credible, reliable, and verifiable as the USDA data used to make the determination for U.S. agricultural land.

When evaluating whether the data relied on are credible, reliable, and verifiable, EPA will take into account whether the data is submitted by, generated by, or approved by the national government of the foreign country in question, as well as how comprehensive and accurate the data source is. It is important for the national government of the area seeking consideration be involved in this process, and we seek comment on whether or not involvement of the national government should be required as part of the petitioning and/or data submittal processes. Additionally, EPA will take into consideration whether the data is publically available, whether the data collection and analysis methodologies and information on the primary data source are available to EPA, and whether the data has been generated, analyzed, and/or approved or endorsed by an independent third party. EPA would also take into account the quality of the data that is available on an annual basis for EPA's annual assessments of any approved aggregate compliance approach, as well as whether the petitioner has identified an entity who will provide to EPA an analysis of the data updates each year following EPA's approval of the aggregate compliance approach for that area. Furthermore, EPA will consider agricultural land use trends from several years preceding 2007, as well as the years following 2007 to the time the petition is submitted in order to evaluate whether or not it is likely that a 2007 baseline would be exceeded in the future. EPA will consider whether there are laws in place in the area for which the petition was submitted that might prohibit or incentivize the clearing of new agricultural lands and the efficacy of these laws. EPA will also assess whether any market factors are expected to drive an increase in the demand for agricultural land.

3. Petition Submission

EPA is proposing that all submittals, including the petition, supporting documentation, and annual data and analyses, be submitted in English. We are also proposing that petitioners submit specified information as part of their formal petition submission package, or explain why such

information is not necessary for EPA to approve their petition. Petitioners would need to submit an assessment of the total amount of land that is cropland or pastureland that was cleared or cultivated prior to December 19, 2007 and that was actively managed or fallow and nonforested on that date. For example, in assessing the amount of total existing agricultural land in the U.S. on the enactment date of EISA, EPA used FSA Crop History data to show that there were 402 million acres of agricultural land existing in the U.S. in 2007. Additionally, if the petitioner is seeking approval of the aggregate compliance approach for a particular feedstock, they would also need to submit an assessment of the total amount of agricultural land dedicated to that feedstock in 2007 within the specified area. Petitioners would also be required to provide EPA with maps or electronic data identifying the boundaries of the land in question and a description of the feedstock(s) for which the petitioner is submitting the petition.

As part of the petition, the petitioner would be required to submit to EPA land use data that demonstrates that the land in question is agricultural land that was cleared or cultivated prior to December 19, 2007 and that was actively managed or fallow and nonforested on that date, which may include satellite imagery data, aerial photography, census data, agricultural surveys, and/or agricultural economic modeling data. As mentioned above, the FSA crop history data used for the U.S. aggregate compliance approach determination consists of annual records of farm-level land use data that includes all cropland and pastureland in the U.S. EPA also considered USDA Census of Agriculture data, which consists of a full census of the U.S. agricultural sector once every five years, as well as the USDA Nation Agricultural Statistics Service (NASS) Crop Data Layer (CDL), which is based on satellite data.

In establishing the total amount of existing agricultural land for the U.S. aggregate compliance approach determination, EPA relied on the RFS2 definitions of the relevant terms, including planted crops, crop residue, and agricultural land, which is defined as consisting of cropland, pastureland and CRP land. EPA will take into consideration whether the data submitted by the petitioner relies on comparable definitions. For purposes of RFS2, planted crops are defined as all annual or perennial agricultural crops from existing agricultural land that may be used as feedstocks for renewable fuel, such as grains, oilseeds, sugarcane, switchgrass, prairie grass, duckweed, and other species (but not including algae species or planted trees), providing they were intentionally applied by humans to the ground, a growth medium, a pond or tank, either by direct application as seed or plant, or through intentional natural seeding or vegetative propagation by mature plants introduced or left undisturbed for that purpose. Crop residue is defined as the biomass left over from the harvesting or processing of planted crops from existing agricultural land and any biomass removed from existing agricultural land that facilitates crop management (including biomass removed from such lands in relation to invasive species control or fire management), whether or not the biomass includes any portion of a crop or crop plant. Cropland is defined as land used for production of crops for harvest and includes cultivated cropland, such as for row crops or close-grown crops, and non-cultivated cropland, such as for horticultural or aquatic crops. Pastureland is land managed for the production of indigenous or introduced forage plants for livestock grazing or hay production, and to prevent succession to other plant types. It is important to note that EPA considers pastureland to be distinctly different from rangeland, which may be used for livestock grazing, but is not managed to prevent succession to other plant types. Finally, CRP land is land enrolled in the US Conservation Reserve Program (administered by USDA's Farm Service Agency), which encourages farmers to convert highly erodible cropland or other environmentally sensitive acreage to vegetative cover, such as tame or native grasses, wildlife plantings, trees, filterstrips, or riparian buffers. EPA recognizes that the CRP is only applicable to U.S. agricultural land. EPA solicits comments on whether the final rules should allow EPA to consider land that is equivalent or similar to US CRP land as existing agricultural land for purposes of RFS2-compliant feedstock cultivation in a foreign country, and whether EPA should be able to make such a determination in the context of a petition for application of the aggregate approach to a foreign country.

The petitioner would also be required to provide EPA with historical land use data for the land in question, covering the years from prior to 2007 to the current year. For the U.S. aggregate compliance approach determination, EPA analyzed the FSA Crop History data from the years 2005 through 2007 and the USDA Census of Agriculture from 1997 through 2007, finding that there was an overall decade trend of contraction of agricultural land utilization in the U.S. The petitioner would need to provide a description of any applicable laws, agricultural practices, economic considerations, or other relevant factors that had or may have an effect on the use of the land in question. For the U.S. aggregate compliance approach determination, EPA also took in account the EISA renewable fuel obligations, the unsuitability and high cost of developing previously undeveloped land for agricultural purposes, as well as projected increases in crop yields on existing agricultural land.

Finally, the petitioner would be required to provide EPA with a plan describing how the entity who will, on a continuing yearly basis, conduct any data gathering and analysis necessary to assist EPA in its annual assessment of any approved aggregate approach. In the plan, the petitioner would describe the data, the data source, and the schedule on which the data would be updated and made available to EPA and the public. Additionally, the plan would include the entity's strategy and schedule for conducting an annual analysis of the data and providing it to EPA.

4. Petition Process

We believe that it will be important to incorporate a public comment component into EPA's deliberations on a petition made to incorporate an aggregate compliance approach for a new area. EPA plans to publish a **Federal Register** notice informing the public of incoming petitions, with information on how to view the petitions and any supporting information. EPA proposes to then accept public comment on the petition for a specified period of time. Once the public comment period closes, EPA will make an assessment, taking into account the information submitted in the petition as well as the comments received, and will then publish a decision in the **Federal Register** to either approve or deny the petitioner's request. If the petition has been approved, the **Federal Register** notice will specify an effective date at which time producers using the specified feedstocks from the specified areas identified in EPA's approval will be subject to the aggregate compliance approach requirements in 40 CFR 80.1454(g) in lieu of the renewable biomass recordkeeping and reporting requirements. In the event that the annual data submitted by the petitioner

is insufficient to demonstrate that the baseline amount of land has not been exceeded or if the annual data is not submitted in a timely manner, EPA will make a finding that the baseline acreage has been exceeded and producers using crops or crop residue from the specified area will be subject to the individual recordkeeping and reporting requirements described in the regulations. EPA is seeking comments on this proposed process. Additionally, EPA requests comment on whether the burden associated with the petition process is reasonable, and how it might be minimized while still remaining adequately robust. Specific estimates about the time and cost of preparing a petition will be published in Information Collection Request associated with this proposed rulemaking.

VI. Public Participation

We request comment on all aspects of this proposal. This section describes how you can participate in this process.

A. How do I submit comments?

We are opening a formal comment period by publishing this document. We will accept comments during the period indicated under **DATES** in the first part of this proposal. If you have an interest in the proposed standards and changes to the RFS regulations described in this document, we encourage you to comment on any aspect of this rulemaking. We also request comment on specific topics identified throughout this proposal.

Your comments will be most useful if you include appropriate and detailed supporting rationale, data, and analysis. Commenters are especially encouraged to provide specific suggestions for any changes that they believe need to be made. You should send all comments, except those containing proprietary information, to our Air Docket (*see* **ADDRESSES** in the first part of this proposal) before the end of the comment period.

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit Confidential Business Information (CBI) or information that is otherwise protected by statute, please follow the instructions in Section VI.B.

B. How should I submit CBI to the agency?

Do not submit information that you consider to be CBI electronically through the electronic public docket, *http://www.regulations.gov,* or by e-mail. Send or deliver information identified as CBI only to the following address: U.S. Environmental Protection Agency, Assessment and Standards Division, 2000 Traverwood Drive, Ann Arbor, MI 48105, Attention Docket ID EPA–HQ–OAR–2010–0133. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD–ROM, 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 CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comments that include any information claimed as CBI, a copy of the comments that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit the copy that does not contain CBI on disk or CD–ROM, mark the outside of the disk or CD–ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

VII. 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.

The economic impacts of the RFS2 program on regulated parties, including the impacts of the required volumes of renewable fuel, were already addressed in the RFS2 final rule promulgated on March 26, 2010 (75 FR 14670). This action proposes the percentage standards applicable in 2011 based on the volumes that were analyzed in the RFS2 final rule. This action also proposes two new regulatory provisions that have been determined to have no adverse economic impact on regulated parties since they would increase flexibility to produce qualifying renewable fuel under the RFS2 program.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2398.01.

This proposed regulation has a provision that EPA would use to authorize renewable fuel producers using foreign-grown feedstocks to use an aggregate approach to comply with the renewable biomass verification provisions, similar to that applicable to producers using crops and crop residue grown in the United States. See discussion in Section V.B. For this authorization, foreign based entities could petition EPA for approval of the aggregate compliance approach for specified renewable fuel feedstocks either in a foreign country as a whole or in a specified geographical area within a country. This petition request for crops from foreign grown land areas would be voluntary. If approved by EPA, such a petition would allow biomass produced in a foreign country or geographical area to be counted as feedstock to make renewable fuel under the RFS2 program. Other actions in this proposed regulation would not impose any new information collection burdens on regulated entities beyond those already required under RFS2. The submission of this information is required in order for EPA to evaluate and act on the petitions. Respondents may assert claims of business confidentiality (CBI) for any or all of the information they submit. We do not believe that most respondents would characterize the information they submit to us under this information collection as CBI. However, any information claimed as confidential would be treated in accordance with 40 CFR Part 2 and established Agency procedures. Information that is received without a claim of confidentiality may be made available to the public without further notice to the submitter under 40 CFR 2.203.

EPA estimates that there would be 15 respondents (petitioners), submitting 15 responses (petitions) in response to this provision. The estimated burden annual

burden, assuming 15 respondents, would be 200 hours and annual cost is $14,196. Burden is defined at 5 CFR 1320.3(b).

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

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–OAR–2010–0133. Submit any comments related to the ICR to EPA and OMB. *See* **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after July 20, 2010, a comment to OMB is best assured of having its full effect if OMB receives it by August 19, 2010. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, we certify that this proposed action will not have a significant economic impact on a substantial number of small entities. This rule sets the annual standard for cellulosic biofuels, proposes a regulatory provision for the generation of Delayed RINs, and establishes criteria for foreign countries to adopt an aggregate approach of compliance with the renewable biomass provision similar to that used in the U.S. However, the impacts of the RFS2 program on small entities were already addressed in the RFS2 final rule promulgated on March 26, 2010 (75 FR 14670). Therefore, this proposed rule will not impose any additional requirements on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

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

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. This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This proposed rule does not have tribal implications, as this rule will be implemented at the Federal level and impose compliance costs only on transportation fuel refiners, blenders, marketers, distributors, importers, and exporters. Tribal governments would be affected only to the extent they purchase and use regulated fuels. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks and because it implements specific standards established by Congress in statutes.

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.

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action does not relax the control measures on sources regulated by the RFS2 regulations and therefore will not cause emissions increases from these sources.

VIII. Statutory Authority

Statutory authority for this action comes from section 211 of the Clean Air Act, 42 U.S.C. 7545. Additional support for the procedural and compliance related aspects of today's proposal, including the proposed recordkeeping requirements, come from Sections 114, 208, and 301(a) of the Clean Air Act, 42 U.S.C. Sections 7414, 7542, and 7601(a).

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Diesel Fuel, Fuel additives, Gasoline, Imports, Labeling, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: July 9, 2010.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 80 is proposed to be amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

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

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

2. Section 80.1426 is amended by revising paragraph (e)(1) and adding paragraph (g) to read as follows:

§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

* * * * *

(e) * * *

(1) Except as provided in paragraph (g)(7) of this section for delayed RINs, the producer or importer of renewable fuel must assign all RINs generated to volumes of renewable fuel.

* * * * *

(g) *Delayed RIN generation.* Parties who produce or import renewable fuel may generate delayed RINs to represent renewable fuel volumes that have already been transferred to another party if those renewable fuel volumes can be described by a pathway that has been added to Table 1 to § 80.1426 on or after July 1, 2010 and before January 1, 2011.

(1) When a new pathway is added to Table 1 to § 80.1426, EPA will specify the effective date of that new pathway.

(2) Delayed RINs must be generated within 30 days of the effective date of the rule in which the pathway is added.

(3) Delayed RINs may only be generated to represent renewable fuel produced or imported between July 1, 2010 and the effective date of the rule in which the pathway is added.

(4) If a party originally generated and transferred RINs with renewable fuel volumes, and those RINs can be described by a pathway added to Table 1 to § 80.1426 on or after July 1, 2010 and before January 1, 2011, that party must retire a number of gallon-RINs prior to generating delayed RINs.

(i) The number of gallon-RINs retired must not exceed the number of gallon-RINs originally generated to represent the renewable fuel volumes produced or imported between July 1, 2010 and the effective date of the rule in which the pathway is added.

(ii) Retired RINs must have a D code of 6.

(iii) Retired RINs must have a K code of 2.

(iv) Retired RINs must have been generated in 2010.

(5) For parties that retire RINs pursuant to paragraph (g)(4) of this section, the number of delayed gallon-RINs generated shall be equal to the number of gallon-RINs retired.

(6) For parties that did not retire RINs pursuant to paragraph (g)(4) of this section, the number of delayed gallon-RINs generated shall be determined pursuant to paragraph (f) of this section.

(i) The standardized volume of fuel (V_s) used to determine the RIN volume (V_{RIN}) under paragraph (f) of this section shall be the standardized volume of renewable fuel produced or imported between July 1, 2010 and the effective date of the rule in which the pathway is added.

(ii) The renewable fuel for which delayed RINs are generated must be described by a pathway that has been added to Table 1 to § 80.1426 on or after July 1, 2010 and before January 1, 2011.

(7) All delayed RINs generated by a renewable fuel producer must be generated on the same date.

(8) Delayed RINs shall have a K code of 2.

(9) The D code that shall be used in delayed RINs generated shall be the D code specified in Table 1 to § 80.1426 which corresponds to the pathway that describes the producer's operations.

3. Section 80.1454 is amended by revising paragraph (g) introductory text to read as follows:

§ 80.1454 What are the recordkeeping requirements under the RFS Program?

* * * * *

(g) *Aggregate compliance with renewable biomass requirement.* Any producer or RIN-generating importer of renewable fuel made from planted crops or crop residue from existing U.S. agricultural land as defined in § 80.1401, or any producer or RIN-generating importer of renewable fuel made from feedstock covered by a petition approved pursuant to § 80.1457, is subject to the aggregate compliance approach and is not required to maintain feedstock records unless EPA publishes a finding that the 2007 baseline amount of agricultural land has been exceeded or that the criterion in § 80.1457(a) is no longer satisfied.

* * * * *

4. Section 80.1457 is added to read as follows:

§ 80.1457 Petition process for international aggregate compliance approach.

(a) EPA may approve a petition for application of the aggregate compliance approach to non-U.S. planted crops and crop residues from existing foreign agricultural land if it determines that an aggregate compliance approach will provide reasonable assurance that specified renewable fuel feedstocks from a given geographical area meet the definition of renewable biomass and will continue to meet the definition of renewable biomass, based on the submission of credible, reliable, and verifiable data.

(1) As part of its evaluation, EPA will consider:

(i) Whether there has been a reasonable identification of the

aggregate amount of agricultural land in the specified geographical area as of December 19, 2007 that was available for the production of the specified feedstock(s) and that satisfy the definition of renewable biomass;

(ii) Whether information from years preceding and following 2007 shows that the 2007 amount of agricultural land identified in paragraph (a)(1)(i) of this section is not likely to be exceeded in the future;

(iii) Whether economic considerations, legal constraints, historical land use and agricultural practices, and/or other factors show that it is likely that producers of the feedstock(s) will continue to use agricultural land within area of land identified in paragraph (a)(1)(i) of this section in the future as opposed to clearing and cultivating land that was not included in that area of land.

(iv) Whether there is a reliable method to evaluate on a continuing basis whether the 2007 area of land identified in paragraph (a)(1)(i) of this section is being exceeded; and

(v) Whether an entity has been identified to conduct data gathering and analysis needed for the evaluation specified in paragraph (a)(1)(iv) of this section, for submission to EPA on an annual basis if EPA grants the petition.

(2) [Reserved]

(b) Any petition submitted under paragraph (a) of this section must be in the English language, and must include all of the following, or an explanation of why it is not needed for EPA to approve the petition:

(1) Maps or electronic data identifying the boundaries of the land for which the petitioner seeks approval of an aggregate compliance approach.

(2)(i) For petitions regarding crops or crop residue, the total amount of land that is cropland or pastureland within the geographic boundaries specified in paragraph (b)(1) of this section that was cleared or cultivated prior to December 19, 2007 and that was actively managed or fallow and nonforested on that date, and the total amount of land that is cropland or pastureland within the geographic boundaries specified in paragraph (b)(1) of this section that was not cleared or cultivated prior to December 19, 2007 and actively managed or fallow and nonforested on that date.

(ii) If the petitioner is seeking approval of the aggregate compliance approach for a particular planted crop or crop residue, the total amount of land within the geographic boundaries specified in paragraph (b)(1) of this section that was used for the production of that feedstock in 2007 and that was actively managed or fallow and nonforested on that date, and the total amount of land within the geographic boundaries specified in paragraph (b)(1) of this section that was used for the production of that feedstock in 2007 that was not cleared or cultivated prior to December 19, 2007 and actively managed or fallow and nonforested on that date.

(3) A description of the feedstock(s) for which the petitioner is submitting the petition.

(4) Land use data that demonstrates that the land in question in paragraph (b)(1) of this section is cropland or pastureland that was cleared or cultivated prior to December 19, 2007 and that was actively managed or fallow and nonforested on that date, which may include any of the following:

(i) Satellite imagery data.

(ii) Aerial photography.

(iii) Census data.

(iv) Agricultural surveys.

(v) Agricultural economic modeling data.

(5) Historical land use data for the land within the geographic boundaries specified in paragraph (b)(1) of this section to the current year, which may include any of the following:

(i) Satellite imagery data.

(ii) Aerial photography.

(iii) Census data.

(iv) Agricultural surveys.

(v) Agricultural economic modeling data.

(6) A description of any applicable laws, agricultural practices, economic considerations, or other relevant factors that had or may have an effect on the use of the land within the geographic boundaries specified in paragraph (b)(1) of this section.

(7) A plan describing how the petitioner will identify an entity who will, on a continuing basis, conduct data gathering, analysis, and submittal to assist EPA in making an annual determination of whether the criterion specified in paragraph (a) of this section remains satisfied.

(8) Any additional information the Administrator may require.

(c) If EPA approves a petition it will issue a **Federal Register** notice announcing its decision and specifying an effective date for the application of the aggregate compliance approach to the specified feedstock(s) from the specific geographical area. Thereafter, the specified feedstocks from the specified area will be covered by the aggregate compliance approach set forth in § 80.1454(g), or as otherwise specified pursuant to paragraph (d) of this section.

(d) If EPA grants a petition to establish an aggregate compliance approach for a specified feedstock(s) from a specific geographical area, it may include any conditions that EPA considers appropriate in light of the conditions and circumstances involved.

(e)(1) EPA may withdraw its approval of the aggregate approach for the area and feedstocks in question if:

(i) EPA determines that the data submitted pursuant to the plan described in paragraph (b)(7) of this section does not demonstrate that the amount of cropland and pastureland within the geographic boundaries covered by the approved petition does not exceed the 2007 baseline amount of land;

(ii) EPA determines based on other information that the criterion specified in paragraph (a) of this section is no longer satisfied; or

(iii) EPA determines that the data needed for its annual evaluation has not been collected and submitted in a timely and appropriate manner.

(2) If EPA withdraws its approval, then producers using feedstocks from that area will be subject to the individual recordkeeping and reporting requirements of § 80.1454(b) through (d) in accordance with the schedule specified in § 80.1454(g).

[FR Doc. 2010–17281 Filed 7–19–10; 8:45 am]

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Part IV

Securities and Exchange Commission

5 CFR Part 4401 and 17 CFR Part 200
Adoption of Supplemental Standards of Ethical Conduct for Members and Employees of the Securities and Exchange Commission and Revisions to the Commission's Ethics Rules; Final Rule

SECURITIES AND EXCHANGE COMMISSION

5 CFR Part 4401 and 17 CFR Part 200

[Release No. 34–62501]

Adoption of Supplemental Standards of Ethical Conduct for Members and Employees of the Securities and Exchange Commission and Revisions to the Commission's Ethics Rules

AGENCY: Office of Government Ethics and Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission with the concurrence of the Office of Government Ethics is adopting supplemental standards of ethical conduct for the Commission's members and employees. The new supplemental standards give guidance to Commission members and employees on permitted, prohibited, and restricted financial interests and transactions and on engaging in outside employment and activities. In addition, the Commission has revised its ethics rules to make them compatible with the Office of Government Ethics' government-wide ethics provisions and to reflect current Commission policies.

DATES: *Effective Date:* August 19, 2010.

FOR FURTHER INFORMATION CONTACT: Richard E. Connor, Office of the General Counsel, (202) 551–5170, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1050.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission with the concurrence of the Office of Government Ethics ("OGE") is adopting supplemental standards of ethical conduct for the Commission's members and employees. The Commission first adopted conduct regulations in 1953 "to restate the ethical principles which it believes should govern and have governed the conduct of members and employees and former members and employees." Subsequent comprehensive revisions in 1966 and 1980 were enacted to provide members, employees, special government employees, and former Commission members and employees with a comprehensive statement of standards of conduct which are dictated by applicable Federal law, Executive Orders, and the Commission's own requirements.[5]

Executive Order 12674, as amended by Executive Order 12731, authorized OGE to establish a single, comprehensive, and clear set of executive-branch standards of conduct. On August 7, 1992, OGE published the Standards of ethical conduct for employees of the executive branch, codified at 5 CFR part 2635, to establish uniform standards of ethical conduct for all executive branch employees.[6] With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch agencies to publish agency-specific supplemental regulations necessary to implement their respective ethics programs.

The Commission has responsibility for oversight of the securities industry and the protection of investors. These new supplemental standards are necessary to re-codify and provide guidance to Commission members and employees on permitted, prohibited, and restricted financial interests and transactions and on engaging in outside employment and activities. The Commission is also updating its existing ethics rules to conform to OGE's government-wide ethics obligations and reflect current Commission policies.

A. The Commission's supplemental standards are contained in new 5 CFR part 4401. New Rule 4401.101 (General) states that Commission members and employees must comply with 5 CFR part 2635 (Standards of ethical conduct for employees of the executive branch). New Rule 4401.101 further states that members and employees are subject to the Executive branch financial disclosure regulations, 5 CFR part 2634; the Office of Personnel Management's Employee responsibilities and conduct regulations at 5 CFR part 735; and 17 CFR part 200, subparts C and M, as amended, the Commission's Canons of ethics and the Regulation concerning conduct of members and employees and former members and employees.

New Rule 4401.102 (Prohibited and restricted financial interests and transactions) supersedes former Commission ethics rule 735–5 (Securities transactions). New Rule 4401.102(a) provides that the rule's provisions apply to all securities holdings or transactions effected directly or indirectly on behalf of the member or employee. The rule's requirements also extend to holdings and transactions of or on behalf of the member's or employee's spouse, unemancipated minor children, or persons for whom the member or employee serves as legal guardian.

New Rule 4401.102(b)(1) prohibits members and employees from purchasing or selling a security while in possession of material nonpublic information, as defined in 5 CFR 2635.703(b). Rule 2635.703(b) states that nonpublic information is information that the individual gains through his or her Federal position, which the person knows or reasonably should know is not available to the general public. Under this definition, nonpublic information includes information routinely exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552 or otherwise protected by statute, rule, or Executive Order; information that the Commission designates as confidential; and information that is not generally available to the public and that the Commission has not actually released or disseminated.[7]

New Rule 4401.102(b)(2) prohibits members or employees from recommending or suggesting the purchase or sale of a security either based on material nonpublic information about the security or which the member or employee cannot purchase or sell because of this rule's restrictions.

New Rule 4401.102(c) states that members and employees may not—

—Knowingly purchase or hold a security or other financial interest in an entity directly regulated by the Commission;

—Purchase a security in an initial public offering ("IPO") for seven calendar days after the IPO is effective, except for IPOs of shares in a registered investment company or other publicly traded or publicly available collective investment fund;

—Purchase or carry securities on margin;

—Sell securities short;[8]

—Enter into a financial relationship or obtain a loan from an entity or person directly regulated by the Commission and receive terms more favorable than would be available in like circumstances to members of the public, except as otherwise permitted

[5] *See, e.g.,* 45 FR 36064 (May 29, 1980).

[6] *See* 57 FR 35006–35067 (Aug. 7, 1992), as corrected at 57 FR 48557 (Oct. 27, 1992) and 57 FR 52583 (Nov. 4, 1992), with additional grace period extensions at 59 FR 4779–4780 (Feb. 2, 1994), 60 FR 6390–6391 (Feb. 2, 1995), 60 FR 66857–66858 (Dec. 27, 1995) and 61 FR 40950–40952 (Aug. 7, 1996).

[7] Prohibitions regarding disclosure or use of confidential or nonpublic information are set forth in Clause 30 of Schedule A of the Securities Act of 1933, 15 U.S.C. 77aa(30) and Securities Act Rules 122 and 406 (17 CFR 230.122, 230.406); sections 13(f)(3) and 24(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)(3), 78x) and Exchange Act Rule 0–4 (17 CFR 240.24b–2); section 45(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–44) and Investment Company Act Rule 45a–1 (17 CFR 270.45a–1); and section 210(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–10).

[8] Short selling is defined in 17 CFR 242.200(a).

by 5 CFR 2635, subpart B (Gifts from outside sources);

—Engage in any transactions involving derivatives, except for transactions in shares in a registered investment company or other publicly traded or publicly available collective investment fund; or

—Purchase or sell any security of an entity that is under investigation by the Commission, a party to a proceeding before the Commission, or a party to a proceeding in which the Commission is a party.

New Rule 4401.102(d)(1) generally requires members and employees to clear any securities or related financial transaction. Currently, the Commission is clearing transactions through the Ethics Program System ("EPS") computer system. New Rule 4401.102(d)(2) provides that, if the member or employee obtains clearance of the transaction as provided in the rule, that clearance will be prima facie evidence that the member or employee did not knowingly purchase, sell, or hold a security of a regulated entity; improperly purchase an IPO or engage in a transaction in a derivative; or improperly purchase or sell a security of an entity subject to Commission investigation or enforcement action.

New Rule 4401.102(e) provides generally that members and employees must hold a security for a minimum of six months from the trade date.[9] Under new Rule 4401.102(e)(2), the holding period does not apply to securities that are sold for 90 percent or less of their original purchase price; securities with an initial term of less than six months that are held to term; or shares in money market funds. New Rule 4401.102(e)(3) requires members and employees to hold shares of registered investment companies for a minimum of 30 days from the purchase date.

New Rule 4401.102(f)(1) generally requires members and employees to report all securities holdings as required by the Designated Agency Ethics Official ("DAEO"). Currently, this reporting occurs through EPS. Also, members and employees must provide duplicate statements for every account containing reportable securities to the DAEO. Under new Rule 4401.102(f)(2) members and employees must report all purchases and sales within five days of receipt of confirmation of the transaction.[10] The reporting of purchases and sales is also done through EPS.

Consistent with current Commission standards, new Rule 4401.102(g)(1) excludes certain transactions and holdings from the rule's requirements. Certain holdings and transactions are excluded from the prohibition of new Rule 4401.102(c) and the prior clearance, holding period, and reporting requirements. These include:

—Transactions effected by the member's or employee's spouse on behalf of someone other than the member or employee, the spouse, their unemancipated minor child, or a person for whom the member or employee serves as legal guardian;

—Holdings or transactions effected by a member's or employee's legally separated spouse living apart from the member or employee (even if for their unemnacipated minor child) so long as the member or employee does not in fact control, advise with respect to, or have knowledge of these holdings and transactions;

—U.S. Government or Federal government agency securities;

—Investments in the Thrift Savings Plan or a government retirement plan administered by a Federal agency; and

—Certificates of deposit and comparable instruments issued by depository institutions subject to Federal regulation and Federal deposit insurance.

In accordance with existing standards, new Rule 4401.102(g)(2) provides that certain additional transactions are not prohibited by new Rule 4401.102(c) and excludes these holdings and transactions from the prior clearance and holding requirements. However, these interests must be reported in accordance with new Rule 4401.102(f).

This exclusion applies to:

—The holdings of a trust in which the member or employee (or the member's or employee's spouse, the member's or employee's unemancipated minor child, or person for whom the member or employee serves as legal guardian) is (i) solely a vested beneficiary of an irrevocable trust or (ii) solely a vested beneficiary of a revocable trust where the trust instrument expressly directs the trustee to make present, mandatory distributions of trust income or principal; provided, that the member or employee did not create the trust, has no power to control, and does not, in fact, control or advise with respect to the holdings and transactions of the trust or have knowledge of its holdings or transactions;

—The acceptance or reinvestment of stock dividends on securities already owned;

—The exercise of a right to convert securities; and

—The acquisition of stock or the acquisition or exercise of employee stock options or similar instruments received as compensation and issued by either (i) a member's or employee's former employer or (ii) the present or former employer of the member's or employee's spouse.

New Rule 4401.102(h) sets forth the circumstances under which members and employees may seek a waiver of the requirements of the rule.

New Rule 4401.103 supersedes in part Commission rule 735–4, 17 CFR 200.735–4 (Outside employment and activities) and sets forth the circumstances under which Commission members, employees, and special government employees may engage in outside employment or activities. New Rule 4401.103(a)(2) broadly defines employment to include any form of non-Federal employment or business relationship, involving the provision of personal service by the employee. The definition includes acting as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher, writer, or speaker. The rule excludes participation in certain nonprofit religious, charitable, and civic organizations from the definition of employment unless the person (i) serves as an officer or director; (ii) provides professional services or advice; (iii) receives compensation (other than reimbursement for expenses) from the organization; or (iv) is an active participant as defined in 5 CFR 2635.502(b)(1)(v) on a committee of a professional organization whose interests may be substantially affected by the Commission.

New Rule 4401.103(b) encourages members and employees to participate in *pro bono* and community service so long as that service is consistent with OGE's requirements including 5 CFR parts 2634 (governing financial reporting) and 2635 (establishing the government-wide ethics standards), as well as the restrictions contained in 18 U.S.C. 203 (prohibiting seeking or receiving compensation for representational services before the Government), 205 (prohibiting assisting in prosecution of claims against or acting as attorney or agent before the Government), and 208 (prohibiting an employee's participation in matters

[9] This rule applies to securities purchased after Commission employment.

[10] Any person who receives a conditional offer of employment from the Commission must report all securities holdings after acceptance of that offer and before commencement of employment with the Commission on the prescribed form. These reports are currently received on SEC Form 682.

affecting the employee's own financial interest and those of certain specified persons and organizations).

Under new Rule 4401.103(d)(1), each employee must obtain prior approval before engaging in any outside employment, whether or not for compensation. New Rule 4401.103(c)(1)(i) provides that no employee may engage in any outside employment or activity that conflicts with Commission employment. New Rule 4401.103(c)(1)(iii) prohibits any employee from (i) outside employment on behalf of any entity regulated by the Commission; (ii) engaging in activity directly or indirectly related to the issuance, purchase, investment, or trading of securities or securities futures, except for securities holdings or transactions permitted by new Rule 4401.102; or (iii) engaging in work otherwise involved with the securities industry. Commission members are subject to the restrictions of Section 4(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78d(a).

Under new Rule 4401.103(d)(2), an employee's request for prior approval of any outside employment must be made both to the appropriate Division Directors, Office Heads, or Regional Directors as well as the Commission's Office of the General Counsel's Ethics Office. New Rule 4401.103(d)(3) requires that the request identify the proposed outside employer; describe the work to be performed, the duration of the employment, and any compensation to be received; and include a statement that the employee will disqualify himself or herself from matters involving the proposed employer.

Under new Rule 4401.103(d)(4), the request must be updated annually or if there is a significant change in either the nature of the employment or in the employee's position with the Commission. New Rule 4401.103(d)(5) provides that approval will be granted only if the outside employment does not involve conduct prohibited by law or regulation, including the government-wide ethics requirements in 5 CFR part 2635.

B. The Commission is separately amending its Regulation concerning conduct of Commission members and employees and former members and employees, 17 CFR 200–735–1 *et seq.* These amendments generally delete Commission requirements that are duplicative of OGE's government-wide requirements. The amendments also direct members, employees, special government employees, and former members and employees to the applicable ethics laws and regulations for ease of reference.

Certain Commission ethics requirements remain in effect. Under 17 CFR 200.735–3(b) (General provisions), a member or employee shall not engage in any personal business transaction or arrangement for personal profit which arises from his or her official position or authority or is based on nonpublic information obtained by virtue of that position or authority. The restrictions on release of nonpublic Commission documents contained in 17 CFR 200.735–3(b)(2) (Policy) (formerly Rule 735–3(b)(7)) also remain in effect. The Commission encourages its members and employees to engage in teaching, lecturing, and writing. Therefore, the provisions governing those activities, including the clearance of publications and speeches, contained in 17 CFR 200.735–4(b) and (d) (formerly Rules 735–4(b)(5) and (e)), continue.

The Commission will also continue to require any former member or employee who is retained or employed to represent any person before the Commission within two years of leaving the Commission to provide written notice of that representation. 17 CFR 200.735–8(b) (Practice by former members and employees of the Commission).

The amendments also replace references to the Director of Personnel with references to the General Counsel, the Commission's Office of the General Counsel's Ethics Office, and the Designated Agency Ethics Official to reflect current agency practice.

I. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with section 553(b)(3)(A) of the Administrative Procedure Act,[11] that these rules relate solely to agency organization, procedure, or practice. These rules are therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act[12] therefore does not apply. Because these rules relate to "agency organization, procedure or practice that does not substantially affect the right or obligations of non-agency parties," they are not subject to the Small Business Regulatory Enforcement Fairness Act.[13] The rules do not contain any new collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[14]

[11] 5 U.S.C. 553(b)(3)(A).

[12] 5 U.S.C. 601 *et seq.*

[13] 5 U.S.C. 804(3)(C).

[14] 44 U.S.C. 3501 *et seq.*

II. Costs and Benefits of the Amendments

Taken as a whole, the Commission and the public have a substantial interest in the integrity of the Commission's processes. Congress has directed the Commission to oversee the securities markets and securities professionals and to protect investors. To that end, the ethical standards contained in the rules enacted today require the Commission's members and employees to maintain high standards of honesty, integrity, and impartiality, and to avoid actual, or the appearance of, conflicts of interest.

In general, the costs of the procedures in the Commission's rules of practice fall largely on the Commission and its employees. As noted, the amendments set forth in this release relate to internal agency management. These rules re-codify pre-existing obligations on the Commission's members and employees with certain minor modifications. As such, the Commission believes that the costs imposed by compliance with these amended rules have not substantially increased from the obligations of Commission members and employees before these amendments.

III. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act, 15 U.S.C. 78w(a)(2), requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition. The purposes of the Exchange Act include protection of interstate commerce and maintenance of fair and honest markets. The degree of trust that investors and the public have in the Commission and its employees is critical to these goals. The Commission and its employees must adhere to the highest standards of integrity and impartiality and avoid the appearance of conflicts of interest. These rules affect a relatively small number of persons. Therefore, the Commission has determined that the burden on competition is small and is necessary and appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b) of the Securities Act, 15 U.S.C. 77b(b); Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f); Section 2(c) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(c); and Section 202(c) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–2(c) require that the Commission consider efficiency, competition, and capital formation, in addition to the protection of investors, whenever it is required to consider or

determine whether an action is necessary or appropriate in the public interest. As noted above, these rules apply to a relatively small number of people and do not substantially alter their pre-existing obligations. The Commission believes that the amendments that the Commission is adopting today will have a small impact on competition, the capital markets, or capital formation.

IV. Statutory Basis for the Rules

These new supplemental rules and the amendments to the Commission's ethics rules are being adopted pursuant to statutory authority granted to OGE and to the Commission. These include 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); section 19 of the Securities Act of 1933, 15 U.S.C. 77s; section 23 of the Securities Exchange Act of 1934, 15 U.S.C. 78w; section 319 of the Trust Indenture Act of 1939, 15 U.S.C. 77sss; section 40 of the Investment Company Act of 1940, 15 U.S.C. 80a–39; and section 211 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–11.

List of Subjects

5 CFR Part 4401

Administrative practice and procedure, Conduct and Ethics.

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government Agencies), Conduct and Ethics, Information and Requests, and Organization.

■ For the reasons set out in the preamble, Title 5 of the Code of Federal Regulations and Title 17, Chapter II, Part 200, are amended as follows:

TITLE 5—ADMINISTRATIVE PERSONNEL

■ 1. Add a new chapter XXXIV, consisting of part 4401 to read as follows:

CHAPTER XXXIV—SECURITIES AND EXCHANGE COMMISSION

PART 4401—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR MEMBERS AND EMPLOYEES OF THE SECURITIES AND EXCHANGE COMMISSION

Sec.

4401.101 General.
4401.102 Prohibited and restricted financial interests and transactions.
4401.103 Outside employment and activities.

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159; 3 CFR 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547; 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.403, 2635.803; 15 U.S.C. 77s, 78w, 77sss, 80a–37, 80b–11.

§ 4401.101 General.

In accordance with 5 CFR 2635.105, the regulations in this part apply to members and employees of the Securities and Exchange Commission ("Commission") and supplement the Standards of ethical conduct for employees of the executive branch contained in 5 CFR part 2635. Members and employees of the Commission are required to comply with 5 CFR part 2635 and this part. In addition, they are subject to the Executive branch financial disclosure regulations, 5 CFR part 2634; the Office of Personnel Management Employee responsibilities and conduct regulations at 5 CFR part 735; and the Commission's Canons of ethics and Regulation concerning conduct of members and employees and former members and employees, 17 CFR part 200, subparts C and M.

§ 4401.102 Prohibited and restricted financial interests and transactions.

(a) *Applicability.* The requirements of this section apply to all securities holdings or transactions effected, directly or indirectly, by or on behalf of a member or employee, the member's or employee's spouse, the member's or employee's unemancipated minor child, or any person for whom the member or employee serves as legal guardian. A member or employee is deemed to have sufficient interest in the securities holdings and transactions of his or her spouse, unemancipated minor child, or person for whom the member or employee serves as legal guardian that such holdings or transactions are subject to all the terms of this part.

(b) *In general.*

(1) Members and employees are prohibited from purchasing or selling any security while in possession of material nonpublic information regarding that security. Nonpublic information has the meaning as provided in 5 CFR 2635.703(b).

(2) Members and employees are prohibited from recommending or suggesting to any person the purchase or sale of security:

(i) Based on material nonpublic information regarding that security; or

(ii) That the member or employee could not purchase or sell because of the restrictions contained in this Rule.

(c) *Prohibited and restricted holdings and transactions.* Members and employees are prohibited from:

(1) Knowingly purchasing or holding a security or other financial interest in an entity directly regulated by the Commission;

(2) Purchasing a security in an initial public offering ("IPO") for seven calendar days after the IPO effective date, except that this prohibition does not apply to an IPO of shares in a registered investment company or other publicly traded or publicly available collective investment fund;

(3) Purchasing or otherwise carrying securities on margin;

(4) Selling securities short as defined in 17 CFR 242.200(a);

(5) Accepting a loan from, or entering into any other financial relationship with, an entity, institution or other person directly regulated by the Commission if the loan or financial relationship is governed by terms more favorable than would be available in like circumstances to members of the public, except as otherwise permitted by 5 CFR part 2635, subpart B (Gifts from outside sources);

(6) Engaging in transactions involving financial instruments that are derivatives of securities (that is, the value of the security depends on or is derived from, in whole or in part, the value of another security, or a group, or an index of securities), except that this prohibition does not apply to transactions in shares in a registered investment company or other publicly traded or publicly available collective investment fund; and

(7) Purchasing or selling any security issued by an entity that is:

(i) Under investigation by the Commission;

(ii) A party to a proceeding before the Commission; or

(iii) A party to a proceeding to which the Commission is a party.

(d) *Prior clearance of transactions in securities or related financial interests.*

(1) Except as set forth in paragraph (g) of this section, members and employees must confirm before entering into any security or other related financial transaction that the security or related financial transaction is not prohibited or restricted as to them by clearing the transaction in the manner required by the Designated Agency Ethics Official ("DAEO"). A member or employee will have five business days after clearance to effect a transaction.

(2) Documentation of the clearance of any transaction pursuant to this paragraph (d) shall be prima facie evidence that the member or employee has not knowingly purchased, sold, or held such financial interest in violation of the provisions of paragraphs (c)(1), (2), (6), or (7) of this section.

(3) The DAEO shall be responsible for administering the Commission's

clearance systems. The DAEO shall maintain a record of securities that members and employees may not purchase or sell, or otherwise hold, because such securities are the subject of the various prohibitions and restrictions contained in this section.

(e) *Holding periods for securities and related financial interests.*

(1) *General rule.* Except as set forth in paragraph (g) and in paragraphs (e)(2) and (3) of this section, members and employees must hold a security purchased after commencement of employment with the Commission for a minimum of six (6) months from the trade date.

(2) *General exceptions.* This holding period does not apply to:

(i) Securities sold for ninety percent (90) or less of the original purchase price;

(ii) Securities with an initial term of less than six (6) months that are held to term; and

(iii) Shares in money market funds, as defined in Rule 12d1–1(d)(2), 17 CFR 270.12d1–1(d)(2).

(3) *Exception for shares in registered investment companies.* Members and employees must hold shares in registered investment companies for a minimum of thirty (30) days from the purchase date.

(f) *Reporting requirements.*

(1) Except as set forth in paragraph (g) of this section, members and employees must:

(i) Report and certify all securities holdings according to the schedule required by the DAEO; and

(ii) Submit duplicate statements for every account containing reportable securities to the DAEO according to such procedures required by the DAEO.

(2) Members and employees must report all purchases, sales, acquisitions, or dispositions of securities within five (5) business days after receipt of confirmation of the transaction.

(3) Any person who receives a conditional offer of employment from the Commission must report all securities holdings after acceptance of that offer and before commencement of employment with the Commission on the form prescribed by the Commission.

(g) *Exceptions.*

(1) The following transactions are exempt from the requirements of paragraphs (c), (d), (e), and (f) of this section:

(i) Securities transactions effected by a member's or employee's spouse on behalf of an entity or person other than the member or employee, the member's or employee's spouse, the member's or employee's unemancipated minor child, or any person for whom the member or employee serves as legal guardian;

(ii) Securities holdings and transactions of a member's or employee's legally separated spouse living apart from the member or employee (including those effected for the benefit of the member's or employee's minor child), *provided that* the member or employee has no control, and does not, in fact, control, advise with respect to, or have knowledge of those holdings and transactions;

(iii) Securities issued by the United States Government or one of its agencies;

(iv) Investments in funds administered by the Thrift Savings Plan or by any retirement plan administered by a Federal government agency; and

(v) Certificates of deposit or other comparable instruments issued by depository institutions subject to Federal regulation and Federal deposit insurance.

(2) The following holdings and transactions are exempt from the requirements of paragraphs (c), (d), and (e), but these interests must be reported in accordance with this paragraph (f) of this section:

(i) The holdings of a trust in which the member or employee (or the member's or employee's spouse, the member's or employee's unemancipated minor child, or person for whom the member or employee serves as legal guardian) is:

(A) Solely a vested beneficiary of an irrevocable trust; or

(B) Solely a vested beneficiary of a revocable trust where the trust instrument expressly directs the trustee to make present, mandatory distributions of trust income or principal; provided, the member or employee did not create the trust, has no power to control, and does not, in fact, control or advise with respect to the holdings and transactions of the trust;

(ii) Acceptance or reinvestment of stock dividends on securities already owned;

(iii) Exercise of a right to convert securities; and

(iv) The acquisition of stock or the acquisition or the exercise of employee stock options, or other comparable instruments, received as compensation from an issuer that is:

(A) The member's or employee's former employer; or

(B) The present or former employer of the member's or employee's spouse.

(h) *Waivers.*

(1) Members may request from the Commission a waiver of the prohibitions or limitations that would otherwise apply to a securities holding or transaction on the grounds that application of the rule would cause an undue hardship. A member requests a waiver by submitting a confidential written application to the Commission's Office of the General Counsel's Ethics Office. The DAEO will review the request and provide to the Commission a recommendation for resolution of the waiver request. In developing a recommendation, the DAEO may consult, on a confidential basis, other Commission personnel as the DAEO in his or her discretion considers necessary.

(2) Employees may request from the DAEO a waiver of the prohibitions or limitations that would otherwise apply to a securities holding or transaction on the grounds that application of the rule would cause an undue hardship. An employee requests a waiver by submitting a confidential written application to the Commission's Office of the General Counsel's Ethics Office in the manner prescribed by the DAEO. In considering a waiver request, the DAEO, or his or her designee, may consult with the employee's supervisors and other Commission personnel as the DAEO in his or her discretion considers necessary.

(3) The Commission or the DAEO, as applicable, will provide written notice of its determination of the waiver request to the requesting member or employee.

(4) The Commission or the DAEO, as applicable, may condition the grant of a waiver under this provision upon the agreement to certain undertakings (such as execution of a written statement of disqualification) to avoid the appearance of misuse of position or loss of impartiality, and to ensure confidence in the impartiality and objectivity of the Commission. The Commission or DAEO, as applicable, shall note the existence of conditions on the waiver and describe them in reasonable detail in the text of the waiver-request determination.

(5) The grant of a waiver requested pursuant to this section must reflect the judgment that the waiver:

(i) Is necessary to avoid an undue hardship; and, under the particular circumstances, application of the prohibition or restriction is not necessary to avoid the appearance of misuse of position or loss of impartiality, or otherwise necessary to ensure confidence in the impartiality and objectivity of the Commission;

(ii) Is consistent with 18 U.S.C. 208 (Acts affecting a personal financial interest), 5 CFR part 2635 (Standards of ethical conduct for employees of the executive branch), and 5 CFR part 2640

(Interpretation, exemptions and waiver guidance concerning 18 U.S.C. 208); and

(iii) Is not otherwise prohibited by law.

(6) The determination of the Commission with respect to a member's request for a waiver is final and binding on the member.

(7) The determination of the DAEO with respect to an employee's request for a waiver may be appealed to the Commission, in accordance with the requirements of Rules 430 and 431 of the Commission's Rule of Practice, 17 CFR 201.430, 201.431. The determination of the DAEO or, if appealed, the Commission, is final and binding on the employee.

(8) Notwithstanding the grant of a waiver, a member or employee remains subject to the disqualification requirements of 5 CFR 2635.402 (Disqualifying financial interests) and 5 CFR 2635.502 (Personal and business relationships) with respect to transactions or holdings subject to the waiver.

(i) *Required disposition of securities.* The DAEO is authorized to require disposition of securities acquired as a result of a violation of the provisions of this section, whether unintentional or not. The DAEO shall report repeated violations to the Commission for appropriate action.

§ 4401.103 Outside employment and activities.

(a) *Definitions.* As used in this section:

(1) *Employee* is defined in 5 CFR 2635.102(h) and includes employees and special government employees of the Commission.

(2) *Employment* is defined broadly, as any form of non-Federal employment or business relationship, involving the provision of personal services by the employee. It includes services as an officer, director, employee, agent, attorney, accountant, consultant, contractor, general partner, trustee, teacher, writer, or speaker, but does not include participation in the activities of a nonprofit charitable, religious, professional, civic, or public service organization, unless such activities:

(i) Involve serving as an officer or director of the organization;

(ii) Involve providing professional services or advice to the organization;

(iii) Are for compensation, other than reimbursement of expenses; or

(iv) Involve serving as an active participant (as defined in 5 CFR 2635.502(b)(1)(v)) in a professional organization whose interests may be substantially affected by the Commission.

(3) *Professional services* means practicing a profession as the term "profession" is defined in 5 CFR 2636.305(b)(1).

(4) *DAEO* is the Designated Agency Ethics Official.

(b) *Pro bono and community service.* Subject to the prohibitions, restrictions and requirements contained in law and Federal regulations, including 18 U.S.C. 203 (Compensation to members of Congress, officers, and others in matters affecting the Government), 205 (Activities of officers and employees in claims against and other matters affecting the Government), and 208 (Acts affecting a personal financial interest), 5 CFR part 2634 (Executive branch financial disclosure), 5 CFR part 2635 (Standards of ethical conduct for employees of the executive branch), and paragraph (c) of this section, employees are encouraged to participate in matters involving improvement to their communities, and, when qualified, to provide professional *pro bono* services.

(c) *Prohibitions and restrictions on outside employment and activities.*

(1) *Prohibitions and restrictions on employees other than members.*

(i) No employee may engage in any outside employment or activities that conflict with employment with the Commission.

(ii) No employee shall engage in any outside employment, whether or not for compensation, without prior approval, in accordance with paragraph (d) of this section.

(iii) The Commission will not approve the following kinds of employment or activities:

(A) Employment with any entity regulated by the Commission;

(B) Employment or any activity directly or indirectly related to the issuance, purchase, sale, investment or trading of securities or futures on securities or a group of securities, except this prohibition does not apply to securities holdings or transactions permitted by § 4401.102 of this subpart; or

(C) Employment otherwise involved with the securities industry.

(2) *Prohibitions and restrictions on members.*

(i) Members of the Commission may engage in outside employment only to the extent permitted by Section 4(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78d(a). This provision does not preclude members from engaging in permitted securities transactions.

(ii) Notwithstanding the absence of a statutory prohibition, a member may not engage in any outside employment or activity, if such outside employment or activity would materially impair the member's ability to perform properly the member's duties. Such outside employment or activity includes such fiduciary relationships such as serving as a trustee, executor or corporate director.

(d) *Prior approval requirement.*

(1) An employee, other than a member or special government employee, must obtain written approval before engaging in any outside employment (whether or not for compensation).

(2) Requests for prior approval of outside employment shall be submitted in writing to the appropriate agency designee and to the Commission's Office of the General Counsel's Ethics Office. Agency designees include Division Directors, Office Heads and Regional Directors.

(3) The request shall include, at a minimum:

(i) The name and address of the prospective outside employer;

(ii) A description of the proposed outside employment, including the duties and services to be performed;

(iii) The expected duration of the outside employment;

(iv) The fee or other compensation, if any, to be received by the Commission employee for the outside employment; and

(v) A statement that the employee will disqualify himself or herself, if the request is approved, from participating in particular matters that could directly affect his outside employer during the period of the outside employment and, thereafter, from participating in particular matters involving specific parties, consistent with 5 CFR 2635.502 (Personal and business relationships).

(4) The employee shall submit an updated request for approval:

(i) Annually;

(ii) Upon a significant change in the nature or scope of the outside employment; or

(iii) Upon a significant change in the employee's official position at the Commission.

(5) Approval shall be granted only upon a determination by both the agency designee and Designated Agency Ethics Officers ("DAEO") or by the Commission, on appeal, pursuant to paragraph (d)(6) of this section, that the outside employment is not expected to involve conduct prohibited by law or Federal regulation, including 5 CFR part 2635 (Standards of ethical conduct for employees of the executive branch), and this part.

(6) An employee may appeal the disapproval of a request to engage in outside employment by the agency designee or by the Commission's Office of the General Counsel's Ethics Office to

the Commission in accordance with the requirements of Commission Rules 430 and 431 of the Commission's Rules of Practice, 17 CFR 201.430, 201.431. That appeal shall be submitted in writing to the Commission through the Commission's Office of the General Counsel's Ethics Office and shall explain why the employee believes that his or her request should be approved.

(e) Employees are required to submit proposed publications or prepared speeches relating to the Commission, or the statutes or rules it administers, to the Commission's Office of the General Counsel's Ethics Office for review, pursuant to the Commission's Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission, 17 CFR 200.735–4 (Outside Employment and Activities). Any such publication or speech must include the disclaimer prescribed in 17 CFR 200.735–4(c). Employees who wish to engage in teaching, writing or speaking for compensation should review the provisions of 5 CFR 2635.807 (Teaching, Speaking, and Writing).

TITLE 17—COMMODITY AND SECURITIES EXCHANGES

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart M—Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission

■ 2. The general authority citation for part 200, subpart M is revised to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 80a–37, 80b–11; E.O. 11222, 3 CFR, 1964–1965 Comp., p. 36; 5 CFR 735.104; 5 CFR 2634; and 5 CFR 2635, unless otherwise noted.

■ 3. § 200.735–1 is amended as follows:
■ a. Revising § 200.735–1 to read as follows; and
■ b. Removing footnote 1.

This revision reads as follows:

§ 200.735–1 Purpose.

This subpart sets forth the standards of ethical conduct required of members, employees and special Government employees, and former members and employees of the Securities and Exchange Commission.

■ 4. § 200.735–2(b) is revised to read as follows:

§ 200.735–2 Policy.

* * * * *

(b) For these reasons, members, employees, and special Government employees should at all times abide by the standards of ethical conduct for employees of the executive branch (codified in 5 CFR part 2635); the supplemental standards of ethical conduct for members and employees of the Securities and Exchange Commission (codified in 5 CFR part 4401); the standards of conduct set forth in this subpart; the Canons of ethics for members of the Securities and Exchange Commission (codified in subpart C of this part 200); and, in the case of a person practicing a profession as defined in 5 CFR 2636.305(b)(1), the applicable professional ethical standards.

■ 5. § 200.735–3 is amended by:
■ a. Revising paragraph (a);
■ b. Removing footnote 2 in paragraph (b)(1);
■ c. Removing paragraphs (b)(2) through (b)(6) and footnotes 3 and 4 in paragraphs (b)(3)(vi) and (b)(6) respectively;
■ d. Redesignating paragraph (b)(7) as paragraph (b)(2), removing footnote 5 in paragraph (b)(7)(i), redesignating footnote 6 in paragraph (b)(7)(iii) as footnote 1 and removing the words "section 22(c) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79y) and Rule 104 thereunder (17 CFR 250.104)" and removing the words "*But see,* section 171 of the Administrative Manual which authorizes the staff to divulge certain nonpublic information with Commission approval (n. 5, *supra*)." from the newly redesignated footnote 2 to newly redesignated paragraph (b)(2);
■ e. Removing paragraphs (b)(8) through (b)(12) and footnote 7 in paragraph (b)(8); and
■ f. Adding paragraphs (c), (d), (e), (f), (g), and (h).

The revision and additions read as follows:

§ 200.735–3 General provisions.

(a) A member or employee shall comply with the requirements of 5 CFR part 2635, subpart A (General provisions) and in particular with the provisions of 5 CFR 2635.101 (Basic obligations of public service); 2635.103 (Applicability to members of the uniformed services); and 2635.104 (Applicability to employees on detail).

* * * * *

(c) A member or employee shall comply with the requirements of 5 CFR part 2635, subpart B (Gifts from outside sources).

(d) A member or employee shall comply with the requirements of 5 CFR part 2635, subpart C (Gifts between employees).

(e) A member or employee shall comply with the requirements of 5 CFR part 2635, subpart D (Conflicting financial requirements);

(f) A member or employee shall comply with the requirements of 5 CFR part 2635, subpart E (Impartiality).

(g) A member or employee shall comply with the requirements of 5 CFR part 2635, subpart G (Misuse of position).

(h) No member or employee shall accept host-paid travel or reimbursement except as in accordance with the requirements of the Supplemental standards of ethical conduct for members and employees of the Securities and Exchange Commission (codified at 5 CFR 4401.103 (Outside Employment and Activities)); 5 CFR part 2635, subpart H (Outside Activities); and 31 U.S.C. 353 and 41 CFR 304–1.1 (Acceptance of payment from a non-Federal source for travel expenses).

■ 6. § 200.735–4 is amended by:
■ a. Revising paragraph (a) and removing footnote 8 to paragraph (a);
■ b. Removing paragraphs (b)(1) through (b)(4) and paragraphs (b)(6) through (b)(8);
■ c. Redesignating paragraph (b)(5) as paragraph (b); in redesignated paragraph (b), further redesginating paragraphs (i), (ii), and (iii) as paragraphs (b)(1), (2), and (3); and redesignating footnotes 9 and 10 in newly designated paragraphs (b) introductory text and (b)(3) as footnotes 2 and 3 respectively and removing the words "(*See* 17 CFR 200.735–4(b)(7))" from newly redesignated footnote 2;
■ d. Removing footnote 11;
■ e. Revising paragraph (c) and removing footnotes 12, 13, and 14;
■ f. Removing paragraph (d);
■ g. Redesignating paragraph (e) as paragraph (d) and removing footnote 15 in newly redesignated paragraph (d)(1) and adding new footnote 4 to newly redesignated paragraph (d)(1);
■ h. In newly redesignated paragraph (d)(1), removing the words "paragraph (b)(5)" and, in their place, adding "paragraph (b)", and revising newly redesignated paragraph (d)(2)(ii);
■ i. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h);
■ j. Adding new paragraphs (e) and (f);
■ k. Removing footnote 16 in paragraph (g) and the authority citation at the end of the section.

The revisions and additions read as follows:

§ 200.735–4 Outside employment and activities.

(a) Members and employees shall comply with the requirements of the

Supplemental standards of ethical conduct for members and employees of the Securities and Exchange Commission (codified at 5 CFR 4401.103 (Outside employment and activities) and 5 CFR part 2635, subpart H (Outside activities)).

* * * * *

(c) If otherwise permitted by 18 U.S.C. 203 and 205, the provisions of these rules or of 5 CFR 4401.103 do not preclude an employee from acting as agent or attorney:

(1) For any Commission employee who is sued or under investigation in connection with his or her official duties;

(2) For any Commission employee who is the subject of disciplinary, loyalty, or other personnel administrative proceedings in connection with those proceedings; or

(3) For any Commission employee who raises claims or against whom allegations of wrongdoing are made pursuant to the Commission's Equal Opportunity regulations, if such representation is not inconsistent with the faithful performance of the employee's duties.

(d)(1) * * *[4]

(2) * * *

(ii) (A) A determination by the General Counsel that a proposed publication conforms to the requirements of the rule will not involve adoption of, or concurrence in, the views expressed. Therefore, such publication or speech shall include at an appropriate place or in a footnote or otherwise, the following disclaimer of responsibility:

The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner.

This [article, outline, speech, chapter] expresses the author's views and does not necessarily reflect those of the Commission, the [other] Commissioners, or [other] members of the staff.

(B) In appropriate cases, the above disclaimer may be modified by the General Counsel or the Commission to reflect the circumstances of an individual case. In addition, any publication or speech that reflects positions taken by the Commission shall set forth those positions accurately and, if it contains differences with Commission positions, it shall clearly state that such positions are those of the employee.

(e) With respect to host-paid travel, members and employees shall comply with the requirements of the Supplemental standards of ethical conduct for members and employees of the Securities and Exchange Commission (codified at 5 CFR 4401.103 (Outside employment and activities)); 5 CFR part 2635, subpart H (Outside Activities); and 31 U.S.C. 1353 and 41 CFR 304–1.1 (Acceptance of payment from a non-Federal source for travel expenses).

(f)(1) With respect to seeking or negotiating outside employment, members and employees shall comply with the requirements of the Supplemental standards of ethical conduct for members and employees of the Securities and Exchange Commission (codified at 5 CFR 4401.103 (Outside employment and activities)); 5 CFR part 2635, subpart F (Seeking other employment); 5 CFR part 2635, subpart H (Outside activities).

(2) Members and employees should be aware that 18 U.S.C. 208 (Acts affecting a personal interest) provides, among other things, that a member or employee is prohibited from participating personally and substantially in any particular matter in which, to his or her knowledge, the member or employee, his or her spouse, minor child, general partner, organization of which the employee is an officer, director, trustee, general partner or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest. This provision does not apply if the employee has received a written determination by an authorized official that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's government service.

(3) Members may follow the procedural provision contained in Part V, Section 503 of the Executive Order 11222.

* * * * *

■ 7. § 200.735–5 is amended by:

■ a. Revising § 200.735–5; and

■ b. Removing footnote 17 in paragraph (b)(1)(ii).

The revision reads as follows:

§ 200.735.5 Securities transactions.

Securities transactions by members and employees must comply with the provisions of 5 CFR 4401.102 (Prohibited and restricted financial interests and transactions).

■ 8. § 200.735–6 is amended by:

■ (a) Revising § 200.735–6; and

■ (b) Removing footnote 18.

The revision reads as follows:

§ 200.735–6 Action in case of personal interest.

Members and employees shall comply with the requirements of 5 CFR part 2640 (Interpretation, exemptions, and waiver guidance concerning 18 U.S.C. 208 (Acts affecting a personal interest)).

■ 9. § 200.735–7 is amended by:

■ (a) Revising 200.735–7;

■ (b) Removing footnote 19 in paragraph (c).

The revision reads as follows:

§ 200.735–7 Negotiation for employment.

Members and employees shall comply with the requirements of 18 U.S.C. 208 (Acts affecting a personal interest) and 5 CFR part 2635, subpart F (Seeking other employment). *See* § 200.735–4(f)(2) of this subpart.

■ 10. § 200.735–8 is amended as follows:

■ a. Revising paragraph (a) and removing footnotes 20 and 21 in paragraph (a);

■ b. Removing footnote 22 in paragraph (a)(4);

■ c. In paragraph (d)(1) removing the words "by paragraph (a)(1) of this section";

■ d. In paragraph (d)(2) removing the words "under paragraph (a)(1) of this section";

■ e. Redesignating footnote 23 in paragraph (d)(3) as footnote 5; and

■ f. Redesignating footnote 24 in paragraph (e) as footnote 6.

The revisions read as follows:

§ 200.735–8 Practice by former members and employees of the Commission.

(a) Members and employees and former members and employees shall comply with the requirements of 18 U.S.C. 207 and 5 CFR part 2641 (Post employment conflict of interest restrictions). Members and employees and former members and employees should be aware that, among other restrictions, 18 U.S.C. 207 generally prohibits a former member or employee from knowingly communicating to or appearing before a Federal agency with the intent to influence a particular matter involving specific parties in which that person personally and substantially participated while at the Commission.

* * * * *

■ 11. § 200.735–9 is revised to read as follows:

§ 200.735–9 Indebtedness.

Members and employees shall comply with the requirements of 5 CFR 2635.809 (Just financial obligations).

■ 12. § 200.735–10 is revised to read as follows:

[4] This paragraph (d), requiring review of prepared speeches or writings relating to the Commission does not apply to teaching activities.

§ 200.735–10 Miscellaneous statutory provisions.

Each member and employee is responsible for acquainting himself or herself with the statutory provisions listed in 5 CFR 2635.902 (Related statutes). A violation of any of these provisions is deemed a violation of this subpart M.

■ 13. § 200.735–11 is amended as follows:

■ a. Revising paragraph (a) and removing footnote 25 in paragraph (b);

■ b. Removing paragraphs (c) through (f);

■ c. Redesignating paragraph (g) as paragraph (c), removing the words "paragraph (c)" and in their place, adding the words "paragraph (a)" and removing the words "Director of Personnel" and in their place, adding the words "Commission's Office of the General Counsel's Ethics Office" in newly redesignated paragraph (c);

■ d. Redesignating paragraph (h) through (i) as paragraphs (d) through (e);

■ e. Removing paragraph (j);

■ f. Redesignating paragraphs (k) through (l) as paragraph (f) through (g);

■ g. In newly redesignated paragraph (d), removing each time they appear the words "Director of Personnel or the Assistant Director of Personnel" and, in their place, adding the words "Commission's Office of the General Counsel's Ethics Office"; and

■ h. In newly redesignated paragraph (e), removing the words "paragraph (c)" and in their place, adding the words "paragraph (a)"; and removing the words "Director of Personnel or the Assistant Director of Personnel" and, in their place, adding the words "Commission's Office of the General Counsel's Ethics Office".

The revision reads as follows:

§ 200.735–11 Statement of employment and financial interests.

(a) Members and employees shall file financial disclosure reports in accordance with the requirements of 5 CFR part 2634 (Executive branch financial disclosure).

* * * * *

■ 14. § 200.735–15(b), (e), and (f) are amended by removing the words "Director of Personnel" and, in their place, adding "Commission's Office of the General Counsel's Ethics Office".

■ 15. § 200.735–17 is amended by removing the words "the Executive Director, the Director of Personnel" and adding, in their place, "the General Counsel, the Designated Agency Ethics Official".

Dated: July 14, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

Robert I. Cusick,

Director, Office of Government Ethics.

[FR Doc. 2010–17658 Filed 7–19–10; 8:45 am]

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